NEUTRAL CITATION
2023:GUJHC:34259

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL REVISION APPLICATION NO. 521 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

==========

RAHUL GANDHI
Versus
PURNESH ISHWERBHAI MODI

==========

Appearance:
DR ABHISHEK MANU SINGHVI SENIOR COUNSEL WITH MR RS CHEEMA SENIOR COUNSEL WITH MR HARIN P RAVAL SENIOR COUNSEL WITH MR PRASHANTO CHANDRA SEN SENIOR COUNSEL WITH MS TARANNUM CHEEMA COUNSEL WITH MR KANISHKA SINGH COUNSEL WITH MR PRASANNA S COUNSEL WITH MR NIKHIL BHALLA COUNSEL WITH MR SUMIT KUMAR COUNSEL WITH PANKAJ S CHAMPANERI (214) COUNSEL WITH MR CHINTAN P CHAMPANERI COUNSEL for the Applicant(s) No. 1
MR ND NANAVATY SENIOR COUNSEL WITH MR HARSHIT S TOLIA(2708) COUNSEL for the Respondent(s) No. 1
MR MITESH AMIN PUBLIC PROSECUTOR WITH MR HK PATEL APP for the Respondent(s) No. 2

==========

CORAM:**HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK**

Date : 07/07/2023
CAV JUDGMENT

1. The petitioner herein has filed the present criminal revision application under Section 397 read with Section 401 of the

NEUTRAL CITATION
2023:GUJHC:34259

Criminal Procedure Code, 1973 (hereinafter be referred to as 'the Code') for quashing and setting aside the impugned order dated 20.04.2023 passed below application at Exhibit 5 by the learned 8th Additional Sessions Judge, Surat in Criminal Appeal No.254 of 2023 and to stay the order of conviction against the appellant dated 23.03.2023 passed by the learned Chief Judicial Magistrate, Surat in Criminal Case 18712/2019.

2. Brief facts of the present case are in nutshell as under:-

2.1 It is alleged that the petitioner gave a speech at Kolar Near Bengaluru, for which respondent No.1 – complainant registered a private criminal complaint before the learned Chief Judicial Magistrate, Surat inter alia contending that the speech is punishable as defamation under Section 500 r/w. Section 499 of the Indian Penal Code (hereinafter be referred to as "the IPC"). That such comment made by the applicant was published in the newspapers of the news agency IANS Karnataka State of Kolar on 14.04.2019. It is also alleged that the complainant had filed a private criminal complaint before the learned Chief Judicial Magistrate, Surat and on the basis of the complaint, learned

NEUTRAL CITATION
2023:GUJHC:34259

Chief Judicial Magistrate has taken cognizance under Section 190(A) of the Code and recorded the statement of the complainant. It is further alleged that in such speech, the petitioner addressed the Hon'ble Prime Minister as a thief and compared him with economic offenders of India like Nirav Modi, Mehul Choksi, Lalit Modi and Vijay Malya. It is also alleged that the complainant asked the people gathered in the meeting as to why all thieves have the surname Modi and the petitioner defamed Hon'ble Prime Minister by saying that in Rafale dealing Hon'ble Prime Minister is 100% thief and not chowkidar. It is alleged that the petitioner in the speech stated that Hon'ble Prime Minister gave away Rs.30,000 Crore to his thief friend Mr.Anil Ambani and the said amount was put in the pocket of Mr.Anil Ambani in connection with the Rafel deal.

2.2 It is alleged that the complainant had filed private criminal complaint before the learned Chief Judicial Magistrate, Surat whereby the learned Magistrate quashed and set aside the said complaint vide order dated 23.02.2022. That against the said order of the learned Magistrate, the complainant filed Special

NEUTRAL CITATION
2023:GUJHC:34259

Criminal Application No.2578 of 2022 before this Court and this Court (Coram: Hon'ble Mr.Justice V. M. Pancholi) vide order dated 07.03.2022 granted interim relief in terms of paragraph No.7(C) of the Special Criminal Application. That during the pendency of the said petition, on 16.02.2023 learned counsel for the petitioner stated that sufficient evidence has come on record of the concerned Trial Court, he proceeded to withdraw the petition.

2.3 It is alleged that thereafter, the learned Chief Judicial Magistrate has concluded the trial and held the petitioner guilty for the offence punishable under Sections 499 and 500 of the IPC and sentenced him to undergo simple imprisonment of two years.

2.4 It is alleged that being aggrieved and dissatisfied with the impugned judgment and order of conviction passed by the learned Magistrate, the petitioner preferred Criminal Appeal No.254 of 2023 along with the application at Exhibit 5 for suspension of sentence before the District and Sessions Court, Surat. The said application at Exhibit 5 vide order dated

NEUTRAL CITATION
2023:GUJHC:34259

20.04.2023 came to be dismissed by the learned 8th Additional Sessions Judge, Surat.

2.5 Feeling aggrieved and dissatisfied with the impugned order passed by the learned 8th Additional Sessions Judge Surat, the present criminal revision application is preferred with the following prayers:-

> *A) Admit and allow the present application;*
>
> *B) To call for the record and proceedings of Criminal Appeal No. 254 of 2023 from the Ld. 8th Addl. Sessions Judge, Surat and in Criminal Case 18712 2019 before the Ld. Chief Judicial Magistrate, Surat and further be pleased to*
>
> *C) set aside the impugned judgment and order dt. 20.04.2023 passed by the Ld. 8th Addl. Sessions Judge, Surat in Criminal Appeal 254/2023;*
>
> *D) Stay the order of conviction against the Appellant dt. 23.03.2023 passed by the Ld. Chief Judicial Magistrate, Surat in Criminal Case 18712/2019;*
>
> *E) Pass an ex parte ad interim stay of order of conviction against the Appellant dt. 23.03.2023 passed by the Ld. Chief Judicial Magistrate, Surat in Criminal Case 18712/2019 during the pendency of these proceedings;*
>
> *F) To pass such other and further order(s), as are deemed fit, in the interest of justice.*

3. Heard Mr.Abhishek Manu Singhvi, learned senior counsel

NEUTRAL CITATION
2023:GUJHC:34259

assisted by Mr.P. S. Champaneri, learned counsel appearing for the petitioner, Mr.N. D. Nanavaty, learned senior counsel assisted by Mr.Hashit Tolia, learned counsel for respondent No.1 and Mr.Mitesh Amin, learned Public Prosecutor assisted by Mr.H. K. Patel, learned Additional Public Prosecutor for the respondent No.2 – State of Gujarat.

4. Mr.Singhvi, learned senior counsel for Mr.Champaneri, learned counsel for the petitioner submitted that the offence registered against the petitioner is neither serious in nature nor moral turpitude, which are the two tests for denying to suspend the conviction and there is no identifiable class at all to maintain a complaint and, therefore, the maintainability of the complaint itself is questionable. It is submitted by learned senior counsel for the petitioner that if there is any intrinsic strength, the complaint cannot be filed by a non-identifiable class. It is submitted that as per the law, only a person with a locus can file complaint and that locus cannot be eliminated by saying that anyone from a non-identifiable class can file a complaint. It is also submitted by learned senior counsel that there are about four to five serious ex-facie vitiating factors about the process of

NEUTRAL CITATION
2023:GUJHC:34259

the trial that led to the petitioner's conviction and Section 202 was brought into protect from hasty prosecutions. Learned senior counsel for the petitioner submitted that with regard to offending speech or sentence, there is no evidence in terms of the Evidence Act or the Information Technology Act (for short "the IT Act") has been produced to justify the proceedings. Learned senior counsel for the petitioner also submitted that in case of a speech, there is three probabilities that the complainant himself heard the speech or he was present there and second thing is that there may be a reporter attended it and published a story / article, so he/she can state such fact or some other person, who attended the event, can also authenticate the speech; so none of the witnesses was present from the above three categories. On the aspects of the irreversible and irreparable, it is submitted by the learned senior counsel that the petitioner is representing a constituency but due to this conviction he misses the same and his duty towards the people would be ruined. Learned senior counsel submitted that the consequence faced by the petitioner is that he missed the previous session and might also miss the second session and another consequence is to the constituency

NEUTRAL CITATION
2023:GUJHC:34259

that he is deprived of his representation. Learned senior counsel for the petitioner submitted that this Court has already exercised powers under Section 389 of the Cr.P.C in serious cases but the present case is not a serious one or one involving moral turpitude and the decision relied upon by the Trial Court to convict the petitioner actually deals with a serious case of life imprisonment. While relying upon the decision of the Hon'ble Supreme Court in the case of *Navjot Singh Siddu Vs. State of Punjab* reported in *(2007) 2 SCC 574*, learned senior counsel submitted that in the said decision, the case was of a murder which later on converted into attempt to murder and in fact, even the appellant of the said case got suspension of sentence. Learned senior counsel submitted that another decision relied upon by the Trial Court was a rape and abduction, which got the conviction suspended. It is submitted that the guideline suggests that Section 389 of the Cr.P.C. cannot be exercised if the case is a serious one or involves moral turpitude and the present case is not a serious or moral turpitude, therefore, nobody can suggest that the petitioner's case fall in the moral turpitude or serious category, in fact, this case is a bailable one and it is not against

NEUTRAL CITATION
2023:GUJHC:34259

the society at large. Learned senior counsel for the petitioner submitted that the decisions relied upon by the Trial Court are the offences against the society and yet the Courts have exercised powers under Section 389 of the Cr.P.C. He submitted that the decisions relied upon in the present case are relating to the Members of Parliament and Members of Legislative Assembly, whose convictions have been suspended to avoid their disqualifications by the Courts and in such serious offences and against the society, the Courts have granted relief under Section 389 of the Cr.P.C. from any stretch of imagination. Learned senior counsel for the petitioner submitted that when the petitioner misses the sessions in the parliament, it entails a loss to him of raising his democratic voice in the Parliament and also entails loss to his constituency as their MP's voice is not being raised. Learned senior counsel for the petitioner submitted that it is a general detriment to the public interest of the country that the Parliament is without one voice and it may be within six or seven months, the appeal of the petitioner is allowed and he is acquitted, whether the Court can restore the loss caused to the petitioner and if the same is not restored then it is an irreversible

NEUTRAL CITATION
2023:GUJHC:34259

loss. Learned senior counsel for the petitioner submitted that the Election Petition would not help the petitioner and he has alleged criminal defamation at a first appeal stage and there are three appeal stages in the law, however, for alleged defamation, the petitioner will have to loss his six to eight years. While referring to the decisions of the High Courts, learned senior counsel for the petitioner submitted that the various High Courts have granted suspension of conviction in cases where serious crimes like murder, rape, abduction etc. are committed and that this Court may consider the fact that if the relief is not granted to the petitioner then he will loss eight years of his career. Learned senior counsel for the petitioner submitted that in criminal law, a victim or complainant has to first be hurt (in defamation by the utterance etc.), then it must monitor if the Public Prosecutor is properly prosecuting the case and later if there is conviction, he can file an appeal. Learned senior counsel for the petitioner submitted that in the present case, when the judgment was pronounced the role of the complainant ends there and what would be possible interest disqualification; he would be content with the conviction and sentence, which fact is between the

NEUTRAL CITATION
2023:GUJHC:34259

Court and the person for suspension as there is disqualification, there can be no locus for the complainant for disqualification. While referring Section 378 of the Cr.P.C., learned counsel for the petitioner submitted that the complainant has to take leave of the Court if there is an acquittal. Learned senior counsel for the petitioner submitted that this appeal must succeed because law does not permit such complaint and not a single person comes from 13 Crore people to file a complaint except once named in the speech and as per the law, only aggrieved person can lodge the complaint. It is submitted by the learned senior counsel for the petitioner submitted that the complainant has only made mockery of law and allowing this complaint would mean that anybody can come and file a defamation case, which would make the exceptions redundant. While referring to the statement of Purnesh Modi recorded before the Magistrate Court, learned senior counsel submitted that the complainant has stated in the statement that several other castes are identified as Modi community, which would mean that anyone from 13 Crore people can come and file a case. Learned senior counsel for the petitioner submitted that it can safely be said that this is a

NEUTRAL CITATION
2023:GUJHC:34259

conglomeration like India, of diverse castes, sub-castes and sub-groups and it cannot give locus to anyone to file complaint like present one. He submitted that the said witness has clearly stated that Lalit Modi, Nirav Modi, Mehul Choksi, Vijay Mallya none belong to the caste of complainant Purnesh Modi or that of Prime Minister or even the said witness. Learned senior counsel for the petitioner submitted that the complainant himself has stated that in 1988 he got his surname changed from Butwala to Modi and if the petitioner would have said tsuch fact about the caste of Modi then the complaint would have been maintainable, however in the present case, he has named Prime Minister, which even the Sessions Court in its order has noted that the petitioner defamed PM Modi, so law mandates that Prime Minister can file a complaint and not anyone from so-called 13 Crore people. Learned senior counsel for the petitioner submitted that another very important point is that the Magistrate Court has relied upon the order passed by the Supreme Court admonishing the petitioner to be careful in future, for his statements in the Rafael Deal, however, admittedly, the speech in the instant case was made in April 2019 and the proceedings

NEUTRAL CITATION
2023:GUJHC:34259

of the Supreme Court was of November 2019. Learned senior counsel for the petitioner has submitted that on 02.05.2019, when the Magistrate Court issued summons to the petitioner, he had no evidence and there was no prosecutable evidence before the Magistrate Court and the only material was Whatsapp message which sent to Mr Purnesh Modi of a news clipping, but the sender of the message is not known and, therefore, this is a hearsay evidence. Learned senior counsel for the petitioner submitted that after filing of the complaint in April 2019, the prosecution recorded statements of witnesses in June 2021 and after two and half years, the complainant seeks to re-open the case saying that he wants to see the video of the speech to the Court in presence of the accused, however, the Magistrate dismissed the complainant's plea. It is submitted by learned senior counsel for the petitioner that the said fact was basically an afterthought on the part of the complainant and thereafter, he moved this Court seeking stay in the month of March 2022 on the trial and in February 2023 after a year, nothing has happened or changed suddenly he came back to this Court and seeks to vacate the stay which he himself got. Learned senior

NEUTRAL CITATION
2023:GUJHC:34259

counsel for the petitioner submitted that within a month of vacating the stay, while nothing new has happened, the judgment delivered and in fact this Court did not question him anything. It is submitted by the learned senior counsel for the petitioner that there is no certificate under Section 65B of the IT Act to prove the electronic evidence produced by the complainant and then suddenly one Yaji who is a local BJP Member cropped up in June 2021 and closely linked with the complainant and Yaji was never mentioned in the list of witnesses till June 2021, who brought a CD claiming to be given by the Election Commission. Learned senior counsel for the petitioner has referred the decisions of the Hon'ble Supreme Court and submitted that the Hon'ble Supreme Court has reversed the orders of the High Courts in the cases where the High Courts have not suspended the sentence / conviction. Learned senior counsel for the petitioner submitted that the weight to be given to the complainant in the present proceedings on the point that he is not concerned with sentence but with disqualification, which is a political realm and he cannot say that he does not want to see him in the Parliament and thus he is

NEUTRAL CITATION
2023:GUJHC:34259

here to oppose the plea for suspension of conviction and sentence. While summering his submissions, learned senior counsel for the petitioner submitted that the case of the petitioner is not a serious offence or cognizable or non-bailable and the offence is not against the society and there is no law and order situation due to the speech of the petitioner. Lastly, learned counsel for the petitioner submitted that all these grounds are best for the Court to exercise its power under Section 389 of the Cr.P.C. and if conviction of the petitioner is not stayed, he will stand disqualified for a period which can be said to be virtually semi-permanent period. Learned senior counsel for the petitioner submitted that the application deserves to be allowed or to stay the conviction against the petitioner.

4.1 In support of his submissions, Mr.Singhvi, learned senior counsel for the petitioner has relied upon the following decisions:-

1.	Subramanian Swamy Vs. Union of India, Ministry of law and others (para 176, 177, 178)	(2016) 7 SCC 221
2.	Shyam Narain Pandey Vs. State of Uttar Pradesh (para 6)	(2014) 8 SCC 909

NEUTRAL CITATION
2023:GUJHC:34259

3.	G. Narasimhan, G. Kasturi and K. Gopalan Vs. T. V. Chokkappa (para 14)	(1072) 2 SCC 680
4	K. M. Mathew and others Vs. Balan (para 26, 27, 28)	1984 SCC Online Ker 156
5	K. Khushboo Vs. Kanniammal and another (para 37, 43, 44)	(2010) 5 SCC 600
6	M. P. Narayana Pillai and others Vs. M. P. Chacko and another (para 10, 11)	1986 SCC Online Ker 322
7	Sunil Todi and others Vs. State of Gujarat and another (para 45) (quoted para 10, 11)	2021 SCC Online SC 1174
8	Vijay Dhanuka and others Vs. Najima Mamtaj and others (para 11, 12)	(2014) 14 SCC 638
9	Adalat Prasad Vs. Rooplal Jindal and others (para 15)	(2004) 7 SCC 338
10	Narottamdas L. Shah Vs. Patel Maganbhai Revabhai and others (para 57)	1984 GLH 687
11	Anvar P. V. Vs. P. K. Basheer and others (para 7, 14)	(2014) 10 SCC 473
12	New York Times Co. Vs. Sullivan	376 US 254 1964
13	Cantwell Vs. Connecticut	310 US 296
14	Gertz Vs. Robert Wench	418 US 323 (1974)
15	Kartar Singh and others Vs. State of Punjab (para 12)	AIR 1956 SC 541
16	Vinod Dua Vs. Union of India and others (para 68)	2021 SCC Online 414
17	The Express Newspaper (Private) Ltd and others Vs. Union of India and others (para 124)	AIR 1958 SC 578
18	Lok Prahari Vs. Election Commission of India and another (para 16)	(2018) 18 SCC 114
19	Indira Kapoor Vs. State of H.P. (para 26)	2022 SCC Online HP 5017
20	Mohammed Moquim Vs. State of Odisha (Vigilance) (para 16)	CRLA No. 880 of 2022 dated 19.10.2022
21	Sayed Mohammed Noorul Ameer and others Vs. U. T. Administration of Lakshdweep (para 12 and 18)	2023 SCC Online Ker 604
22	Shakuntala Khatik Vs. State of M.P. (para 13)	I.L.R. (2020) M.P. 2468

23	Smt. Sheela Kushwah and others Vs. State of Madhya Pradesh	CRA No.11606 of 2022 dated 09.01.2023
24	Naranbhai Bhikhabhai Kachchadia Vs. State of Gujarat	Cr.A No. 418 of 2016 dated 29.04.2016
25	Ravikant S. Patil Vs. Sarvabhouma S. Bagali (para 12 to 16)	(2007) 1 SCC 673
26	Pradip Madhwani, Editor of Nobat Daily and another Vs. State of Gujarat and another (para 60)	(2003) 44 (3) GLR 2489
27	Smt. Aruna Asaf Ali and others Vs. Purna Narayan Sinha (para 7, 9)	1984 Cr.L.J. 1121
28	Sasikumar B. Menon Vs. S. Viyajan and another (para 7, 8)	1998 Cri.L.J. 3973
29	M. P. Narayana Pillai and others Vs. M. P. Chacko and another (para 10, 11)	1986 Cri.L.J. 2002
30	Vishwa Nath Vs. Shambhu Pandeya and another (para 22)	1995 Cri.L.J. 277
31	P. Karunakaran and another Vs. C. Jayasooryan and another (para 3, 4)	1992 Cri.L.J. 3540
32	Birla Corporation Limited Vs. Adventz Investments and Holdings Limited and others (para 31, 32)	(2019) 16 SCC 610
33	Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and another (para 23, 31, 30)	(2017) 3 SCC 528
34	National Bank of Oman Vs. Barakara Abdul Aziz and another (para 7, 8, 9, 12)	(2013) 2 SCC 488
35	Dy. Chief Controller of Imports and Exports Vs. Roshanlal Agarwal and others (para 9)	(2003) 4 SCC 139
36	Bishnu Deo Shaw Vs. State of West Bengal (para 26)	(1979) 3 SCC 714
37	Yashwant Sinha and others Vs. Central Bureau of Investigation (para 32)	(2020) 2 SCC 338
38	Madhu Limaye Vs. The State of Maharashtra (para 6, 8, 10, 13, 17))	91977) 4 SCC 551
39	Prahlad Lodhi Vs. State of Madhya Pradesh (para 16, 26, 27)	Cr.A. No.9444 of 2019 dated 06.11.2019
40	Nehru C. Olekar Vs. State of Karnataka (para	Cr.L.A. No.390 of

NEUTRAL CITATION
2023:GUJHC:34259

	11)	2023 dated 05.04.2023
41	Hardik Bharatbhai Patel Vs. The State of Gujarat (Hon'ble Supreme Court)	Cri.A No.629 of 2022 dated 12.04.2022
42	Hardik Bharatbhai Patel Vs. State of Gujarat (High Court of Gujarat)	CRMA No.1 of 2019 in Cr.A No.1135 of 2018 dated 29.03.2019
43	State of Rajasthan Vs. Salman Salim Khan	(2015) 15 SCC 666
44	Navjot Singh Sidhu Vs. State of Punjab and another	(2007) 2 SCC 574
45	Mohit alias Sonu and another Vs. State of Uttar Pradesh and another	(2013) 7 SCC 789
46	Rajeshbhai Chandubhai and others Vs. State of Gujarat	(2001) Online SCC Guj 237 = (2001) 42 (3) GLR 1979
47	Sucha Singh Langah Vs. State of Punjab (Hon'ble Supreme Court)	Cr.A No.40 of 2017

5. Despite of the aforesaid arguments, learned senior counsel for the petitioner has submitted the following written submissions.

> *"1. These Written Submissions are filed in order to summarise and highlight the points argued orally and without prejudice to them or to the material already placed on the record, including the submissions filed before the courts below.*
>
> *2. These submissions are divided into the following sections.*
>
> *Section A — deals with the nature of offence of defamation and how it is neither heinous, nor involving moral turpitude and therefore does not belong to the 'rare' category of offences where the stay of conviction may be A ordinarily denied; It is also not anti-societal, being an offence which*

NEUTRAL CITATION
2023:GUJHC:34259

can only be prosecuted by a personally aggrieved private complainant.

Section B - attempts to summarise how the Applicant has a good prima facie case in appeal. Particularly, this section deals with (a) aspects including the complainant's lack of locus (Section 199 of CrPC); (b) the absence of an identifiable class (Explanation 2 to Section 499 of CrPC) constituting an 2) "we ingredient of the offence of defamation; (c) the perfunctory treatment of the Sessions Court as to the submissions relating to electronic evidence and the contents of the speech in question not having been proven; and (d) the real apprehension that the Applicant did not get a fair trial.

Section C reiterates how the Applicant suffers irreparable injury / irreversible consequences and how other courts have in similar cases and in heinous cases have considered the effect of disqualification to be such an irreversible consequence that they have thought it fit to stay conviction. This section also highlights the fallacious reliance of the Gujarat High Court judgment in Narenbhai Bhikhabai Kachhadia and deliberate omission of the Supreme Court judgement, when in fact the Supreme Court in very same case held that the consequences of disqualification would be 'virtually irreparable'. This section also shows how the Complainant has no locus to contest this Application and that balance of convenience rests fully with the Applicant.

Section D attempts to deal with the Applicant's rejoinder to some of the key submissions made by the Respondents in reply.

A. The offence of defamation is neither heinous or serious nor one involving moral turpitude; and not anti-social

1. Powers under Section 389 is what is of concern in this case. Firstly, Section 389 of the CrPC does not distinguish between offences in its text. It cuts across all offences. The discretion on the exercise of this power is shaped and guided by jurisprudence developed through precedents of this Court, the Supreme Court and other High Courts. Particularly in relation to the power under Section 389 for stay of conviction. he two guiding factors laid down traditionally are (a) no serious offence involved punishable with death or life imprisonment or imprisonment of a period

NEUTRAL CITATION

2023:GUJHC:34259

not tess than 10 years; (b) the offences involved should not involve moral turpitude (Shyam Narain Pandey v. State of Uttar Pradesh (2014) 8 SCC 909, Para 6 @pg. no. 135 of Vol-I-judgment compilation).

2. In each of the cases relied on in Pandey (at Paras 7 - 10), the oral arguments took the Court through each of the cases and showed how the offence was either murder (Section 302), rape (Section 376) or offence involving moral turpitude such as bribery, corruption, misuse of public office, amassing disproportionate assets and the like i.e. Section 7 or 13 of Prevention of Corruption Act or cheating and conspiracy to cheat (420 read with 120B).

3. Both the Sessions Court and the Complainant have extensively relied on how stay of conviction can be granted only in 'Extraordinary circumstances' and how this case does not fit the bill. What 'extraordinary circumstances' are have not been exhaustively defined. Obviously, the issue has to be decided on the facts and circumstances of the given case.

*4. In **Pandey (supra)**, the Hon'ble Supreme Court embarked upon a classification by adopting the principle of exclusion. It was highlighted that certain kind of cases as set out therein would not fall in the category of 'the extraordinary.' As a necessary corollary, the cases not falling therein ought to be treated as a separate class.*

5. The exclusions are cases where the sentence awarded is death sentence or life imprisonment or imprisonment for more than ten years; offences under Prevention of Corruption Act and offences involving moral turpitude. The Hon' ble Court in that case did not specifically examine the issue of electoral disqualification. The present case of defamation nowhere falls in any of the said categories which have been excluded.

(See Page 671&672/ Revision Application)

6. In Subramanian Swamy's case |(2016) 7 SCC 221)] (starts at Pg. 1 of Judgment Compilation Volume 1), the Hon'ble Supreme Court closely examined the prayer for decriminalisation of defamation, as an offence. Of course, the vires were upheld. It needs however to be emphasized that the offence of defamation is bailable and noncognisable. Furthermore the offence is not social in

NEUTRAL CITATION
2023:GUJHC:34259

nature as the process of law can be set in motion only if the person aggrieved claiming to be defamed chooses to come forward. It also needs to be appreciated that even when proved, the offence of defamation is one of the only 22 offences in IPC punishable simple imprisonment. Thus, there is a wide range within which the judicial discretion is required to be exercised. The offence would thus fall within the category of 'extraordinary cases.' It is also not anti-societal. being an offence which can only be prosecuted by a person aggrieved through a private complaint.

7. Admittedly, by any stretch of imagination, the present offence cannot be said to involve moral turpitude. Defamation is in fact the direct polar opposite of a serious offence — with the Legislature deemed to have treated it so. The Respondents have attempted to argue that the very fact that disqualification is provided for as a consequence makes it serious is neither here nor there and a circular argument. On the contrary, the disqualification makes it an irreparable consequence. which is in Applicant's favour in this case. That being the case, it cannot be held to be a serious offence merely because the Complainant states so.

8. In the alternative and without prejudice to the above submissions, the alleged statement of the Applicant when read as a whole would still not constitute defamation. At the highest, it would be a case of political hyperbole or satire.

9. It is true that Sec. 8 of Representation of Peoples' Act, 195 provides for disqualification if an MP/MLA is convicted of an offence punishable with 2 years or more. It is true that the seriousness of the offence is immaterial to such disqualification. However, the seriousness/non-seriousness of offence cannot be considered immaterial for stay of conviction which is not provided for anywhere in that Act and is a discretion of the Court. As demonstrated by during the course of arguments there is no absolute bar on stay of conviction and it has been considered and granted in a number of cases where irreparable loss to the applicant has been shown.

10. When it is therefore clearly shown that the offence of defamation has no seriousness or moral turpitude attached to it, it is not clear at all on what grounds then such stay of conviction can be denied. It cannot be denied merely for personal dislike for the accused (based on other extraneous

NEUTRAL CITATION
2023:GUJHC:34259

material sought to be placed on record only for the purpose of opposing the stay of conviction, which would otherwise have no bearing on the Appeal)

B. The Applicant has a good Prima facie case in Appeal

Sessions Court's failure to consider key contentions of the Applicant

11. The Sessions Court has deliberately not given any prima facie findings on material issues arising in the appeal and duly raised in the course of the arguments. (See Page 69 / Revision Application).

12. On the contrary, irrelevant factors have weighed with the Sessions Court such as derogatory remarks against Prime Minister Narendra Modi; that an MP is liable to be dealt with more sternly than an ordinary citizen; and that a speech given during the course of an election campaign stands on a different footing, and attracts harsh punishment; and that an especially high standard of morality is required from a person like the appellant;

13. Similarly the finding at Pg. 69 that the Complainant being an ex-minister, involved in public life. certainly suffered harm in his reputation and pain and agony in society. These observations are apparently irrelevant, besides being contrary to facts because there is nothing on record that the Respondent - Complainant was a minister at the time when the alleged speech was made.

14. Though the trial court has duly noted the submission that the association and collection of persons cannot embrace a large population of 13 crores, which is not a definite or identifiable group (at Pg. 67), it failed to answer the same. The term “Modi” does not fall in the category of “association or collection of persons” as stipulated under Section 499 of the Indian Penal Code (See Explanation 2). Association or collection of persons must be an identifiable body to ascertain definitiveness. The collection has to be boundaried and without wooly edges (Also See Para 176-178, Subramanian Swamy v. Union of India (2016) 7 SCC 221). [Pg 116 of Judgments Compilation Vol-1] Complainant's own testimony lacks strength. On one hand he has deposed that he belongs to the Modi community and on the other states that he came from Modh Vanika Samaj. These two terms cannot be used interchangeably.

NEUTRAL CITATION
2023:GUJHC:34259

Admittedly, Modi Community included many surnames including Rathod, Taily, Modi & Ors (@ pg. 25/23-43/Complainant's evidence/Convenience Compilation).

15. Admissions weakening the case of Complainant by witness Mr. Niranjanbhai Tenmalbhai Rathod:

a. He admitted that he was not a Modi and produced no document in relation to his caste (@Pg. 64/60-72/Convenience Compilation).

b. He also admitted that Modh people belong to other communities as well (@Pg. 70/60-72/CC). He also admitted that Modi surname falls under many other castes also (@Pg. 70/60-72/ Convenience Compilation).

c. Admitted that Nirav Modi, Lalit Modi and Mehul Choksi, all do not fall within the same caste (@Pg. 70-71/60-72/ Convenience Compilation).

16. Admittedly, the Ld Trial Court has not come to a conclusion that the complainant is defamed as a member of Modi community. In fact, as mentioned above, there is no Modi samaj or community established on record, while there are Modh Vanik Samaj or Modh Gachi Samaj or Teli Gachi Samaj existing. The only thing brought on record is an empty letterhead of a trust that is established as recently as 2015.

17. The Ld. Appellate Court declined to go into the question of admissibility and proof of electronic evidence at the stage of determining the question of stay of conviction; and left it to be determined at the stage of final arguments of the Appeal (Para 9, Pg. 70). Undeniably, a vital question was left unanswered because it required a detailed and exhaustive deliberation. Moreover, the Ld. Appellate Court adopted the escape route of leaning on the oral evidence in the form of the statement of Mr. Ganeshbhai Manjunath Yaaji (Ex-67), without even referring to the formidable criticism against his deposition and belated appearance as a witness. (Grounds 55 — 57 of the Memorandum of Appeal — Pg. 602 — 605 as also in Written Arguments AnnexureP-9 @ Pg 666/Revision Application)

Complainant could not have filed this Complaint

NEUTRAL CITATION
2023:GUJHC:34259

18. Complainant has no locus to file this Complaint. Complainant is not a person aggrieved to file the complaint as the alleged defamatory statements are against Shri Narendra Modi. As regards offence of defamation, it is only a person aggrieved by the offence who can file the complaint (Section 199 of the Cr.PC, a specific section carved out specifically for defamation) The surname of the complainant is not Modi and in fact originally is Bhutala (Pg. 33-34/Convenience Compilation/Cross examination of complainant), even failed to establish that he is a 'Modi' capable of being defamed by the alleged speech. See Narottamdas L. Shah vs. Patel Maganbhai Revabhai & Anr, 1984 Cri, L. J. 1790, Paras 71 ~ 76 @ Pg. 231 of Judgment Compilation Vol —I) where it was held that any lawyer cannot be treated as aggrieved, nor can an amorphous collection of a community of lawyers also cannot be treated as a collective of persons as for Exception.

Serious, ex-facie, trial vitiating factors -1. Violation of Sec, 202(1) CrPC

19. Section 202, Cr.PC contemplates postponement of issue of process in a case where accused is residing at a place beyond the area in which the court exercises jurisdiction. This is a mandatory requirement to avoid false complaints. The mandatory nature of the provision requires the Court to follow it due course even on letter and spirit even if not raised by the applicant.

20. Admittedly, in the instant case, this was not followed. Shockingly the impugned order underlines a passage in Sunil Todi v. State of Gujarat, AIR 2022 SC 147 to advance the proposition that Section 202 is not mandatory when in fact the case at Para 45 (quoting from another Constitution Bench judgment in Para 11) (@pg. No. 195 of Judgments Compilation Vol-1) states just the opposite and holds that enquiry to be held before issuance of summons to accused residing outside the jurisdiction of the court cannot be dispensed with.

21. Section 202 mandates that no process could not have been issued to an Accused who resides beyond the territorial jurisdiction of the magistrate without the magistrate duly conducting an enquiry and determining for himself, based on the complaint, and the examination of the material presented along with the complaint, and the witnesses if any named in the complaint, and determining

NEUTRAL CITATION
2023:GUJHC:34259

that there is sufficient cause to proceed against the Accused.

22. This was not the position before the coming into force of the Criminal Procedure Amendment Act, 2005 (Act 25 of 2005). Section 19 of the said Act enacted an amendment making this pre-process inquiry mandatory in case one or more accused persons resides outside the territory.

23. The Notes on Clauses presented along with the Bill to the Rajya Sabha had this to say on Clause 19 of the Bill (retained as Section 19 in the Act).

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused"

24. This legislative intent was noticed in Vijay Dhanuka y. Najima Mamiaj, (2014) 14 SCC 638 (Para 12 @ Pg. 207 of Judgments Compilation Vol-I) and it was held to be mandatory. In Abhijit Pawar v. Hemant Madhukar Nimbatkar and Anr., (2017) 3 SCC 528 (Para 30 @ Pg. 109 of the Judgment Compilation Vol-III), it has been held that the objection as to Section 202 non-compliance is a pure legal issue and that it can be raised at any stage. Therefore the Trial Court's: reasoning on not allowing this objection by the Accused at the time of final arguments in the Trial, and the Sessions' Court's approval of the same are clearly contrary to law.

Serious, ex-facie, trial vitiating factors -2, No documentary evidence or case of no evidence in terms of Indian Evidence Act

25. The Respondent has not been able to produce proper proof of the speech. The following evidence had been relied on by the Respondent:

- WhatsApp cutting of news from IANS Kolar, Karnataka

NEUTRAL CITATION
2023:GUJHC:34259

dated 14.04.2019 - WhatsApp cutting on the basis on which the complaint was filed, and process was issued against the Applicant has not been proved, It has not even been exhibited.

- Pen drive (Ex.21) - The drive contains the alleged speech. Not produced along with the complaint; produced only when Respondent/Complainant came for deposition before court on 11.11.2020; exhibited with undertaking to prove it in accordance with law.(Convenience Compilation /pg.26) averments regarding pen drive not there in complaint; no evidence to show that the pen drive was not tampered with; no evidence as to who recorded on pen drive; no Section 65(B) certificate produced to support original recording; the certificate produced was only to prove its recording through the recording from YouTube to pen drive.

- Three CDs (Ex.26) - This consist of data of speech taken from the Election Commission; not produced along with the complaint; source and authenticity not proved; Election Commission gave CDs to witness Ganesh Yaji (Ex.67); Ganesh Yaji gave them to PM Raghunath (Ex.56) and PM Raghunath mailed them to complainant; therefore, complaint merely received the three CDs and knows nothing about the preparation of the three CDs; The CDs were admittedly in an open condition (pg. 56-57/Convenience Compilation)

- Since none of the witnesses had heard the original speech delivered by the Accused, it was critical to prove the authenticity of the telecast which was required to be done in the manner contemplated u/s 65B of the Indian Evidence Act, 1872. The above requirements were admittedly not followed.

- Oral evidence of the witnesses - None of the witnesses are believable or admissible; the main oral witness Ganesh Yaji says he heard the speech when he attended the meeting on 13.4.2019 at Kolar near Bengaluru (Pg. 4459/Convenience Compilation). Name of Ganesh Yaji not there in the complaint nor was it given at the time of filing of the complaint; there was no indication that such a witness would come out with such an evidence particularly when the Applicant did not even know him; Yaji allegedly made a report of the speech which was never produced; he is a committed member of the BJP which is a political party opposed to the Congress to which the Applicant/Accused

belongs; oral evidence contrary to evidence of other witness and electronic evidence; he has spoken about sentences and words which are not there in Pen Drive (Ex.21) or CDs (Ex.26).

- Three DVDs (Ex.126) - The complainant came up with three DVDs to prove the speech of the Accused; there was no direction of the Court to produce any CD/DVD; three DVDs were lying in the election office in a manner by which they were accessible to everyone; they are not proved to be taken out from the data of the video folder of the election office which is where the data of the speech was stored; the speech was originally recorded in a chip in a camera manned by the officers of the election commission; there is no evidence of how the DVDs were kept in office; The complainant being aware of the short comings in the case chose to approach this Hon'ble Court on four occasions in his endeavour to have the speech proved. (pg. 673-677/Revision Application)

26. In Anvar P.V. vy. PK Basheer (2014) 10 SCC 473 (Para 7 & 14 @Pg. No. 243 and 246 of Vol-I judgment compilation), it was held that any documentary evidence by way of electronic record can be proved only in accordance with the procedure described w/S 65B of the: Evidence Act which is a special provision relating to electronic record and is a complete Code in itself.

Serious, ex-facie, trial vitiating factors -3. Fair Trial

27. The complaint was filed in hot haste and the mandatory requirement to hold an inquiry in terms of Section 202 Cr.PC was blatantly overlooked.

28. The evidence which was produced was totally flimsy and did not pass muster under the Evidence Act. The complaint was filed on the basis of an allegation that there was defamation of the Prime Minister Shri Narendra Modi. The conviction was done on the basis that the Applicant/Accused should not have branded the Modi community as thieves.

29. The Ld. Trial Court turned a Nelson's eye to the admission of the Respondent that Modi surname does not mean a particular community. The Ld. Trial Court failed to appreciate that a mere surname was too wide a category to be defamed. In fact, according to the Respondent, there are

13 Crore Modis in India.

30. Without prejudice to the above, the sentencing was done without following mandatory procedures, Both the trial and sentencing were unduly hasty, following a year-long stay of proceedings obtained by the Complainant from this Hon'ble Court following the then trial judge having disallowed his application to put to the Applicant, questions under Section 313 Cr.PC pertaining to electronic evidence or to ask him to respond to the contents of electronic recordings by playing the instruments, as canvassed on behalf of the Complainant.

31. This stay was vacated following the withdrawal of the High Court proceedings by the Complainant without any change of circumstance and without any explanation leading to legitimate apprehension that the proceedings are vitiated by abuse of process and forum shopping by the Complainant

Unduly hasty and harsh punishment

32. Immediately on being pronounced guilty and without giving him an opportunity of composing himself and consulting his lawyer, the Applicant was asked to make his submissions on question of sentence. The sentencing order does not show any reasoning to reflect that the Ld. Trial Court took into consideration the fact that the accused was being awarded the maximum permissible sentence of imprisonment.

33. No precedent was referred to where in an offence of defamation, maximum sentence has been imposed. The Ld. Trial Judge hastily referred to a case where the Hon'ble Supreme Court had admonished the Applicant. Summary inquiry was held in regard to the issue of sentencing. Ld. Trial Court proceeded to grant maximum punishment without assigning any special reasons (See Para 26 @Pg. No. 125, Vol-III judgment compilation, Bishnu Deo Shaw v. West Bengal (1979) 3 SCC 714).

34. No attention was given to the fact that the Applicant was a first time offender. He had never appeared before the Supreme Court in the case relied upon by the Ld. Trial Court , as an offender charged with an offence. It was a contempt of court case in Yashwant Sinha & Anr. v. CBI, (2020) 2 SCC 338 @Pg. No. 158, Para 32 Vol-III judgment

NEUTRAL CITATION
2023:GUJHC:34259

compilation.

35. Three factors weighed with the court for imposing maximum sentence are all completely extraneous or irrelevant: a. That the appellant was a sitting MP connected with public life — (See Pg. 75, Impugned Order)

i. This is a misplaced criterion in as much as the appellant happens to be a leading MP of the opposition whose duty it is to critically evaluate the performance of the government and be unsparing in his criticism of its omissions and commissions.

ii. In fact the appellant was: exercising his constitutional right of free speech protected by Article 19(1)(a). Even if the speech attributed to him is taken to be true for the purpose of arguments, at the highest, it is the case of political hyperbole or satire which is well protected right of free speech. It is well established that people in public life have to be thick skinned. (See Kartar Singh v. State of Punjab AIR 56 SC 541 Para 12 Pg. 413 @Judgments Compilation Vol-I)

b. Higher standard of morality expected from a person like the appellant — (See Page 69).

i. The above observations are vague and presumptive.

c. Reliance on Yashwant Sinha case:

i. Indisputably, the quantum of sentence Is a factor of critical importance in the present case Inasmuch as even a punishment of one(J) minute less than the maximum punishment would pot have incurred disqualification, The major criticism of the order of sentence passed by the Ld, Trial Court is incorporated In (Para (v) at Pg. 671, Revision Application), The sentencing order stood vitiated for gross misreading of the factual and legal situation vis-a-vis the Yashwant Sinha v CBI (2020) 2 SCC 338 (Pg 158@Judgment Compilations Vol-I11). heavily relied upon for choosing to impose the maximum punishment, The said verdict was delivered on 14.11.2019 while the impugned speech was made on 13.04.2019. The finding that the Applicant should have been careful in making a speech on 13.04.2019 in light of the judgment delivered on 14.11.2019, seven months later, is patently far-fetched. The Impugned Sessions Court order is vitiated for having

NEUTRAL CITATION
2023:GUJHC:34259

totally overlooked this aspect and for considering a wrong jurisdictional fact for deciding the length of sentence.

C. Irreparable, irreversible situation and extra ordinary circumstance

36. The Applicant's counsel had taken the Court through the chart in Pg. 685 of the Revision Application where several High Courts have in case after case, and in all such cases the offence being more heinous and serious; held how disqualification is an irreparable consequence and has given a stay of conviction. That may be taken to have been reiterated herein.

37. In addition, attention is also drawn to the order of the Supreme Court in Pg 1 of the Judgment Compilation Volume 2 in Hardik Bharat Bhai Patel Vs. The State of Gujarat (Criminal Appeal No. 629 Of2022) where the Supreme Court has reversed the judgment of this Hon'ble Court refusing stay of conviction, relying on Naranbhai Bhikhabhai Kachhadia's Case (2017) 2 GLR 136, The Supreme Court went on to hold that the High Court ought to have stayed the conviction. Incidentally, it is the same Naranbhai case also being relied on by the Complainant and the Session's Court.

38. Applicant/Accused would suffer irreparable injury coupled with irreversible consequences resulting in injustice. A stay of conviction takes effect from the date of stay. All consequences of a conviction take full effect prior to the said date. 39. The disqualification as MP on account of a frivolous conviction is causing irreparable harm and injury not only to the Applicant/Accused who is a full-time politician but also to the constituents of the Applicant's constituency (See Para 16 @Pg. No. 625, Vol-I judgment compilation, Lok Prahari through General Secretary v. Election Commission of India & Ors.)

40. If the conviction is not stayed, Applicant/Accused may not even be able to participate in the 2024 General Elections which would be a critical General Election, St is well established in a catena of cases that in case conviction is not stayed, the loss of chance of contesting an election cannot be compensated.

41. The Impugned Judgment relies on Naranbhai Bhikhabhai Kachhadia's Case (2017) 2 GLR 136 to hold

that removal of disqualification as member of parliament cannot be termed as irreversible or irreparable loss of damage to the Appellant.

42. However, there is a deliberate omission to refer to the decision of the Hon'ble Supreme Court in Criminal Appeal No.418/2016 vide order dated 29.04.2016(@Pg. No. 683, Vol-I judgment compilation, last but one para) that was preferred in the very same case. SC held therein that "disqualification was a virtually 'irreparable consequence' of conviction not only on the disqualified MP but also on the constituents who he is representing".

43. Reliance on a case law that has been modified by the Hon"ble Supreme Court while dismissing the Applicant's plea of stay of conviction would constitute irreparable injury.

44. It is submitted that once the offence is not within the prohibited category of offences which are neither serious, nor involving moral turpitude, the finding of irreparable consequence is fully determinative of whether the person is entitled to a stay of conviction. The Hon'ble Supreme Court held in State of Rajasthan v. Salman Salim Khan , (2015) 15 SCC 666

"21. If some foreign country is not granting permission to visit the said country on the ground that the respondent has been convicted of an offence and has been sentenced for five years of imprisonment under the Indian law, the said order cannot be a ground to stay the order of conviction. If an order of conviction in an manner is causing_ irreversible consequences or injustice to the respondent. it was oven to the court to consider the same. If the court comes to a definite conclusion that irreversible consequences/in justice would be caused to the accused which could not be restored it was well within the domain of the court to sta. the conviction. No such ground has been shown by the High Court while passing the impugned order [Salman Khan v. State of Rajasthan, 2013 SCC OnLine Raj 3099] . Further, we find that now more than one year has passed and there is nothing on the record to suggest that the respondent has to visit UK again for further shooting of any film/movie.

22. For the reasons aforesaid, we set aside the impugned judgment and order dated 12-112013 passed by the High

Court of Judicature of Rajasthan at Jodhpur in Salman Khan v. State of Rajasthan [Salman Khan v. State of Rajasthan, 2013 SCC OnLine Raj 3099) and remit the case to the High Court to decide the matter afresh, It would be open to the respondent to show that if the order of conviction is not stayed it will cause irreversible consequences/injustice to him which cannot be undone if he ultimately succeeds. It would be open to the State to oppose such prayer on the ground that non-suspension of conviction will not cause any irreversible consequences or injustice to the respondent and the same can be undone if he ultimately succeeds."

45. Moreover, the Complainant has no role/ gain in any order of this Hon'ble Court suspending the conviction of the Accused. He has a very limited role in the entire process (See section 378(4) of the CrPC). He has even. less locus when he hasn't opposed the suspension of sentence, which is the only executable order, The balance of convenience therefore firmly rests with the Applicant and he shall be entitled to a stay of conviction.

S.No.	*Submissions in Reply*	*Brief Rejoinder*
A	Speech in Accordance with Law	
A1	Witness Manjunath Yaji was present when the speech was made by the Accused in Kolar and the eye-witness has deposed on behalf of the prosecution (Exh.67; pages 36-41 of Documents filed by Complainant)	***Refer to evidence of Yaji (Exh.67; CC pages 44-59)*** *Not named as a witness at the time of filing the complaint. Appears as a witness in January 2021 for the first time 20 months after filing of the Complaint on 15 April 2019.* *Associated with the BJP for 45 years (Exh. 67; CC page 53). Cultural Advisor to BKP CM of Karnataka (Exh. 67; CC page 44)* *Admits in corss-examination that the*

NEUTRAL CITATION
2023:GUJHC:34259

		CD does not cover the entire speech and portions have been left out (CC pages 56-57) *The witness admits that he has not seen the original CD (CC page 53).* *The witness admits that the portion "This Modi people are thieves. We should not believe them" is not there in all CDs Ex. 26 (CC page 57).* *[GROUNDS 55 to 57 of MEMORANDUM OF APPEAL (PAGES 602-6-5)]* *[POINT B IN WRITTEN SUBMISSIONS (PAGE 666)]* *[IMPUGNED ORDER (PAGE 70)]*
A2	*Speech is proved in accordance with law based on electronic evidence and accompanying 65B certificates*	*The Section 65 B certificate not in accordance with law – the certificate not prepared by the maker of the CD, and the certificate was not issued while producing the CD in Court (Pg 18-81 / CC)* *CD was in an open condition (Pg 52 – 53 / convenience compilation)*
C	No Special Circumstances Warranting Stay of	

NEUTRAL CITATION
2023:GUJHC:34259

	Conviction	
C1	*"Special Circumstances" need to be demostrated, even in a case where the offence is neither serious, nor involves moral turpitude.*	*The main special circumstance which is relevant is the irreversible nature of the consequences befalling the Accused is not only loss of the democratic right to continue his constituency but also to deny him the opportunity to seek a re-election.*
D	Complaint was Maintainable and Complainant is the Person Aggrieved	
D1	*Refer to Exh. 39 (S. No.4; page 25 – 26 of Documents filed by Complainant) Notification of Govt. of Gujarat dated 01.08.1995*	*The Complainant is not even mentioned in the speech. 13 crore is not an identifiable class.*
E	S. 202 Enquiry Compliance / Belated Stage	
E1	*Statement of Complainant recorded in the form of verification and summons issued on the basis of the verification*	*Reliance on infirmity of 202 is one of the circumstances substantiating the arguments of vitiation of trial.*
F	Accused is a Habitual Offender has criminal antecedents esp. of Defamation	
F1	*Table of Cases referred to by the Complainant*	*All the cases are defamation cases. Two of them relate to the same speech* *In a number of cases process has not been issued.* *All of them are initiated by BJP party functionaries or persons having a conection with the*

NEUTRAL CITATION
2023:GUJHC:34259

		party, hence political in nature. *None of the cases have resulted in a conviction. The law may not treat the Applicant differently when there is no conviction – that is a violation of the principle of presumption of innocence.*
G	Conduct of Accused after conviction	
G1	*Accused has given speeches refusing to apologies, saying he is "Gandhi", not Savarkar etc.*	*All of these points have been raised before Sessions Court and Sessions Court have overlooked them.* *The newspaper cuttings relied upon by the complainant are not part of the record and cannot be looked at this stage as they have no bearing on the present issue. The unwarranted reliance on extraneous material seems to be an act of desperation and an attempt to cause prejudice. Moreover, newspaper cuttings cannot be relied on as evidence (see for instance, Samant N. Balkrishna v. George Fernandez, (1969) 3 SCC 238; Laxmi Raj Shetty v. State of T.N., (1988) 3 SCC 319;*

NEUTRAL CITATION
2023:GUJHC:34259

		Quamarul Islam v. S. K. Kanta, 1994 Supp (3) SCC 5; Ghanshyam Upadhyay v. State of U.P., (2020) 16 SCC 811; Kushum Lata v. Union of India, (2006) 6 SCC 180 and Rohit Pandey v. Union of India, (2005) 13 SCC 702) *Complainant, if he is aggrieved with Sessions court not considering these issues, should invoke appropriate remedy and not make these unwarranted submissions in the Applicant's revision application.* *The Applicant has preferred an appeal for the wrongful conviction and is sanguine about the points raised therein hence asking for apology at this stage only demonstrates the weakness of the case of the complainant.* *Infact, during the course of arguments the senior counsel of the complainant has used extensive unparliamentary words such as 'motormouth' etc to describe the Applicant which is completely*

NEUTRAL CITATION
2023:GUJHC:34259

		unwarranted. *During the course of arguments the main grievance of the complainant seems to yet again be the reference made to the Prime Minister in the alleged speech. It shall be pertinent to mention that on several occasions as part of his political discourse, the Prime Minister has resorted to use of unparliamentary words against the Applicant and his family members.*
H	Supreme Court caution in Yashwant Sinha had come before Accused was heard on sentencing	
	Supreme Court caution in Yashwant Sinha had come before Accused was heard on sentencing. Therefore it can be considered	*There is nothing in the statement that was made by the Applicant during his sentencing hearing that would be going against the caution of the supreme court – which pertained to not involving the supreme court in his political commentary or speeches.* *Moreover, a sentencing court ought to only consider aggravating circumstances at the time of commission of the offence and not thereafter. That would fall foul of Article*

		20(2) of the Constitution.

6. In the case of **Subramanian Swamy** (supra), the Hon'ble Supreme Court has held and observed in paragraph no.176 as under:-

> *"176. More than five decades back, the Court, in Sahib Singh Mehra v. State of Uttar Pradesh, AIR 1965 SC 1451 : 1965 (2) SCR 823 while being called upon to decide whether public prosecutor would constitute a class or come within the definition of "collection of persons" referred to Explanation 2 to Section 499 of IPC, and held that collection of persons must be identifiable in the sense that one could, with certainty, say that this group of particular people has been defamed, as distinguished from the rest of the community. The Court, in the facts of the case, held that the prosecuting staff of Aligarh or, as a matter of fact, the prosecuting staff in the State of Uttar Pradesh, was certainly such an identifiable group or collection of persons, and there was nothing indefinite about it. Thus, in the said authority, emphasis is laid on the concept of identifiability and definitiveness as regards collection of persons."*

7. In the case of **Shyam Narain Pandey Vs. State of Uttar Pradesh** (supra), the Hon'ble Supreme Court has held and observed in paragraph no.6 as under:-

> *"6. It may be noticed that even for the suspension of the sentence, the court has to record the reasons in writing under Section 389(1) Cr.PC. Couple of provisos were added under Section 389(1) Cr.PC pursuant to the recommendations made by the Law Commission of India*

NEUTRAL CITATION
2023:GUJHC:34259

and observations of this Court in various judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the public prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice."

8. In the case of **Indira Kapoor** (supra), the High Court of Himachal Pradesh has held and observed in paragraphs no.26, 27 and 32 as under:-

"26. Though appeal is to be decided by this court on merit, but having taken note of aforesaid aspects of the matter, this court is of the view that the case at hand comes under the category of 'exceptional' case and, in case conviction is not stayed, petitioner's political career would be ruined. For the reasons stated herein above, this Court finds that on account of conviction, petitioner has been rendered disqualified to be a Member of Legislative Assembly and, in case conviction is not stayed, she would not be able to contest the elections, which are otherwise bound to be held on 12.11.2022. Since conclusion of appeal may take some time and in the event of appeal . being allowed and applicant being acquitted, she cannot be compensated for the loss, which she may suffer on account of her losing

NEUTRAL CITATION
2023:GUJHC:34259

chance to contest elections to Himachal Pradesh Vidhan Sabha as Member of Legislative Assembly.

27. No doubt, power under S.389 CrPC to be exercised sparingly and with circumspection so as to stay the conviction, yet it is equally true that principle of law is to be applied as per peculiar facts and circumstances of each case. There cannot be a straightjacket formula rather, each case is to be examined in its own peculiar facts and circumstances. In case, conviction of petitioner is not stayed, she will suffer the consequences, which cannot be compensated subsequently in any terms and are irreversible.

32. Accordingly, in view of the detailed discussion held supra and the law taken note above, present application is allowed. Judgment of conviction and order of sentence dated 7.8.2021 passed by learned Special Judge, Chamba Division Chamba (HP) in Corruption Case No. 7 of 2015 is stayed, till the final adjudication of the appeal."

9. In the case of **Mohammed Moquim** (supra), the High Court of Orissa has held and observed in paragraph no.16 as under:-

"16. .....So, keeping in view his position as sitting MLA of Odisha Legislative Assembly, the loss befall on him due to the conviction would be irreparable unless the same is stayed. This will also lead to an untimely bye-election to burden the public exchequer. Further, considering the limited period of his sentence for three years and the offences involved, which are neither punishable with death nor imprisonment for life, it is felt apposite to grant stay of the conviction pending appeal since the impact of loss due to disqualification would not only be enormous for the Appellant but also be for the public-exchequer. The Appellant has the statutory right to prefer appeal under Section 374 Cr.P.C. against his conviction and the appeal being admitted by this Court, no reason is found to make a narrow interpretation to debar the Petitioner from disqualification....."

NEUTRAL CITATION
2023:GUJHC:34259

10. In the case of **Sayed Mohammed Noorul Ameer** (supra), the Hon'ble Supreme Court has held and observed in paragraphs no.12 and 18 as under:-

> *"12. There can be no quarrel (and it was not disputed also) that if a sitting Member of the Parliament is convicted and, in the appeal, a Stay or suspension of conviction is granted by the Appellate Court, the disqualification will cease to operate from the date of suspension/stay*
>
> *18. On consideration of the various legal and other circumstances and the special features arising in this case, especially those relating to the second petitioner, this Court is of the view that the case of the second petitioner falls within the category of rare and exceptional circumstances. The ramifications of not suspending the conviction are enormous. Hence this Court is of the view that the conviction and sentence of imprisonment imposed upon the second accused in SC 1/2017 on the files of the Sessions Court, Kavarthi, Union Territory of Lakshadweep should be suspended until disposal of the appeal."*

11. In the case of **Shakuntala Khatik** (supra), the Madhya Pradesh High Court has held and observed in paragraph no.13 as under:-

> *" 13. In such circumstances, depriving her from contesting election of MLA would be injustice and it would amount to frustrate the provisions of law which has been made by the Legislature to pass nm appropriate order to meet a situation exists in the present case"*

NEUTRAL CITATION
2023:GUJHC:34259

12. In the case of **Sheela Kushwah** (supra), the Madhya Pradesh High Court has held and observed as under:-

> *"Here in this case, it is contended by the counsel for the appellant that if stay is not granted the appellant no.2 would be disqualify to hold the post of member of legislative assembly and can also be disqualified from contesting the further election.*
>
> *Considering the orders passed in (Prablad Lodhi) (supra) and (Shakuntala Khatik) (supra), it is not proper for this Court to give any finding at this stage on merits of the case but prima facie considering the evidence available on record and findings given by the Court below, appellant no.2 is entitled to get relief which is claimed in his application seeking stay on conviction because if the same is not granted he would suffer irreparable loss as he has an elected member of legislative assembly and would be deprived to be continued to hold the said post and can also be deprived to contest the election of legislative assembly, as such application for staying the conviction in respect of appellant no. 1 is not being considered and allowed because as per facts and circumstances and reasons assigned hereinabove the prejudice would cuuse only to appellant no.2, therefore, conviction of only appellant no.2 us passed by Speciul Judge (M.P./MLA) District Gwalior in SC PPS No.02/2022 by judgment dated 02/{2/2022 shall remain stayed till the next date of hearing."*

13. In the case of **Prahlad Lodhi** (supra), the High Court of Madhya Pradesh has held and observed in paragraphs no.16, 26 and 27 as under:-

> *"16. On the basis of above propositions of law, this Court is of the opinion that while suspending the sentence or conviction, the Court must go through the whole evidence recorded during trial by both parties and without commenting on the merits, satisfies itself whether a strong*

NEUTRAL CITATION
2023:GUJHC:34259

case of conviction is made out against the appellant or not. The prosecution is obliged to prove its case against the accused beyond doubt not on the basis of preponderance of probabilities.

26. On the basis of forgoing discussions, without commenting on merits, this Court found a strong case in favour of the appellant for suspension of sentence. Learned senior counsel for the appellant submits that conviction and sentence was recorded against the appellant on 31/10/2019 and he has filed appeal on 04/11/2019 before this Court and Hon'ble Speaker in very hurried manner passed the order on 02/11/2019 dismissing the membership of the appellant from the Legislative Assembly of the State and declared the seat vacant. In these circumstances, stay of conviction is very necessary because appellant is a member of the State Legislative Assembly.

27. Perused the order dated 2nd November, 2019 of the Secretariat of Legislative Assembly, this Court finds that there is urgency for staying the conviction. In these circumstances, this Court is of the firm view that on the basis of the forgoing discussions of the evidence adduced by the prosecution before the trial Court, this Court finds a strong case in favour of the appellant. This Court is also inclined to stay the conviction of the appellant."

14. In the case of **Nehru C. Olekar** (supra), the High Court of Karnataka has held and observed in paragraph no.11 as under:-

"11. It is an admitted fact that the appellant is the sitting MLA and will going to contest the upcoming election to be held in may 2023 and by way of operation of law under Section 8 of the RP Act, he was already disqualified in view of the judgment of conviction and sentence passed by the trial Court. If the conviction is not stayed, he cannot contest the election. Therefore, in view of the judgment of the Hon'ble Supreme Court in Lok Prahari (supra), in an appropriate case, the Court can also stay the operation of the conviction as well as sentence. Therefore, this court feels that it is an appropriate case where the conviction is required to be stayed as this Court has already suspended

NEUTRAL CITATION
2023:GUJHC:34259

sentence in I.A. No.1/2023 on 03.03.2023."

15. Mr.Nanavaty, learned senior counsel for Mr.Tolia, learned counsel for respondent No.1 submitted that under which provisions of law, the petitioner approached this Court. Learned senior counsel for respondent No.1 submitted that this is a criminal revision application, but in the same breath, it can also be a petition under Section 482 of the Cr.P.C. and even this petition is not maintainable under the law. Mr.Nanavaty, learned senior counsel submitted that the Court has to consider the seriousness of the offence and what is its impact on the victim and the society at large and once the person, who is convicted and ordered to suffer sentence of two years or more, has to be disqualified and that is the law. Learned senior counsel submitted that if the Court has not disqualified a person then the Parliament has disqualified him / her and the complainant has not disqualified the accused so it cannot be said that the accused is suffering an irreversible loss and, therefore, the seriousness of the offence need not be considered at this stage. Learned senior counsel submitted that it is mandatory to maintain sanctity and dignity of the highest institution of the country and if the law

NEUTRAL CITATION
2023:GUJHC:34259

bars an individual from being member of Parliament, on his conviction, then it cannot argue against him. Learned senior counsel submitted that the powers under Section 389 of the Cr.P.C. have to be exercised in rarest of rare cases and even after the conviction of the petitioner, he has not stopped from making such comments. While referring the newspaper report, learned senior counsel has submitted that in the newspaper / article, it is stated by the accused that his name is Gandhi and he is not Savarkar and would not apologies for the same and in the said article, it is also stated that the BJP has given him the best gift ever, so why he is scared now and kept this gift with him. Learned senior counsel submitted that the petitioner would not be scared or affected because of disqualification or jail term, so this was his public stand, but in courtroom, he has changed his stand. While referring the statement of the petitioner made before the learned Magistrate, learned senior counsel submitted that the petitioner stated before the Court that he did not remember his speech and that the defamatory line is 'a false statement'. Learned senior counsel also submitted that at least two to three cases have been filed against the petitioner for his

NEUTRAL CITATION
2023:GUJHC:34259

utterances against Veer Savarkar in Cambridge and these cases are filed after the Surat case and his comments on Savarkar etc shows his conduct is irreparable. Learned senior counsel also submitted that the petitioner is a leader of national level political party and when he just be a motormouth wherein he will keep abusing and defaming the opposite side in politics, then he will have to learn a lesson as no one will tolerate his comments and he did not apologies even before the trial was commenced. Learned senior counsel submitted that the decisions relied upon on behalf of the petitioner are on different aspects and the same are not applicable to the facts of the present case. Learned senior counsel also submitted that considering the facts of the case the such plea of the petitioner, it appears that the present revision application is without any merits and the same deserves to be dismissed.

15.1 Following decisions are relied upon by Mr.Nanavaty, learned senior counsel in support of his arguments.

1.	Kanaka Rekha Naik Vs. Manoj Kumar Pradhan and another	(2011) 4 SCC 596

2.	Naranbhai Bhikhabhai Kachhadia Vs. State of Gujarat	2017 (2) GLR 1320
3.	Naranbhai Bhikhabhai Kachhadia Vs. State of Gujarat before Hon'ble Supreme Court	Cr.A No. 418 of 2016
4.	State of Gujarat Vs. Bhagabhai Barad	2019 (3) GLR 2346
5.	Jyoti Basu V. Debi Ghosal	(1982) 1 SCC 691
6.	Manoj Narula Vs. Union of India	(2014) 9 SCC 1
7.	Lily Thomas Vs. Speaker, Lok Sabha	(2013) 7 SCC 653
8.	K. C. Sareen Vs. CBI, Chandigarh	(2001) 6 SCC 584
9.	State of Maharashtra Vs. Gajanan and another	(2003) 12 SCC 432
10.	Ravikant S. Patil Vs. Sarvabhouma S. Bagali	(2007) 1 SCC 673
11.	Shyam Narain Pandey Vs. State of Uttar Pradesh	(2014) 8 SCC 909
12.	Maheshdan Natvardhan Gadhvi Vs. State of Gujarat	2019 SCC Online Guj 6056 = (2020) 61 (4) GLR 3242
13.	Jayantibhai Hirjibhai Devra and aother Vs. State of Gujarat	Cr.M.A. No.17648 of 2012 in Cr.A No.1921 of 2012
14.	Ram Narang Vs. Ramesh Narang and others	(1995) 2 SCC 513
15.	Sunil Todi and others Vs. State of Gujarat and another	2021 SCC Online SC 1174
16.	ASR Systems Pvt Ltd and another Vs. Kimberly Clark Hygiene Products Pvt Ltd Mann and another	2011 Cr.L.J. 3558
17.	Balu Sadam Khalde and another Vs. State of Maharashtra	2023 SCC Online SC 355
18.	Mohit alias Sonu and another Vs. State of Uttar Pradesh and another	(2013) 7 SCC 789
19.	Sheetala Prasad and others Vs. Srikant and another	(2010) 2 SCC 190

16. Over-and-above the aforesaid submissions, Mr.Nanavaty, learned senior counsel has also submitted written submissions, which reads as under:-

NEUTRAL CITATION
2023:GUJHC:34259

1 Revisioner has submitted his case, during the arguments, broadly on the following grounds:-

A. Not a serious offence or of moral turpitude

.

B. Not identifiable or suable class of person/s (Jurisdictionally not maintainable) – Complainant is not aggrieved person within Sec. 199(1) of CRPC,

C. Serious ex-facie trial vitiating factors

I. Violation of Section 202(1) (will vitiate the trial)
II. No documentary evidence or case of no evidence in terms of the Indian Evidence Act
III. Fair Trial

D. Irreparable, irreversible situation and extra-ordinary circumstances.

E. Quantum of punishment/ maximum punishment

The R1 beg to submit his limited synopsis of submission, amongst others, which are urged at the time of arguments, hereinafter.

A. <u>Not a serious offence or of moral turpitude</u>

1. Revisioner relied on: (1) Shyam Narayan Pandey - (life imprisonment); (2) Navjot Singh Sidhu - (Section 304 of CRPC - original charge 302); (3) Ravikant Patil - (Section-376, 366 of IPC); (4) Balkrishna Kumbhar; (5) Ram Narang - (PC Act); (6) K.C. Sareen - (PC Act) and submitted that all above were cases of serious offence. The requirement of "rarest of rare" or "exceptional circumstance" (to suspend conviction) are in the cases of "serious offence" or of "offence of moral turpitude" and relied on para 6 of Shyam Narayan (supra), reproduced at Page 63.

2. Present offence is NC/ Bailable. Convict accused is public servant/M.P.

<u>Reply</u>
3. The stay for conviction as prayed for by duly elected MP cannot be considered because the ROPA – Sec. 8 is also enacted by the parliament, which inter alia prescribes that

if the present or potential MP have suffered an order of conviction with two or more years sentence is automatically disqualified and/or not qualified.

4. While enacting that provision, the parliament has in its wisdom considered sentence of two years or more as serious, and such member who is sentenced or ordered to suffer sentence for two years or more cannot continue to be the member of the house. That by itself nullified the arguments canvassed by the petitioner that only in serious offence such can be relied and not in the present offence.

5. Further, Section 8 of ROPA shall be the guidelines for the MLA / MP qua the nature of offence. Section 8(1) of ROPA enumerates several offencse specifically, which includes offence under PC Act [8(1)(m)]. Further, Section 8(3) of ROPA is treated at par with Section 8(1) in the Act.

6. Offences by MLA / MP can be broadly classified in three categories: (a) In the House (jurisdiction with house – not concern); (b) Out of public life (subject matter of prosecution); (c) Personal in nature (not subject matter of prosecution). The offence of category (b) is always "serious in nature," so as in the present case. In most of the cases, relied by the Revisioner, the cases of category (c) are considered to suspend the conviction.

7. Para 6 of Shyam Narayan, in context of Section 389(1) of CRPC, hold that giving hearing to Ld. Public Prosecutor is "also an indication" as to the seriousness of such offence. Thus, it is an indication and not the only conclusive indication.

8. "Serious offence", "seriousness of the offence" and "offences involving moral turpitude" all are at par as per all above precedents where conviction can not be stayed. The provision of hearing of prosecutor is in respect of "sentence". But for conviction, all offence are equal. The Ld. Trial Court, @ Page 355- para 4- 4th Line onwards and in Para 22.3 @ Page 340, specifically gave judicious findings of gravity, i.e. "seriousness of the offence" per se.

9. Seriousness of the offence - (a) The accused was MP; (b) The accused was President of second largest national level political party; (c) The accused was President of the party ruled in Central for more than 50 years; (d) The accused was giving a public speech to thousands of voters;

NEUTRAL CITATION
2023:GUJHC:34259

(e) With a clear intent to affect the result of the election, the accused made a statement of false fact, in the election; (f) Also referred the most infamous absconder accused of the country, who are on the run; (g) Further, referred the name of the Hon'ble Prime Minister to add sensation, apparently and for an intention to affect the election result of the candidate of concern constituency (Kollar) belonging to the political party of Hon'ble PM; (h) The accused than did not stopped there but imputed that "Saare Choro ke naam Modi Modi Modi hi Kyu Hai";

Thus, the present case would certainly fall in the category of "seriousness of the offence".

10. Further, the above act shall amount to an offence punishable u/s. 171G of IPC also. Thus, the offence punishable u/s. 499 is committed with an intent to make a false statement in connection with an election, which is per se, offence of moral turpitude.

11. Moral Turpitude is interpreted in Sushil Kumar 7 as under:

"Para 24-In Pawan Kumar v. State of Haryana [(1996) 4 SCC 17 : 1996 SCC (Cri) 583 : AIR 1996 SC 3300] this Court has observed as under : (SCC p. 21, para 12)

"12. 'Moral turpitude' is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity."

The aforesaid judgment in Pawan Kumar [(1996) 4 SCC 17 : 1996 SCC (Cri) 583 : AIR 1996 SC 3300] has been considered by this Court again in Allahabad Bank v. Deepak Kumar Bhola [(1997) 4 SCC 1 : 1997 SCC (L&S) 897] and placed reliance on Baleshwar Singh v. District Magistrate and Collector [AIR 1959 All 71] wherein it has been held as under:

"The expression 'moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of

NEUTRAL CITATION
2023:GUJHC:34259

any private and social duty which a person owes to his fellow men or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man."

12. The accused is MP holding very high position in society, having bounden duty to the society not to scandalize any person from the society or Hon'ble PM. The defence of fair comment is neither proved nor believed by the Courts below. The Revisioner has breached the modesty, even if his version is accepted just for the sake of the arguments. Further, the Revisioner owes a duty to each individual and the society in general not to influence the election on the basis of false fact. Thus, under the facts, evidence and circumstance of the case, the offence committed by the accused shall fall in the category of moral turpitude also.

13. After conviction, it is immaterial whether the offence was NC and/or Bailable or not.

14. While staying the conviction, the Courts in the precedents also essentially consider high moral or whether the offences are private in nature or accused shown high moral, etc., but not the facts, evidence and circumstances of present nature. For example, in the case of Navjot Singh (supra) the Hon'ble Supreme Court consider that (a) though provisions of Section 8(4) of ROPA was in existence at that point of time and convict could have availed that benefit, resign from the post of MP to maintain high morals; (b) the offence was of private in nature and not out of his public life; and (c) after trial / appeal the Hon'ble Court considered that the offence was committed out of fit of anger.

15. The appellant does not offer any explanation to his defamatory speech at any point of time, regret, recourse, or apology either after he was held guilty and heard on quantum of punishment or in appeal or in revision. The accused may be entitled to take that stand. However, thereafter accused cannot challenge the consequences of his own stand, which is provided under the law.

B. Not identifiable or suable class of person/s - Complainant is not aggrieved person within Section 199(1) of CRPC (Jurisdictionally not maintainable):

Reply:

16. Mixed question of law and facts.

17. Ld. Magistrate appreciated this issue in para 19.1 to 19.3 (Page 295 to 322), which is unassailable in law or facts.

18. Ld. Magistrate considered:

"If a well-defined class is defamed every person of that class can file a complaint even if the defamatory imputation in question does not mention him by name" (G. Narasimhan)

19. Complaint Exh.1 (Page 85- Para 6, 7, 10), Oral Evidence Exh.18 - Complainant, Documentary Evidence Exh.39 - Government Order with regard to including persons having "Modi Surname" in particular caste makes it clear that: (a) complaint is filed for the defamation of persons having "Modi" surname and (b) Persons belonging to "Modi Community". Undisputedly, R1 is having "Modi" Surname and also belonging to "Modi Community". Now, "Modi" surname holder and member of "Modi Community" are certainly identifiable/ suable class/ well defined class.

20. Further, "Modi" people are a fraction of Ganchi/ Taili/ Modhvanik Ghnyati, as per the evidence and thus again a well-defined identifiable/suable class. Like persons are having "Patel" Community as well as surname, "Jain" Community as well as surname, "Modi" is also a community and surname both. Ld. Magistrate also relies upon other evidence in this regard: Exh.60- Niranjan Rathod (Page 270 to 278- Order), etc.

21. Without admitting anything, this question of fact need no interference in the narrow and limited scope of revisional jurisdiction u/s. 397 r/w. 401 of CRPC, when it is properly appreciated by the Ld. Magistrate and Ld. Sessions Judge in possible way, no interference on this ground is required.

22. "Saare modi" includes Purnesh Modi and that is why he is an aggrieved party.

23. Ld. Appellate Court also take into consideration all the above. Thus, the limited ground of "correctness", "legality" or "proprietary of any finding" u/s. 397(1) areot available to the Revisioner.

C. Serious ex-facie trial vitiating factors- (1) Violation of Section 202(1):

24. By referring to para 10(vii)(a) page 72 the revisioner argued that the lower appellate court misinterpreted the precedent of the Sunil Todi 9 and concluded that the above provision is not mandatory.

Reply

25. The appellate court has NOT concluded that the provisions of Section 202 are not mandatory. The Ld. Sessions Judge has on the contrary hold that as per para 47 of Sunil Todi (Supra) and ASR Systems if the Ld. Magistrate had after giving thought full consideration to the complaint, verification and documents produced there with had issued summons, that itself would amount to an inquiry/ compliance of Section 202(1).

26. Both the courts below have further observed that said contention was taken at the fage end and without challenging the summons at appropriate stage and therefore Trial cannot be vitiated.

27. The useful reference can be made to Section 460(e) r/ w. Section 465 of CRPC. If any magistrate not empowered by the law to take cognizance of an offence u/s. 190(1)(a) or (b), but erroneously and good faith do that the proceedings shall not be set aside merely on the ground of his not being so empowered. Further, Section 465 of CRPC also provides that no finding, sentence or order by a court of competent jurisdiction shall be reversed by the court of appeal on the ground of alleged irregularity, unless there is a failure of justice has in fact been occasioned thereby.

28. No such prejudice is pleaded by the accused. The Ld. Magistrate has categorically followed the above principle of law and relied upon Section 465 of CRPC also, as stated in the order @ Para 20.2- Page 329. The Hon'ble Appellate

NEUTRAL CITATION
2023:GUJHC:34259

Court has also appreciated that correct position of law.

C. Serious ex-facie trial vitiating factors - (2) No documentary evidence or case of no evidence in terms of the Indian Evidence Act

Reply:

29. The complaint is based on broadly three types of evidences: (1) oral evidence (total 9 witnesses); (2) documentary evidence; (3) electronic evidence (Para 3 of order of Ld. Magistrate @ Page 192)

30. This is a case of defamation by slander per se. Therefore, the evidence of witness heard the defamatory speech is very important and useful.

31. Eye witness Ganesh Yaji- Exh. 67 very categorically depose that he himself physically present when the accused delivered the defamatory speech in Kollar on 13.4.2019 and this witness heard that defamatory imputation. Further, CD Exh. 26 is shown to this witness in laptop during the trial, wherein he confirms the subject imputation and defamatory speech (Para 15 of Trial Court order @ Page 278 to 288). Thus, the oral evidence is sufficiently corroborated by making this witness to watch the CD Exh. 26. Further, during the cross of this witness accused has put suggestions, in the nature of admission. Therefore also, the offence is proved by this oral evidence.

32. The above oral evidence is now sought to be challenged in appeal and this revision, as stated in Ground @ Page 20 of revisions Application on the ground of (a) contradiction of not material nature; (b) again some trivial omissions; (c) some improvements not material; (d) this witness is not named as witness in the complaint; (e) interested witness; (f) oral evidence in defamation not to believe as exact speech and content may not come in evidence (g) the CD Exh-26 shown to this witness is not proved/ believable/ alleged tempered and (h) oral evidences is some what contradictory to the electronic evidence.

33. All these grounds are subject matter of final hearing in appeal only. On the contrary, the CD is shown not to prove the CD but to corroborate the oral evidence and therefore, there is no requirement of certificate u/s. 65B(4)

NEUTRAL CITATION

2023:GUJHC:34259

of Evidence Act, to that extent of corroboration.

34. Other eye witnesses, who also identically supported the complainant's case are (1) M. Shiv Swami- Exh.111 (Para 16- Page 288 to 291); (2) Arunkumar K R- Exh.115 [along with affidavit 116 in substantial compliance of Section 65B(4) of Evidence Act] (Para 17- Page 291 to 292); (3) Punit AVN- Exh.124 (Para 18- Page 292 to 295); (4) Niranjan Rathod - Exh.60 (Para 14- Page 270 to 278); (5) P M Ragunath- Exh.56 (Para 13- Page 267 to 270); (5) Manhar Lapsiwala- Exh. 37 (Para 11- Page 259 to 267) and (6) complainant himself Exh.18 (Para 10- Page 245 to 259).

35. Further, for electronics evidence it is proved vide Exh.127 along with certificate u/s. 65B(4) of Evidence Act. The officer from the election office entered the witness box and gave affidavit in the nature of 65B(4) of the Evidence Act, while again the DVD Containing the defamatory imputation.

36. Further, all these defences of the revisioner are required a full fledge thorough hearing of appeal and not permissible in law to appreciate at such infant stage, merely because accused is a MP.

37. Thus, without admitting anything, even if the contentions of electronic evidence raised by the revisioner is believed to be arguable, the case is also not only based on electronic evidence but also on the above referred sufficient and reliable oral evidence remained unshaken during the trial.

<u>Admission of electronic evidence</u>

38. Further, complainant gave application Exh.136 inter alia stating that electronics evidence Exh. 21, 26 and 126 are proved as per the Indian Evidence Act and therefore, said video recording is required to be shown to the accused u/s. 313 for his explanation. (Page 112 to 114)

39. The accused specifically admitted before the trial court, as observed in the order dated 23.2.2022 passed in Application Exh.136 by Ld. Magistrate, that

"In accused person under section 313 of the Criminal Procedure Code is looked at, specific questions with regard to Exh. 21, 26 and the CDs and pendrive produced vide

NEUTRAL CITATION
2023:GUJHC:34259

Exh. 26 have already been put to the accused. Specific question with regard the evidences brought on record pursuant to light thrown by witness against the accused, have also been asked to the accused. It appears to this court that there are no any other or further important questions left out from being asked to the accused. This court further finds that there is no defect in the statement already recorded of the accused person. Under these facts and circumstances, this court does not find it just and proper to summon the accused again and to confront him with further questions in relation to the [produced CD, pen driver and DVDs (Exh. 21, 26 and Exh..... illegible....) by playing the same in the court in front of the accused, as prayed for in the present application, especially when the learned advocate for the accused has no dispute in this regard" (Page 131/160)

40. Further, there are several admissions by the accused as observed by the Ld. Magistrate also in para 27 of the order of the Ld. Magistrate. (Page 351 to 353)

41. Section 499 of IPC reads as under:

"Section 499 - Defamation- Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person."

42. Thus, not only intention or knowledge but "reason to believe" is an additional factor to bring the imputer to prosecute. Reason to believe is sufficiently established in the present case. "Reason to believe" is on lower pedestal than intention or knowledge. In the present case, all the three ingredients, i.e. intention, knowledge and reason to believe are inter changeably satisfied.

C. <u>Serious ex-facie trial vitiating factors- (3) Fair Trial</u>

43. The revisioner alleges the complainant "getting" a stay of proceedings before the Trial Court on 7.3.2022 in pursuant to application Exh.136 (statement u/s. 313) and then delayed the trial and suddenly withdrew the Petition from this Hon'ble Court on 16.2.2023. Further, alleges that

NEUTRAL CITATION
2023:GUJHC:34259

in tearing hurry the Ld. Trial Court concluded the trial.

44. Above allegation is a blatant disregard to the court of law and a deliberate false statement. Challenging any order rejecting application given by the complainant before the higher forum is legal right of the complainant and regular process of law. Accordingly, the order was challenged. Thereafter, this Hon'ble Court after hearing the Respondent no.1 passed the reasoned, detailed order in the open court, which is never challenged by the revisioner. Thereafter, following events took place:

S.No	Date	Particulars
1.	28.03.2022	*Court Order* *"1. At the joint request of the learned Advocates for the parties, stand over to 8th APRIL, 2022.* *2. Interim relief granted earlier to continue, TILL THEN."*
2.	08.04.2022	*Identically adjourned (Order not available on the website)*
3.		*Summer Vacation of the High court*
4.	25.07.2022	*Court Order* *"At the joint request, stand over to 26.08.2022. Interim relief granted earlier to continue till then."*
5.	24.08.2022	*Accused filed his Affidavit-in-Reply before the High Court objecting the Petition.*
6.	26.08.2022	*Court Order* *"At the joint request of the learned advocates appearing for the parties, the matter is adjourned to 7th October, 2022.* *Interim relief granted earlier to continue till then."*
7.	07.10.2022	*Identically adjourned (Order not available on the website)*
8.	18.11.2022	*Identically adjourned (Order not available on the website)*
9.		*Winter Vacation of the High Court*

10.	06.01.2023	<u>Court Order</u> *"Learned advocates appearing for the parties have jointly requested for time.* *Stand over to 3rd February, 2023.* *Ad-interim relief, granted earlier, to continue till then."*
11.	03.02.2023	*Identically adjourned (Order not available on the website)*
12.	16.02.2023	*Thus, the Accused never insisted/ co-operated for the hearing and final disposal of the SCRA No. 2578/2022 before the Hon'ble High Court; matter was adjourned upon joint request only; the submission of the Complainant-Petitioner was essentially forming part of the Order issuing notice dated 07.03.2022. It was for the accused to advance his submissions by way of oral arguments, which he never did.* *The Complainant-Petitioner being a Public Figure and responsible citizen, wanted to follow the guidelines of the Hon'ble Supreme Court directing to dispose off the criminal cases of MLA/MP expeditiously. Accordingly, R1 took 2nd legal opinion and after pursuing above referred admission of the accused felt that sufficient evidence has already come on record to prove the case. Accordingly, the was withdrawn.*

45. The appellant has not disclosed that the case was at the stage of final argument and judgement. Therefore, disposing of the case accordingly within one month is absolutely expected from the court and it is not in tearing hurry. Case is covered in the category of MLA/ MP and bound by the direction of the Hon'ble Supreme Court to dispose off on day to day basis.

D. <u>Irreparable, irreversible situation and extra-ordinary</u>

NEUTRAL CITATION
2023:GUJHC:34259

circumstances

46. The revisioner has stated himself to be public servant/ MP and prayed to consider the same as "special circumstance", "irreversible" or "extra ordinary" or "rare" or "exceptional circumstance' by relying upon judgments from other Hon'ble High Courts reproduced in chart form @ Page 685.

Reply:

47. The law with regard to suspension of conviction can be summarised as under:

i. It is should be in rare and exceptional circumstance.
ii. Court should examine "seriousness of offence" and/or "offence of moral turpitude" over and above "serious offence" and shall not invoke the jurisdiction.
iii. Criminal antecedents of the accused convicted will be a relevant consideration, even in the case of suspension of sentence in the case of Kanak Rekha Nayak (para 14).
iv. The Court should not be impressed by the fact that the accused being sitting MLA/ MP even in staying the sentence [Kanak Rekha (Supra)].

Note: Accused has history of at least 12 identical criminal cases registered against him, as stated in para 26 of the reply filed by Respondent no.1 before the Ld. Sessions Judge in Criminal Appeal No. 254 of 2023.

v. A public servant losing his job is not a consideration/ ground to exercise the discretion u/s. 389(1) (K.C. Sareen - followed in number of cases)

Note: Identically public representative may disqualify u/s. 8 of ROPA.

vi. The court have to have the regard to the undersigned philosophy of the constitution and democracy, which is sought to be achieved through the ROPA, which in turn has made the provisions for disqualification. Naranbhai Bhikhabhai Kachhadiya 13 - para 22 to 26.

Note: It is falsely argued that above case of Naranbhai Supra is overruled by the Hon'ble Supreme

NEUTRAL CITATION
2023:GUJHC:34259

Court. Above judgment of this Hon'ble Court was challenged before the Hon'ble Supreme Court, vide Criminal Appeal no.418 of 2016. However, it was submitted before the Hon'ble Supreme High Court that the compromise was entered between accused and victim; unconditional offer of compensation (of Rs. 5 lacs) was given by the accused and accepted by the victim. The Ld. Trial Court was directed the ensure the compliance of compensation of Rs. 5 lacs. Accordingly, the Hon'ble Supreme Court, quashed the prosecution against the that petitioner with certain condition. However, the judgment of this Hon'ble Court and principle laid down therein are never disturbed, but on the contrary can be said to have been confirmed, in the respectful submission of the Respondent no.1.

vii. A right to be elected is neither a fundamental right nor common law right, but at the best it is pure and simple, a statutory right (Jyoti Basu).

48. Further, the judgments of other Hon'ble High Courts relied upon by the appellant are not applicable or contrary to the law laid down by the Hon'ble Supreme Court and this Hon'ble Court, as above. For example, in the case of Indira Kapoor most of the witnesses turn hostile and in cross examination they admitted receipt of the payment qua the work done. Other several relevant facts are referred in Para 21 and 22. Identically some of the cases have nothing to do with the public life of the concerned accused but the offence was purely private in nature like in Navjot Singh Supra case. Against some of the orders the appeal is pending before the Hon'ble Supreme Court.

49. Further, the conduct of the accused- See para 28 to 36 of the reply filed before the Ld. Sessions Judge, Surat in Criminal Appeal No. 254 of 2023.

E. <u>Quantum of punishment/ maximum punishment</u>

51. The accused committed serious offence with larger impact, as stated above. Accused committed the offence to influence the election by defaming the Respondent no.1 and stating false fact (Para 22.3 of Ld.Trial Court Order @ Page 340). Accused did not deny his speech at Kollar, but disputed the incriminating imputation.

NEUTRAL CITATION
2023:GUJHC:34259

52. Even after the accused was held guilty, he did not show any conduct, wherein the reformative measures like lessor than maximum punishment can be awarded. The accused blatantly said that he is not sorry for his offence and not tendering any apology. The accused may have right to do so, but then he must face the consequences of maximum punishment. Therefore, now convicted accused cannot claim leniency of lessor punishment / quantum of punishment.

53. In any case, this can be decided finally appeal. The exceptional conduct and childish arrogance of the accused makes him liable to suffer maximum punishment.

F. Role of complainant in complaint case in opposing suspension of "conviction" when not opposed "sentence"

54. Section 401(2)- Mandatory to hear the complainant. This being private complaint case, Section 385(1)(iii) makes it mandatory to hear the complainant.

55. Further, accused has defamed R1 and his community as a public leader in discharge of his public duty. If the accused is again allowed to resume that position, again will misuse the same, looking to his arrogance as reflecting on the record. That's why the R1 has not only locus but also want to prevent the repetition of the offence at such a high magnitude. The Respondent no.1 is even today aggrieved person and may humbly pray the Hon'ble Courts of law that the order of holding accused guilty and conviction may kindly be in operation, in the interest of justice and to prevail the majesty of justice.

Under these circumstances, the revision is utterly devoid of merits and may kindly be dismissed in the interest of justice.

17. In the case of **Kanaka Rekha Naik** (supra), the Hon'ble Supreme Court has held and observed in paragraph no.14 as under:-

NEUTRAL CITATION
2023:GUJHC:34259

> *"14. There is no dispute that the respondent herein is involved in more than one case of similar nature of rioting etc. This fact has not been taken into consideration at all by the High Court. The High Court did not even suspend the execution of the sentence awarded by the trial Court but directed his release on bail. The High Court was obviously impressed by the singular fact that the respondent is a sitting M.L.A. The High Court did not record even a single reason confining the relief of releasing on bail only to the respondent, though there are two appellants in the appeal preferred challenging the judgment of the trial Court. What are the reasons for confining the relief only to the respondent herein and directing his release? The only reason appears to be the fact that the respondent is a sitting M.L.A. The law does not make any distinction between the representatives of the people and others, accused of criminal offences. Neither they can claim any privilege nor can it be granted by any Court. The law treats all equally."*

18. In the case of **Naranbhai Bhikhabhai Kachhadia** (supra), this Court has held and observed in paragraphs no.21 to 26 as under:-

> *"21. Therefore, a public servant losing his job which is necessary for his survival has also not to be considered as a ground for exercise of such discretion for stay of the conviction. Disqualification earned as a Member of Parliament could not be a justification for exercise of such discretion. The Hon'ble Apex Court has considered various relevant aspects including the observations made in the judgment in the case of K.C. Sareen v. CBI [(2001) 6 SC 584] as well as in another case reported in (2003) 12 SCC 434 in the case of Union of India v. Atar Singh. The consistent broad guidelines which have been laid down by the Hon'ble Apex Court clearly provide that an order of conviction should not be suspended merely on the ground that non-suspension of such conviction may entail the consequences like removal of a government servant from*

NEUTRAL CITATION
2023:GUJHC:34259

service or, as it is stated in the facts of the case, disqualification as a Member of Parliament. It has also been observed that such power should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice and irreversible consequences.

22. Much emphasis by learned Sr. Counsel Shri Nanavati on this aspect of irreversible situation being created causing damage to the applicant is also required to be considered with reference to the public interest. If such a representative of people or a public servant is allowed to behave in such fashion, it would also not be in the public interest and the court cannot absolve pending the appeal such a conduct at this stage exercising discretion under sec. 389 of CrPC. As observed, though the discretion is vested with the court, it has to be exercised rarely and with circumspection only in some circumstances which justify exercise of such power . The background of facts as stated do not justify exercise of such discretion as it cannot be said to be an exceptional case. The submissions which have been made referring to the irreversible situation being created causing damage to the career or prejudice to the applicant could be said to be a consequence of the act amounting to the offence which every accused is bound to suffer at the conclusion of the trial.

23. It is required to be noted that Justice J.S. Verma Committee Report on amendment to the criminal law has proposed and recommended that sec. 8 of the Representation of People Act, 1951 should be amended providing for disqualification of the Member of Parliament or the legislative assembly. It appears that necessary amendment has been made and as observed by the Hon'ble Apex Court in the judgment reported in (2014) 9 SCC 1 in the case of Manoj Narula v. Union of India, criminalisation of politics create a dent in the marrows of nation. In this judgment referring to Art. 84, the Hon'ble Apex Court has quoted President of the Constituent Assembly Dr. Rajendra Prasad, which is quoted in para 111,

"*There are only two regrets which I must share with the honourable Members. I would have liked to have some qualifications laid down for Members of the Legislatures. It is anomalous that we should insist upon high qualifications for those who administer or help in administering the law*

NEUTRAL CITATION
2023:GUJHC:34259

but none for those who make it except that they are elected. A law-giver requires intellectual equipment but even more than that capacity to take a balanced view of things, to act independently and above all to be true to those fundamental things of life - in one word - to have character (Hear, hear). It is not possible to devise any yardstick for measuring the moral qualities of a man and so long as that is not possible, our Constitution will remain defective....."

The Hon'ble Apex Court has observed and quoted in the next para 112,

"*Hopefully, Parliament may take action on the views expressed by Dr. Rajendra Prasad, the first President of our Republic.*"

24. Therefore, when it is talked about good governance, it must reflect upon the democracy and rule of law which in turn has been provided in the Representation of People Act, 1951 providing for disqualification. In other words, while exercising power under sec. 389, the courts have to have regard to the underlying philosophy of the Constitution and democracy which is sought to be achieved through the Representation of People Act, 1951 which in turn has made the provision for disqualification.

25. A useful reference can also be made to the observations made by the Hon'ble Apex Court in a judgment reported in AIR 2005 SC 688 in the case of K. Prabhakaran v. P. Jayarajan with Ramesh Singh Dalal v. Nafe Singh and ors., where the discussion has been made referring to sec. 8 of the Representation of the People Act that those who break the law should not make the law and the purpose which is sought to be achieved by enacting disqualification on conviction.

26. It is in these circumstances the present application seeking suspension of conviction cannot be entertained. "

19. In the aforesaid case i.e. **Naranbhai Bhikhabhai Kachhadia** (supra), the Hon'ble Supreme Court has NOT set aside or overruled, but maintaining the principle of law, quashed

NEUTRAL CITATION
2023:GUJHC:34259

the entire prosecution against the convicted accused on the ground of compromise with the Complainant and paying sufficient damages of Rs.5 lacs.

20. Relevant paragraph of the decision of this Court in the case of **Bhagabhai Dhanabhai Barad** (supra) is as under:-

> *"It is the sublime(best) public policy to keep convicted public servant under disability of conviction inspite of keeping the sentence of imprisonment in abeyance.*
>
> *Suspension of conviction should be exercised by Appellate or Revisional Court in very exceptional circumstances."*

21. In the case of **Jyoti Basu and others** (supra), the Hon'ble Supreme Court has held and observed in paragraph no.18 as under:-

> *"8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar*

NEUTRAL CITATION
2023:GUJHC:34259

to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, Is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?"

22. In the case of **Manoj Narula** (supra), the Hon'ble Supreme Court has held and observed in paragraph no.111 as under:-

"111. The qualifications postulated by clause (c) of Article 84 have not yet been prescribed by law by Parliament. In this context, it is worth quoting the President of the Constituent Assembly Dr. Rajendra Prasad, who said on 26th November, 1949, before formally putting the motion moved by Dr. Ambedkar to vote, as follows:

"*There are only two regrets which I must share with the honourable Members. I would have liked to have some qualifications laid down for members of the Legislatures. It*

NEUTRAL CITATION
2023:GUJHC:34259

is anomalous that we should insist upon high qualifications for those who administer or help in administering the law but none for those who made it except that they are elected. A law giver requires intellectual equipment but even more than that capacity to take a balanced view of things to act independently and above all to be true to those fundamental things of life - in one word - to have character (Hear, hear). It is not possible to devise any yardstick for measuring the moral qualities of a man and so long as that is not possible, our Constitution will remain defective. The other regret is that we have not been able to draw up our first Constitution of a free Bharat in an Indian language. The difficulties in both cases were practical and proved insurmountable. But that does not make the regret any the less poignant."

23. In the case of **Lily Thomas** (supra), the Hon'ble Supreme Court has held and observed in paragraphs no.33, 34 and 38 as under:-

"33. Looking at the affirmative terms of Arts. 102(l)(e) and 191(l)(e) of the Constitution, we hold that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a member of Parliament or a State Legislature and for a sitting member of a House of Parliament or a House of a State Legislature. We also hold that the provisions of Article 101(3)(a) and 190(3)(a) of the Constitution expressly prohibit Parliament to defer the date from which the disqualification will come into effect in case of a sitting member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting Sub-Section (4) of Sec. 8 of the Act and accordingly sub-sec. (4) of Sec. 8 of the Act is ultra vires the Constitution.

34. We do not also find merit in the submission of Mr. Luthra and Mr. Kuhad that if a sitting member of Parliament or the State Legislature suffers from a frivolous conviction by the trial Court for an offence given under

NEUTRAL CITATION
2023:GUJHC:34259

Sub-Section (1), (2) or (3) of Sec. 8 of the Act, he will be remediless and he will suffer immense hardship as he would stand disqualified on account of such conviction in the absence of sub- Section (4) of Sec. 8 of the Act. A three- Judge Bench of this Court in Rama Narang V/s. Ramesh Narang & Ors. [(1995) 2 SCC 513] has held that when an appeal is preferred under Section 374 of the Code of Criminal Procedure s [for short 'the Code' the appeal is against both the conviction and sentence and, therefore, the Appellate Court in exercise of its power under Section 389(1) of the Code can also stay then order of conviction and the High Court in exercise of its inherent jurisdiction under Sec. 482 of the Code can also stay the conviction if the power was not to be found in Sec. 389(1) of the Code."

38. Under sub-secs. (1), (2) and (3) of Sec. 8 of the Act. the disqualification takes effect from the date of conviction for any of the offences mentioned in the sub-secs. and remains in force for the periods mentioned in the Sub-Sections. Thus, there may be several sitting members of Parliament and State Legislatures who have already incurred disqualification by virtue of a conviction covered under Sub-Section (1), or sub-sec. (2) or Sub-Section (3) of Sec. 8 of the Act. In Golak Nath and Others V/s. State of Punjab and Another (AIR 1967 SC 1643), Subba Rao. C.i. speaking on behalf of himself. Shah, Sikri, Shelat and Vaidialingam, JJ. has held that Articles 32, 141, 142 of the Constitution are couched in such a wide, and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice and has further held that this Court has the power not only to declare the law but also to restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. Sitting members of Parliament and State Legislature who have already been convicted for any of the offences mentioned in sub-sec. (1), (2) and (3) of Sec. 8 of the Act and who have filed appeals or revisions which are pending and are accordingly saved from the disqualifications by virtue of Sub-Section (4) of Sec. 8 of the Act should not, in our considered opinion, be affected by the declaration now made by us in this judgment. This is because the knowledge that sitting members of Parliament or State Legislatures will no longer be protected by sub-sec. (4) of Sec. 8 of the Act will be acquired by all concerned only on the date this judgment is pronounced by this Court. As has been observed by this Court in Harla V/s. State of Rajasthan (AIR 1951 SC 467) :-

NEUTRAL CITATION
2023:GUJHC:34259

[".....it would be against the principles of natural justice to permit the subjects of a State to be punished or penalized by laws of which they had no knowledge and of which they could not even with exercise of due diligence have acquired any knowledge."]

[However, if any sitting member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-secs. (1), (2) and (3) of Sec. 8 of the Act and by virtue of such conviction and/or sentence suffers the disqualifications mentioned in sub-secs. (1). (2) and (3) of Section 8 of the Act after the pronouncement of this judgment, his membership of Parliament or the State Legislature, as the case may be, will not be saved by sub-sec. (4) of Section 8 of the Act which we have by this judgment declared as ultra vires the Constitution not withstanding that he files the appeal or revision against the conviction and/or sentence.] "

24. In the case of **K. C. Sareen** (supra), the Hon'ble Supreme Court has held and observed in paragraphs no.10 to 13 as under:-

10. *A three Judge Bench of this Court have elaborately considered the scope and ambit of the powers of the appellate court envisaged in Section 389 of the Code. Vide Rama Narang vs. Ramesh Naraang & ors. {1995 (2) SCC 513}. Ahmadi, CJ, who authored the judgment for the Bench said that what can be suspended under Section 389(1) of the Code is the execution of the sentence or execution of the order and obviously the order referred to in the sub-section must be an order which is capable of execution. Learned Chief Justice then observed thus:*

"An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which, if not suspended, would be required to be executed by the authorities. Since the order of conviction does not on the mere filing of an appeal disappear it is difficult to accept

the submission that Section 267 of the Companies Act must be read to apply only to a final order of conviction. Such an interpretation may defeat the very object and purpose for which it came to be enacted."

Nevertheless, the three Judge bench further stated that in certain situation the order of conviction can be executable and in such a case the power under Section 389(1) of the Code could be invoked. The ratio of the judgment can be traced out in the said paragraph which is extracted below:

"16. In certain situations the order of conviction can be executable, in the sense it may incur a disqualification as in the instant case. In such a case the power under Section 389(1) of the Code could be invoked. In such situations the attention of the appellate court must be specifically invited to the consequences which are likely to fall to enable it to apply its mind to the issue since under Section 389(1) it is under an obligation to support its order for reasons to be recorded by it in writing. If the attention of the Court is not invited to this specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto? No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification has ceased to operate."

11. *The legal position, therefore, is this: Though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the*

NEUTRAL CITATION
2023:GUJHC:34259

offence under the PC Act, de hors the sentence of imprisonment as a sequel thereto, is a different matter.

12. *Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic polity. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior court. The mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction it is public interest which suffers and sometimes even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction the fall out would be one of shaking the system itself. Hence it is necessary that the court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a court order suspending the conviction.*

NEUTRAL CITATION
2023:GUJHC:34259

> ***13.*** *The above policy can be acknowledged as necessary for the efficacy and proper functioning of public offices. If so, the legal position can be laid down that when conviction is on a corruption charge against a public servant the appellate court or the revisional court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision.*

25. In the case of **Gajanan and another** (supra), the Hon'ble Supreme Court has held and observed in paragraphs no.4 and 5 as under:-

> *"**4.** Having perused the impugned order as also the judgment of this Court in K.C. Sareen (supra), we find the High Court had no room for distinguishing the law laid down by this Court in K.C. Sareen's case (supra) even on facts. This Court in the said case held :*
>
> *"11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal*

NEUTRAL CITATION
2023:GUJHC:34259

otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter."
(emphasis supplied)

5. *In the said judgment of K.C. Sareen (supra), this Court has held that it is only in very exceptional cases that the court should exercise such power of stay in matters arising out of the Act. The High Court has in the impugned order nowhere pointed out what is the exceptional fact which in its opinion required it to stay the conviction. The High Court also failed to note the direction of this Court that it has a duty to look at all aspects including ramification of keeping such conviction in abeyance. The High Court, in our opinion, has not taken into consideration any of the above factors while staying the conviction. It should also be noted that the view expressed by this Court in K.C. Sareen's case (supra) was subsequently approved followed by the judgment of this Court in Union of India v. Atar Singh & Anr. [JT 2001 (10) SC 212].”*

26. In the case of **Ravikant S. Patil** (supra), the Hon’ble Supreme Court has held and observed in paragraphs no.15 and 15 as under:-

*“**15.** It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying that consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the*

NEUTRAL CITATION
2023:GUJHC:34259

conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction.

16. *We may now refer to the several other decisions of this Court, cited by the parties.*

16.1 *The decision in B.R.Kapur v. State of Tamil Nadu, [2001] 7 SCC 231, will have no application as it was not a case of stay of conviction. In that case, only an order of suspension of sentence was made under Section 389 of the Code. In fact, the petitions seeking stay of the operation of the judgment in the criminal cases were dismissed by the High Court.*

16.2 *In State of Tamil Nadu v. A.Jaganathan, [1996] 5 SCC 329, the State challenged the order of the High Court which had granted suspension of the conviction as also the sentence, relying on Rama Narang (supra). This Court held that the principle laid down in Ram Narang (supra) was that conviction and sentence can both be suspended only if non-grant of suspension of conviction would result in damage which could not be undone if ultimately the appeal/revision was allowed. On facts, it was found that even if stay of conviction was not granted, no prejudice would be caused to the convicted person, having regard to the fact that when the revisions against the conviction and sentences were ultimately allowed, the damage, if any, caused to the respondents therein with regard to payment of stipends etc. could well be revived and made good to the them. This Court noted that if such trifling matters involving slight disadvantage to the convicted person were to be taken into consideration, every conviction would have to be suspended pending appeal or revision. It was further noted that the High Court did not consider at all the moral conduct of the respondents inasmuch as the respondent Jaganathan who was a Police Inspector had been convicted under Sections 392, 218 and 466 IPC, while the other respondents who were also public servants had been convicted under the provision of Prevention of Corruption Act. Under those circumstances, the discretion exercised by the High Court in suspending the conviction was reversed.*

16.3 *In K.C.Sareen v. CBI, Chandigarh, [2001] 6 SCC 584,*

it was held that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. It was further held that merely because the convicted person files an appeal to challenge his conviction, the court should not suspend the operation of the conviction and the court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. The Bench also noted that the evil of corruption has reached a monstrous dimension. While declining the prayer of the appellant for grant of an order of stay of conviction, the Bench observed that when conviction is on a corruption charge against a public servant, the appellate court should not suspend the order of conviction during the pendency of the appeal, even if the sentence of imprisonment is suspended. The Bench further observed that it would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision. These observations would equally apply when a prayer for stay of order of conviction is made so as to remove the disability to contest an election except, as already noted, in a very exceptional and rare case.

16.4 *Lastly, reference may also be made to the decision of this Court in State of Maharashtra v. Gajanan & Anr., [2003] 12 SCC 432. In the said case, relying on the case of K.C.Sareen (supra), it was reiterated that only in exceptional cases, the court should exercise the power of stay of conviction. Since the High Court in the said case had not pointed out any exceptional fact or looked into the ramification of keeping such conviction in abeyance, the order of the High Court staying the conviction was set aside. In the cited case of Union of India v. Atar Singh, [2003] 12 SCC 434, it was noted that the High Court had mechanically passed the order by suspending the conviction and the discretion ought not to have been exercised by the High Court by passing such an order suspending the conviction.*

16.5 *All these decisions, while recognising the power to stay conviction, have cautioned and clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences."*

NEUTRAL CITATION
2023:GUJHC:34259

27. In the case of **Shyam Narain Pandey** (supra), the Hon'ble Supreme Court has held and observed in paragraph no.6 as under:-

> *"**6.** It may be noticed that even for the suspension of the sentence, the court has to record the reasons in writing under Section 389(1) Cr.PC. Couple of provisos were added under Section 389(1) Cr.PC pursuant to the recommendations made by the Law Commission of India and observations of this Court in various judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the public prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice"*

28. In the case of **Mahesdan Narvardhan Gadhavi** (supra), this Court has held and observed in paragraphs no.7 and 12 as under:-

> *"**7.** In support of his submissions, Mr.Sudhir Nanavati, the learned senior counsel appearing for the applicant has relied on the judgement of the Apex Court in the case of*

NEUTRAL CITATION
2023:GUJHC:34259

K.C. Sareen vs. CBI, Chandigarh, reported in (2001) 6 SCC 584, wherein it is held as under :

"When a public servant who is convicted of corruption is allowed to continue to hold public office it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction the fall out would be one of shaking the system itself. Hence it is necessary that the court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a court order suspending the conviction."

12. *The learned APP has also placed reliance on the judgement of the Apex Court in the case of Shyam Narain Pandey vs. State of Uttar Pradesh reported in (2014) 8 SCC 909, wherein it is held as under :*

"5. It has been consistently held by this Court that unless there are exceptional circumstances, the appellate court shall not stay the conviction, though the sentence may be suspended. There is no hard and fast rule or guidelines as to what are those exceptional circumstances. However, there are certain indications in the Code of Criminal Procedure, 1973 itself as to which are those situations and a few indications are available in the judgments of this Court as to what are those circumstances.

7. In Ravikant S. Patil v. Sarvabhabhouma S. Bagali, a three-Judge Bench of this Court has held that: (SCC p. 681, para 6)

"16.5. ..... the power to stay the conviction should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice and irreversible consequences."

8. In Navjot Singh Sidhu v. State of Punjab, following

NEUTRAL CITATION
2023:GUJHC:34259

Ravikant S. Patil case, at paragraph-6, this Court held as follows: (Navjot Singh Sidhu case, SCC pp. 581-82)

"6. The legal position is, therefore, clear that an appellate court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

9. In State of Maharashtra v. Balakrishna Dattatrya Kumbhar, referring also to the two decisions cited above, it has been held at paragraph-15 that : (SCC p. 389)

"15. ..... the appellate court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the court as regards the evil that is likely to befall him, if the said conviction is not suspended. The court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

10. In State of Maharashtra v. Gajanan and Union of India v. Atar Singh, cases under the Prevention of Corruption Act, 1988, this court had to deal with specific situation of loss of job and it has been held that it is not one of exceptional cases for staying the conviction.

11. In the light of the principles stated above, the contention that the appellant will be deprived of his source of livelihood if the conviction is not stayed cannot be appreciated. For the appellant, it is a matter of deprivation of livelihood but he is convicted for deprivation of life of another person. Until he is otherwise declared innocent in appeal, the stain stands. The High Court has discussed in

NEUTRAL CITATION
2023:GUJHC:34259

detail the background of the appellant, the nature of the crime, manner in which it was committed, etc. and has rightly held that it is not a very rare and exceptional case for staying the conviction."

29. In the case of **Jayantibhai Hirjibhai Devra and another** (supra), this Court has held and observed in paragraphs no.7 and 9 as under:-

*"**7.** In the instant case, there is an additional overriding circumstance, namely, that the applicant is a convict in respect of offences under the Prevention of Corruption Act, 1988. In K.C. Sareen Vs CBI, Chandigarh [2001(6) SCC 584], the Apex Court took judicial notice that corruption by a public servant has reached a monstrous dimension in the country. Its tentacles have started grappling even the institutions created for the protection of the republic. The court observed that if a corrupt public servant is allowed to enjoy the suspension of conviction until before he is judicially absolved from such findings, it is the public which will suffer irreparably. The court observed,*

"The legal position, therefore, is this : though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the

NEUTRAL CITATION
2023:GUJHC:34259

offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter."
(Para 11)

7.1 *The apex court took note that the corruption by public servants has now reached a monstrous dimension in India, and that its tentacles have started grappling even the institutions created for the protection of the republic. Then proceeded to state-*

"Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic polity. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant is found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior court. The mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings."

"...When a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person..... Hence it is necessary that the court should not aid the public servant who stands convicted for corruption charges to hold only (sic) public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a court order suspending the conviction." (Para 12)

7.2 *Sareen (Supra) summarized the statement of law in the following words,*

"...the legal position can be laid down that when conviction is on a corruption charge against a public servant the appellate court or the revisional court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment is suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision." *(Para 13)*

7.3 *A caravan of decisions followed K.C. Sareen (supra) reaffirming the preposition that where the conviction is under the Prevention of Corruption Act, 1988, the same should not be suspended or stayed during the pendency of appeal. In Navjot Singh Sidhhu (supra) also K.C.Sareen (Supra) was referred to and the proposition of law was emphasized with following observations,*

"The cases cited have no application to the facts of the present case as both of them related to conviction on charges of corruption and in that context it was observed that when conviction is on a corruption charge, it would be a sublime public policy that the convicted person is kept under disability of the conviction instead of keeping the sentence of imprisonment in abeyance till the disposal of the appeal. In such cases it is obvious that it would be highly improper to suspend the order of conviction of a public servant which would enable him to occupy the same office which he misused. This is not the case here."

7.4 *In State of Maharashtra Vs Gajanan [2003(12) SCC 432], K.C. Sareen (supra) was relied on and the Apex Court expressed itself to state that the High Court could not have stayed the conviction in absence of being pointed out the exceptional facts or the circumstance. Again in Union of India Vs Atar Sing [2003 (12) SCC 434], the position of law was reiterated by the Apex Court in the following words:*

"This appeal is directed against the impugned order of the High Court. The respondent-accused, who has been convicted under Section 409 IPC and Section 13 of the Prevention of Corruption Act, preferred an appeal to the High Court, which has been entertained. On an application being filed under Section 389 of the Code of Criminal Procedure, the High Court has suspended the conviction solely on the ground that nonsuspension of conviction may entail removal of the delinquent government servant from

NEUTRAL CITATION
2023:GUJHC:34259

service."

7.5 *In Navrajsing (supra) also the conviction was under the Prevention of Corruption Act. The order of the learned Single of the High Court staying the conviction was not approved by the Apex Court. In Shiv Kumar Vs State of NTC of Delhi [2008(17) SCC 122], where again it was held that "This Court has observed in several cases that where the accused is convicted for offence punishable under the (Prevention of Corruption) Act, it would not be prudent and desirable to give protection under Section 389 of the Code."*

7.6 *In Central Bureau of Investigation, New Delhi Vs Roshanlal Saini [AIR 2009 SC 755],where the respondent was convicted for offence of corruption, the Apex Court set aside the order of the Appellate Court, which suspended the conviction, relying on decision in K.C. Sareen (supra) and other decisions reiterating preposition of law with regard to suspension of conviction.*

9. *From the foregone discussed position of law, the principles emerging may be outlined. The reason that the order of conviction would result into ouster or removal or dismissal from service, is not sufficient nor is a good ground for that reason. Such ramifications arising out of conviction under the criminal law for a convict government servant are normal consequences often arising from the relevant service rules with which a government servant is governed. The effect of such service rules applicable to the government servant, which operate upon his conviction, is not to be confused with the merits of staying of conviction. Therefore, such consequences by themselves also do not constitute a case to be an exceptional case where the Court would stay the conviction.*

9.1 *Secondly, the possibility of delay in disposal of main appeal is held not to be a good ground in all normal circumstance, and justifying suspension or stay of conviction on such consideration is held to be a wrong approach. Thirdly, that there are arguable points in the appeal is also no ground. Fourthly, existence of prima facie case against conviction may be one of the considerations, but it is not a consideration by itself. They are the considerations on the basis of which the court has admitted the appeal.*

9.2 *It is not the only consideration. The requirement to be insisted is that the case is exceptional or extraordinary or has special circumstances involved. Fifthly, it is the requirement insisted that the case must be informed by special or exceptional circumstances. The special or exceptional circumstances would vary from case to case. They are facts and circumstances which are peculiar to a particular case. No straight-jacket formula can be evolved. A rare and exceptional circumstance which may justify the staying of conviction pending the appeal are those clinching circumstances or factors on the basis of which can be scanned through the facts and which, by virtue of their very kind and nature, have strong debilitating effect against continuing the effect of conviction and its operation. They are the factors which operate at the core of facts of the case. They are indeed one which appeals to the conscience of the Court. The factors discounted hereinabove can not become the special circumstances in isolation.*

9.3 *Sixthly, it has to be shown that specific consequences would entail because of the special and exceptional circumstances. A prima facie case coupled with peculiar or special circumstances involved in the case may place the case in exceptional or extra ordinary category when entailment of specific consequences is shown. The all of the above or few of them may be pressed into service for staying of conviction order. In rarest of rare case, a singular consideration, if the facts providing such single consideration are clinching strong, may become relevant. It goes without saying that in every case where suspension of conviction is present, is unlikely to have the combination the above features mentioned above. Therefore, the cases would be rare which could be characterized by above attributes of special or exceptional circumstances that the court would suspend conviction order.*

9.4 *The parameters on the basis of which stay of conviction may be justified are stricter in the cases where the conviction is under the corruption law, as emphatically held in K.C. Sareen (supra) and in subsequent later decisions. The connotation "exceptional case" in respect of the conviction under the Corruption laws has to be of higher degree and it would be rare case where the Court would be inclined to stay the conviction of those government servants found to be acting corrupt and having been convicted for such offence. The reason is that, the corrupt*

NEUTRAL CITATION
2023:GUJHC:34259

practices and the corrupt act on part of a government servant has repercussion on the society and system as a whole, inasmuch as the corruption corrodes from within."

30. In the case of **Rama Narang** (supra), the Hon'ble Supreme Court has held and observed in paragraphs no.19 as under:-

"19. That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some-disqualification of the type mentioned in Section 267 of the Companies Act we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the ode the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction. Although that issue in the instant case recedes in the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code. We are, therefore, of the opinion that the Division Bench of the High Court of Bombay was not right in holding that the Delhi High Court could not have exercised jurisdiction under Section 482 of the Code if it was confronted with a situation of there being no other provision in the (lode for staying the operation of the order of conviction. In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted persons does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies act and given effect to cannot be undone at a subsequent

NEUTRAL CITATION
2023:GUJHC:34259

date if the conviction is set aside by the Appellate Court. But while granting a stay of suspension of the order of conviction the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company."

31. In the case of **Sunil Todi and others** (supra), the Hon'ble Supreme Court has held and observed in paragraphs no.45 to 48 as under:-

*"**45.** In this backdrop, it becomes necessary now to advert to an order dated 16 April 2021 of a Constitution Bench in Re: Expeditious Trial of Cases under Section 138 of N.I. Act 1881 26. The Constitution Bench notes "the gargantuan pendency of complaints filed under Section 138" and the fact that the "situation has not improved as courts continue to struggle with the humongous pendency". The court noted that there were seven major issues which arose from the responses filed by the State Governments and the Union Territories including in relation to the applicability of Section 202 of the CrPC. Section 143 of the NI Act provides that Sections 262 to 265 of the CrPC (forming a part of Chapter XXI dealing with summary trials) shall apply to all trials for offences punishable under Section 138 of the NI Act. On the scope of the inquiry under Section 202 CrPC in cases under Section 138 of the NI Act, there was a divergence of view between the High Courts. Some High Courts had held that it was mandatory for the Magistrate to conduct an inquiry under Section 202 CrPC before issuing process in complaints filed under Section 138, while there were contrary views in the other High Courts. In that context, the Court observed:*

"10. Section 202 of the Code confers jurisdiction on the Magistrate to conduct an inquiry for the purpose of deciding whether sufficient grounds justifying the issue of process are made out. The amendment to Section 202 of the Code with effect from 23.06.2006, vide Act 25 of 2005,

NEUTRAL CITATION
2023:GUJHC:34259

made it mandatory for the Magistrate to conduct an inquiry before issue of process, in a case where the accused resides beyond the area of jurisdiction of the court. (See: Vijay Dhanuka & Ors. v. Najima Mamtaj & Ors. 1 , Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr. and Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.). There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases Suo Motu Writ Petition (Crl) No. 2 of 2020, decided on 16 April 2021 under Section 138 have been decided by the High Courts upholding the view that it is mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.

11. The learned Amici Curiae referred to a judgment of this Court in K.S. Joseph v. Philips Carbon Black Ltd & Anr. where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open. In view of the judgments of this Court in Vijay Dhanuka (supra), Abhijit Pawar (supra) and Birla Corporation (supra), the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. The learned Amici Curiae recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. We are in agreement with the learned Amici."

46. *Section 145 of the NI Act provides that evidence of the complainant may be given by him on affidavit, which shall be read in evidence in an inquiry, trial or other proceeding notwithstanding anything contained in the CrPC. The Constitution Bench held that Section 145 has been inserted in the Act, with effect from 2003 with the laudable object*

NEUTRAL CITATION
2023:GUJHC:34259

of speeding up trials in complaints filed under Section 138. Hence, the Court noted that if the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. Consequently, it was held that Section 202(2) CrPC is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The Court held that the evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases the Magistrate can examine documents to be satisfied that there are sufficient grounds for proceeding under Section 202.

***47.** In the present case, the Magistrate has adverted to:*

(i) The complaint;
(ii) The affidavit filed by the complainant;
(iii) The evidence as per evidence list and; and
(iv) The submissions of the complainant.

***48.** The order passed by the Magistrate cannot be held to be invalid as betraying a non-application of mind. In Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal27, this Court has held that in determining the question as to whether process is to be issued, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can only be determined at the trial. [See also in this context the decision in Bhushan Kumar v. State (NCT of Delhi)].*"

32. In the case of **ASR Systems Pvt Ltd** (supra), the Bombay High Court has held and observed in paragraph no.4 as under:-

"***4.** The learned counsel for the petitioner raised several grounds challenging the issuance of process. Firstly, according to the learned counsel, process was issued without following mandatory provision of making enquiry*

NEUTRAL CITATION
2023:GUJHC:34259

under Section 202 of the Cr.P.C. when the accused are not situated outside the local jurisdiction of the Magistrate taking cognizance. According to him, in this case, both the accused persons are situated in Delhi while complaints were filed before J.M.F.C., Pune, therefore, it was mandatory to hold enquiry under Section 202 Cr.P.C. before the process could be issued. The learned Single Judge of this Court in Bansilal S. Kabra v/s. Global Trade Finance Ltd. 2010 (2) Bombay C.R. Criminal 754 held that provisions of section 202 about holding of enquiry before issuance of process when the accused is living outside the territorial jurisdiction of the Magistrate is directive and not mandatory. In another case, the learned Single Judge of this Court held that the provision is mandatory but that application was rejected by the learned judge on the ground that the accused had come to the High Court at a belated stage. The learned counsel pointed out that the question has been referred to the larger Bench in view of two conflicting decisions. However, merely because question is referred to the larger bench, all the matters can not be kept pending nor the proceedings can be stayed. The purpose of directing enquiry under Section 202 Cr. P.C. is to avoid unnecessary inconvenience and harassment to the accused persons, who may be living outside territorial jurisdiction of the Court. However, where the contents of the complaint, verification statement and other documents produced alongwith the complaint make out prima-facie case for issuance of process, perusal of such material itself is preliminary enquiry and if the Court is satisfied that prima-facie case is made out , process can be issued. Therefore, in my opinion, said provision in section 202 Cr.P.C. is directory in nature and merely because Magistrate has not recorded statements of several witnesses before issuing process, process can not be quashed. In the present case, complainant had produced relevant documents including original cheques, documents about return of the same as dishonoured by the drawee bank, notices issued by the complainant to the accused, documents showing receipt of the same by the accused and the verification statement to the effect that payment was not made in spite of notice. In my opinion, this was sufficient material for the learned Magistrate to issue process."

33. In the case of **G. Narasimhan, G. Kasturi and K.**

NEUTRAL CITATION
2023:GUJHC:34259

Gopalan (supra), the Hon'ble Supreme Court has held and observed in paragraph no.15 as under:-

> *"**15.** Prima, facie, therefore, if Section 198 of the Code, were to be noticed by itself, the complaint in the present case would be unsustainable, since the news item in question did not mention the respondent nor did it contain any defamatory imputation against him individually. Section 499 of the Penal Code, which defines defamation, lays down that whoever by words, either spoken or intended to be read or by signs etc. makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that the imputation will harm the reputation of such person, is said to defame that person. This part of the section makes defamation in respect of an individual an offence. But Explanation (2) to the section lays down the rule that it may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. A defamatory imputation against a collection of persons thus falls within the definition of defamation. The language of the Explanation is wide, and therefore, besides a company or an association any collection of persons would be covered by it. But such a collection of persons must be an identifiable body so that it is possible to say with definiteness that a group of particular persons, as distinguished from the rest of the community, was defamed. Therefore, in a case where explanation (2) is resorted to, the identity of the company or the association or the collection of persons must be established so as to be relatable to the defamatory words or imputations. Where a writing inveighs against mankind in a general, or against a particular order of men, e.g. men of gown, it is no libel. It must descend to particulars and individuals to make it a libel. 1699 3 Balk 224, cited in Ratanlal and Dhirajlal, Law of Crimes (22nd ed.) 1317. In England also, criminal proceedings would lie in the case of libel against a class provided such a class is not indefinite, e.g., men of science, but a definite one, such as, the clergy of the diocese of Durham, the justices of the peace for the county of Middlesex. (See Kenny's Outlines of Criminal Law 19th ed. 235). If a well-defined class is defamed, every particular of that class can file a complaint even if the defamatory imputation in question does not mention him*

NEUTRAL CITATION
2023:GUJHC:34259

by name."

34. In the case of **Balu Sudam Khalde and another** (supra), the Hon'ble Supreme Court has held and observed in paragraph no.42 as under:-

> *"**42.** Therefore, we are of the opinion that suggestions made to the witness by the defence counsel and the reply to such suggestions would definitely form part of the evidence and can be relied upon by the Court along with other evidence on record to determine the guilt of the accused."*

35. In the case of **Mohit alias Sonu and another** (supra), the Hon'ble Supreme Court has held and observed in paragraphs no.28 and 32 as under:-

> *"**28.** So far as the inherent power of the High Court as contained in Section 482 of Cr.P.C. is concerned, the law in this regard is set at rest by this Court in a catena of decisions. However, we would like to reiterate that when an order, not interlocutory in nature, can be assailed in the High Court in revisional jurisdiction, then there should be a bar in invoking the inherent jurisdiction of the High Court. In other words, inherent power of the Court can be exercised when there is no remedy provided in the Code of Criminal Procedure for redressal of the grievance. It is well settled that inherent power of the court can ordinarily be exercised when there is no express provision in the Code under which order impugned can be challenged.*
>
> ***32.** The intention of the Legislature enacting the Code of Criminal Procedure and the Code of Civil Procedure vis-à-vis the law laid down by this Court it can safely be concluded that when there is a specific remedy provided*

NEUTRAL CITATION
2023:GUJHC:34259

by way of appeal or revision the inherent power under Section 482 Cr.P.C. or Section 151 C.P.C. cannot and should not be resorted to."

36. In the case of **Sheetala Prasad and others** (supra), the Hon'ble Supreme Court has held and observed in paragraph no.12 as under:-

*"**12.** The High Court was exercising the revisional jurisdiction at the instance of a private complainant and, therefore, it is necessary to notice the principles on which such revisional jurisdiction can be exercised. Sub-Section (3) of Section 401 of Code of Criminal Procedure prohibits conversion of a finding of acquittal into one of conviction. Without making the categories exhaustive, revisional jurisdiction can be exercised by the High Court at the instance of private complainant,*

(1) where the trial court has wrongly shut out evidence which the prosecution wished to produce,

(2) where the admissible evidence is wrongly brushed aside as inadmissible,

(3) where the trial court has no jurisdiction to try the case and has still acquitted the accused,

(4) where the material evidence has been overlooked either by the trial court or the appellate court or the order is passed by considering irrelevant evidence and

(5) where the acquittal is based on the compounding of the offence which is invalid under the law."

37. Mr.Amin, learned Public Prosecutor for Mr.Patel, learned Additional Public Prosecutor for respondent No.2 – State of Gujarat submitted that the proceedings under Section 389 of the

NEUTRAL CITATION
2023:GUJHC:34259

Cr.P.C. empowers a Public Prosecutor to make submissions and there is a statutory right of audience in the present case since it is under Section 398 of the Cr.P.C. Learned Public Prosecutor for respondent No.2 submitted that when the legislature allows maximum sentence of two years and the Magistrate has found it to be a fit case for imposing the maximum punishment, it can award the same. Learned Public Prosecutor submitted that this is not the stage for the petitioner to argue on quantum of sentence and the Court has not imposed sentence beyond the permissible term. Learned Public Prosecutor submitted that at this stage, this Court has to look into the seriousness of the case and admittedly, both Magistrate and Sessions Court have already considered the seriousness of the case. Learned Public Prosecutor for respondent No.2 submitted that all those details can be looked into at the time of final hearing of the appeal and though the offence is non-cognizable and bailable but at the moment the petitioner was sentenced and this is not a case where the conviction can be stayed.

38. In rejoinder, Mr.Singhvi, learned senior counsel for the

NEUTRAL CITATION
2023:GUJHC:34259

petitioner, while referring various decisions of the High Courts and the Supreme Court, submitted that Section 389 of the Cr.P.C. is not for any specific offence but it cuts across all the offences and the powers under Section 389 of the Cr.P.C. have to be exercised under extraordinary circumstances and the present plea falls under the same category. Learned senior counsel submitted that none of the decisions says that defamation or electoral disqualification is a serious and heinous offence and on what basis the prosecution side submitted that the defamation is serious offence and none of the decisions cited by the complainant side which suggests that the offence of defamation is against the society at large or anti-societal and the order passed by the Trial Court is contradictory. Learned senior counsel submitted that the findings recorded by the Trial Court in the order are speculative and hypothetical, which suggests that the comments "might have been harmed the sentiments of complainant" and even the Sessions Court in the impugned order has taken note of the arguments but did not deal with the same. Learned senior counsel submitted that as far as the magical witness Mr. Yaji is concerned, he is a BJP member from 40 plus

NEUTRAL CITATION
2023:GUJHC:34259

years and he is obviously a opponent and thus his testimony can not be the sole evidence to convict the petitioner and he can be a witness, but the same must be corroborated with other evidence on record and except this, there is no other evidence available at all. Learned senior counsel further submitted that the electronic evidence that too is also not proved and the evidence in the form of the CD was in an open condition, which is a breach of IT Act. Learned senior counsel submitted that this Court may decide the plea one way or the other and grant stay otherwise the petitioner is gravely prejudiced without any protection. Learned senior counsel submitted that the decisions relied upon on behalf of respondent no.1 are not applicable to the facts of the present case. Learned senior counsel urged this Court to allow the present application and/or grant interim protection in favour of the petitioner.

39. Mr.R. S. Cheema, learned senior counsel has relied upon the decision of the Hon'ble Supreme Court in the case of **Sushil Kumar Singhal Vs. Regional Manager, Punjab National Bank** reported in **(2010) 8 SCC 573**.

NEUTRAL CITATION
2023:GUJHC:34259

40. Now under Section 397 read with Section 401 of the Code which is a revisional jurisdiction of the High Court. Under revisional jurisdiction, the High Court can call upon the record of any inferior Court and examine the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such interior Court and to pass appropriate orders. It is well settled law that though revisional powers of the High Court are very wide but are purely discretionary and should be exercised only in a rare cases to prevent miscarriage of justice and when there is glaring defect in procedure on point of law resulting in failure of justice. It is also well settled that the revisional jurisdictional cannot be exercised to substitute its own view with that of magistrate on question of fact. Unless, the finding of the Court below, is shown to be perverse or untenable in law or is based on irrelevant evidence or ignoring relevant evidence it is impermissible to interfere with the order of the Court below in revisional jurisdiction.

41. I have considered the submissions canvassed by learned counsel appearing on behalf of the respective parties. I have

NEUTRAL CITATION
2023:GUJHC:34259

perused the materials available on record and the decisions cited at the Bar.

42. It is worthwhile to refer to Section 389 of the Cr.P.C. which reads as under:-

> *"**389. Suspension of sentence pending the appeal; release of appellant on bail**:- (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also if he is in confinement, that he be released on bail, or on his own bond.*
>
> *(2) The power conferred by this section on a Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.*
>
> *(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall.--*
>
> *(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or*
>
> *(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,*
>
> *order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.*
>
> *(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."*

NEUTRAL CITATION
2023:GUJHC:34259

43. So far as the argument on the aspect of 'not a serious offence or moral turpitude' is concerned, the Hon'ble Apex Court has held in the case of *Syam Narayan* (supra) in the context of Section 389(1) of the Cr.P.C. that giving hearing to the learned Public Prosecutor is also an indication as to the seriousness of such offence. Thus, it is an indication and not only conclusive indication. The "serious offence", "seriousness of the offence" and "offences involving moral turpitude" are at par as per above precedents where conviction cannot be stayed. The provision of hearing of prosecutor is in respect of sentence, but for conviction, all offences are equal. The learned Trial Court specifically gave findings of gravity, i.e. "seriousness of the offence". That the accused was (i) member of parliament (ii) president of second largest national level political party and (iii) president of the party ruled in country for more than 50 years, who was giving a public speech to the thousands of people and made a false statement in the election with clear intention to affect the result of the election. It appears that the accused suggested the name of the Hon'ble Prime Minister to add

NEUTRAL CITATION
2023:GUJHC:34259

sensation, apparently and for an intention to affect the result of the election of the candidate of concerned constituency belonging to the political party of the Hon'ble Prime Minister and then the accused did not stop there but imputed that "saare choro ke naam modi hi kyu hai". Thus, the present case would certainly falls within the category of seriousness of the offence. Further, the said act would amount to an offence punishable under Section 171G of the IPC also and thus, the offence punishable under Section 499 of the IPC is committed with an intention to make a false statement in connection with election, which is an offence punishable under Section 171G of the IPC.

44. The moral turpitude is interpreted by the Hon'ble Supreme Court in the case of **Sushil Kumar Singhal** (supra). The relevant observations of the said decision are as under:-

> *"Para 24-In Pawan Kumar v. State of Haryana [(1996) 4 SCC 17 : 1996 SCC (Cri) 583 : AIR 1996 SC 3300] this Court has observed as under : (SCC p. 21, para 12)*
>
> *"12. 'Moral turpitude' is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity."*
>
> *The aforesaid judgment in Pawan Kumar [(1996) 4 SCC 17 : 1996 SCC (Cri) 583 : AIR 1996 SC 3300] has been*

NEUTRAL CITATION
2023:GUJHC:34259

> *considered by this Court again in Allahabad Bank v. Deepak Kumar Bhola [(1997) 4 SCC 1 : 1997 SCC (L&S) 897] and placed reliance on Baleshwar Singh v. District Magistrate and Collector [AIR 1959 All 71] wherein it has been held as under:*
>
> *"The expression 'moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellow men or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man."*

45. It appears that the accused is a Member of Parliament possessing high position in the society and having bounden duty not to scandalize any person from the society and the defence of fair comment is neither proved nor believed by the Courts below. The revisioner has breached the modesty, even if his version is accepted and further revisioner owes a duty to each individual and the society in general not to influence the election on the basis of false fact. Thus, under the facts and circumstances of the case, the offence committed by the accused falls in the category of moral turpitude also. Further, Section 8 of the

NEUTRAL CITATION
2023:GUJHC:34259

Representation of the People Act (for short “the ROPA”) is the guidelines for the MLA/MP qua the nature of offence. Section 8(1) of the ROPA enumerates several offences specifically, which includes offence under PC Act and Section 8(3) of ROPA is treated at par with Section 8(1) in the Act. The offences committed by MLA/MP can be classified in three categories i.e. (i) in the House (jurisdiction with house - not concern) (ii) out of public life (subject matter of prosecution) and (iii) personal in nature (not subject matter of prosecution). The offence of category (ii) is “serious in nature” and in most of the cases, relied by the revisioner, the cases of category (iii) are considered to suspend the conviction. So far as non-identifiable or suable class of persons is concerned it is a mixed question of law and facts and the learned Magistrate has appreciated this aspect in para 19.1 to 19.3 which is sustainable in the eyes of law. On perusal of the complaint at Exhibit 1, oral evidence at Exhibit 18, documentary evidence at Exhibit 39 and the Government order, it appears that the persons having “Modi” surname in particular caste makes it clear that the complaint is filed for defamation of persons having “Modi” surname and the persons belonging to

NEUTRAL CITATION
2023:GUJHC:34259

"Modi Community". Undisputedly, respondent no.1 is having "Modi" surname and also belonging to "Modi Community". Now, "Modi" surname holder and member of "Modi Community" are certainly identifiable / well defined class. Further, "Modi" people are a fraction of Ganchi / Taili / Modhvanik Ghnyati, as per the evidence and thus, again a well-defined identifiable / suable class. Like persons are having "Patel" Community as well as surname, "Jain" Community as well as surname, "Modi" is also a community and surname both. It appears from the record that the learned Magistrate has also relied upon the evidence of Niranjan Rathod at Exhibit 60. Without admitting anything, in the proceedings under Section 389(1) of Cr.P.C., within the very narrow and limited scope of revision under Section 397 r/w. Section 401 of Cr.P.C, this fact is appreciated by the learned Magistrate and, therefore, no interference is required on this ground and learned Appellate Court has also considered all the above aspects. Thus, the limited ground of "correctness", "legality" or "proprietary of any finding" u/s. 397(1) is not available with the revisioner. The Appellate Court has not concluded that the provision of Section 202 is not mandatory. It

NEUTRAL CITATION
2023:GUJHC:34259

appears that the learned Appellate Court has, on the contrary, held that as per decisions of *Sunil Todi* (Supra) and *ASR Systems* (Supra), if the learned Magistrate had, after giving thought full consideration to the complaint, verification and documents produced there with, issued summons, that itself would amount to an inquiry / compliance of Section 202(1). The learned Appellate Court also observed that said contention was taken at the fag end and without challenging the summons at appropriate stage and, therefore, the trial cannot be vitiated. If any Magistrate is not empowered by the law to take cognizance of an offence under Section 190(1)(a) or (b), but in good faith do, that proceedings shall not be set aside merely on the ground that the Magistrate is not being empowered. Further, Section 465 of Cr.P.C. also provides that no finding, sentence or order by a Court of competent jurisdiction shall be reversed by the Court of appeal on the ground of alleged irregularity, unless there is a failure of justice has been occasioned thereby. No such prejudice is pleaded by the accused. The learned Magistrate has categorically followed such principle of law and referred and relied upon Section 465 of Cr.P.C. also. It appears that the

NEUTRAL CITATION
2023:GUJHC:34259

complaint is filed on the basis of the oral evidence of the witnesses, documentary evidence and electronic evidence. It appears that the eye witness Ganesh Yaji at Exhibit 67 has categorically deposed that he himself physically present in the election speech which was delivered by the accused and he heard it including the defamatory imputation. Further, to corroborate the oral evidence, CD at Exhibit 26 is shown in laptop during the trial to said witness wherein he confirmed the impugned speech / imputation. The above oral evidence is now sought to be challenged in appeal and the grounds set out in the revision application are (a) contradiction of not material nature; (b) again some trivial omissions; (c) some improvements not material; (d) this witness is not named as witness in the complaint; (e) interested witness; (f) oral evidence in defamation not to believe an exact speech and content may not come in evidence (g) the CD at Exhibit 26 shown to this witness is not proved / believable / alleged tempered and (h) oral evidences are somewhat contradictory to the electronic evidence. All these grounds are subject matter of final hearing of appeal only. On the contrary, the CD is shown to be the corroborative oral

NEUTRAL CITATION
2023:GUJHC:34259

evidence and therefore, there is no requirement of certificate u/s. 65B(4) of Evidence Act, to the extent of corroboration. The case of the complainant was supported by Mr. Shiv Swami at Exhibit 111, Arunkumar K R at Exhibit 115 [along with affidavit 116 in substantial compliance of Section 65B(4) of Evidence Act], Punit AVN at Exhibit 124, Niranjan Rathod at Exhibit 60, P M Ragunath at Exhibit 56, Manhar Lapsiwala at Exhibit 37. Further, the question with regard to the electronic evidence, it is proved vide Exhibit 126 and 127 along with certificate u/s. 65B(4) of Evidence Act. The officer from the election office entered into the witness box and gave affidavit in the nature of evidence under Section 65B(4) of the Evidence Act, while again the DVD containing the defamatory imputation. Further, all these defences of the revisioner are required to full fledge hearing of appeal, which is not permissible under the law to appreciate at such infant stage, merely because accused is a Member of Parliament. Thus, without admitting anything, even if the contentions of electronic evidence raised by the revisioner is believed to be arguable then the case is not only based on electronic evidence but also on the above referred sufficient and

NEUTRAL CITATION
2023:GUJHC:34259

reliable oral evidence remained unshaken during the trial. The complainant gave application at Exhibit 136 inter alia stating that electronic evidence at Exhibit 21, 26 and 126 are proved as per the Evidence Act and, therefore, the said video recording is required to be shown to the accused as per the provisions of Section 313 of the Cr.P.C. for his explanation.

46. It is worthwhile to refer to Section 499 of IPC which reads as under:

> *"Section 499- Defamation- Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person."*

47. Thus, not only intention or knowledge but "reason to believe" is an additional factor to bring the imputer to prosecute. Reason to believe is sufficiently established in the present case and "reason to believe" is on lower pedestal than intention or knowledge. In the present case, all the three ingredients, i.e. intention, knowledge and reason to believe are interred

NEUTRAL CITATION
2023:GUJHC:34259

changeably satisfied.

48. With regard to irreparable, irreversible situation and extraordinary circumstances, the law with regard to suspension of conviction can be summarized as under:

1. It should be in rare and exceptional circumstance.
2. Court should examine “seriousness of offence” and/or “offence of moral turpitude” over and above “serious offence” and shall not invoke the jurisdiction.
3. Criminal antecedents of the accused will be a relevant consideration, even in the case of suspension of sentence as per the decision of the Hon’ble Supreme Court in the case of Kanaka Rekha Nayak (supra).
4. The Court should not be impressed by the fact that the accused being sitting MLA/ MP even in staying the sentence.
5. A public servant losing his job is not a consideration/ ground to exercise the discretion u/s. 389(1) of the Cr.P.C. (K.C. Sareen).

NEUTRAL CITATION
2023:GUJHC:34259

6. A right to be elected is neither a fundamental right nor common law right, but at the best it is pure and simple statutory right (Jyoti Basu 14).

7. Further, the judgments of other the High Court relied upon by the applicant are not applicable or contrary to the law laid down by the Hon'ble Supreme Court and this Hon'ble Court, as above. For example, in the case of *Indira Kapoor* (supra) most of the witnesses turn hostile and in cross examination they admitted receipt of the payment qua the work done. Identically some of the cases have nothing to do with the public life of the concerned accused but the offence was purely private in nature like in Navjot Singh Sidhu (supra). Against some of the orders, the appeal is pending before the Hon'ble Supreme Court.

49. It is worthwhile to refer to the decision of the Hon’ble Supreme Court in the case of **Omprakash Sahni Vs. Jai Shankar Chaudhary and another** rendered in Criminal Appeal No.1331-1332 of 2023 dated 02.05.2023 wherein the Hon’ble Supreme Court has held and observed in paras – 33 and 34 as

NEUTRAL CITATION
2023:GUJHC:34259

under:-

> *33. .....The Appellate Court should not reappreciate the evidence at the stage of Section 389 of the CrPC and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.*
>
> *34. In the case on hand, what the High Court has done is something impermissible. High Court has gone into the issues like political rivalry, delay in lodging the FIR, some over-writings in the First Information Report etc. All these aspects, will have to be looked into at the time of the final hearing of the appeals filed by the convicts. Upon cursory scanning of the evidence on record, we are unable to agree with the contentions coming from the learned Senior Counsel for the convicts that, either there is absolutely no case against the convicts or that the evidence against them is so weak and feeble in nature, that, ultimately in all probabilities the proceedings would terminate in their favour. For the very same reason we are unable to accept the contention coming from the convicts through their learned Senior Counsel that, it would be meaningless, improper and unjust to keep them behind the bars for a pretty long time till they are found not to be guilty of the charges.*

50. Considering the facts and circumstances of the present case and the evidence on record, it appears that the Trial Court has not committed any error of facts and law in passing the impugned order of conviction against the accused for the alleged offences. That against the said order, the accused had preferred an appeal along with the application at exhibit 5 for stay of conviction, which came to be dismissed by the Appellate Court

NEUTRAL CITATION
2023:GUJHC:34259

by confirming the conviction order of the Trial Court.

51. Considering various case laws and written statements, the Trial Court has held and observed thus:-

> *"Further, upon considering entire evidences produced by the Prosecution in this case, the motive behind producing pendrive of Ex-21, three CDs of Ex-26 and three DVDs of Ex - 126 that the lecture which has been mentioned in the complaint was given by the accused. For the purpose that the said fact may be proved in the Court, the electronic evidence has been produced. Further, upon considering cross-examination of witnesses and the arguments advanced by the Defence, the Defence has relied upon these evidences and have made submission that with reference to the fact which has been stated by the witnesses, if the electronic evidences are kept in view, such facts are not included in the same. Whereas, the submission has been made that the said evidence has not peen proved. Thus, two different submissions have been made. But, in this case, through whatever the suggestions have been made by the Defence during cross-examination of Prosecution Witnesses, and that whatever the facts have been admitted during further statement of the accused, which have been discussed in aforesaid paragraphs, the fact of disputed lecture of the accused is being proved beyond doubt. Further, present case is not dependent only on electronic evidences.*
>
> *Further, such argument has been advanced by the Defence that whatever the electronic evidences have been produced by the Prosecution, they have not been proved under provision of the Indian Evidence Act. Further, in this case, with reference to the electronics evidences, the certificate of Ex-65/b 'of the Affidavit has been produced, it is not in consonance with provision of Section-65-b of the Indian Evidence Act. Further, pursuant to the principles established in the Judgment of the Hon'ble Supreme Court in the case of Anvar P.V. Vs. P.K.Basir and Arjun Panditrao Khotkar Vs. Kailash Kushanrao, as it is not a certificate, the*

NEUTRAL CITATION
2023:GUJHC:34259

same is not acceptable as evidence, Therefore, the fact which has been stated regarding disputed lecture by the Prosecution, the same has not been proved appropriately, accordingly the accused cannot be held guilty.

Above argument of Ld. Advocate for the Defence is not acceptable. Because, as per the discussion done earlier, present case is not only and only dependent on electronics evidences. In this case, the oral and documentary evidences have been produced. Further, as per the discussion done above, whatever the suggestions have been given by the Defence through deposition of the witnesses, adverse facts of accused have been suggested and the said facts have been brought on records. Further, many facts have been admitted during further statement of the accused. If the said facts are kept in view, the facts in question have been admitted. Further, on asking regarding Pen-drive, CD and DVD during his further statement, the accused has replied that the said fact is false, the same has not been proved appropriately. Further, nowhere it is stated that the said CD and pendrive have not been tempered with. Only in the written statement given by the accused, pendrive and CD have not peen proved and it is stated that the same may be tampered with. Whereas, nothing has been stated regarding DVD. Further, regarding present case also, as per the discussion done in above paragraphs, for the only reason that defamation of "Modi" community or caste has been caused, present complaint has not been lodged, but on account of hurt caused to the complainant also, present complaint has been lodged. Further, during lecture given by the accused, on giving the name of thieve to Shri Narendra Modi, and comparing him with economic culprits of the Government of India viz. Niral Modi, Lalit Modi, Mehul Choksi, Vijay Malya, he may have stopped his lecture at that point of time. Further, he may have discussed regarding "exclusively said people only. But, the accused has, intentionally for causing insult of the persons with surname "Modi" and known as "Modi", stated in his lecture as to "Why the names of all thieves is Modi."

Thus, as the Prosecution has proved their case beyond doubt, on giving reply of the point no.1 in affirmative, in connection with the point no.2, the below given final order is hereby passed, in the interest of justice."

NEUTRAL CITATION
2023:GUJHC:34259

52. The Appellate Court has held and observed in paragraph no.12 as under:-

> *"12. Based on above discussion, I hold that the Ld. Counsel for the appellant has failed in demonstrating that by not staying the conviction and denying an opportunity to contest the election on account of disqualification u/s. 8(3) of the Representation of the People Act, 1951 an irreversible and irrevocable damage is likely to be caused to the Appellant. The Hon'ble Apex Court has held in numbers of pronouncements that the powers accorded under section 389(1) of CrPC to suspend / stay the conviction is required to be exercised with caution and circumspection and if such power is exercised in a casual and mechanical manner, the same would have serious impact on the public perception on the justice delivery systems and such order will shake public confidence in judiciary. Hence, I am of the opinion that the Appellant has not made out any case to suspend the conviction recorded against him."*

53. Even this view is further strengthened by the High Court of ***Allahabad*** in the case of ***Mohammad Abdullah Azam Khan Vs. State of U.P.*** rendered in Criminal Misc. Application u/s. 389(2) No.2 of 2023 dated 13.04.2023. The High Court of Allahabad in similar facts and circumstances of the said facts has not stayed the conviction of the applicant.

54. It has been consistent held that the power to suspend the sentence sought to be exercised in limited circumstances weighing various factors, as mentioned hereinabove in the order.

NEUTRAL CITATION
2023:GUJHC:34259

However, there is an additional issue that be specifically deal with. It has been strenuously argued that the present offence can never be a serious offence due to the fact that two years is the maximum punishment and therefore Section 389 of the Code power ought to be exercised necessarily.

55. In this regard, it is crucial to note that the maximum punishment in any offence is not the only indicator of the seriousness of the offence. There may be other factors, having a larger impact on the society as a whole and the enormity of the issue at hand. In the instant case, the conviction is under Section 499 of the IPC for the offence of defamation not just against one person but a large segment of the society – an identifiable class. The offence of Section 499 is to be examined not merely in the context of the maximum punishment it entails but also in the facts and circumstances and the persons against whom it has been made and by whom it has been made, for the purpose of exercising the power under Section 389 of the Code.

56. The offence of Section 499 can certainly be considered to

NEUTRAL CITATION
2023:GUJHC:34259

be a serious offence of having a large public character thereby affecting the society at large in a given case wherein a large number of persons of the society have been defamed. The offence of defamation is not to be ignored as a mere trivial offence as has been sought to be suggested by the petitioner rather it must be examined from the point of view of mischief that the provision seeks to control and also from the point of view of the alleged defamation being of an individual or a larger class.

57. In understanding the importance of the need of the offence of defamation, its seriousness and the link of the offence with human dignity and fundamental rights of persons who are defamed by accused persons, the observations of the Hon'ble Supreme Court in the case ***Subramanian Swamy*** (supra) are relevant. The Hon'ble Supreme Court, linking the issue of reputation of an individual or a class with Section 499, noted that world over, reputation as a concept has been recognised to be an important part of the personality of a person and has itself become a fundamental human right. The relevant paragraphs of

NEUTRAL CITATION
2023:GUJHC:34259

the decision of the Hon'ble Supreme Court in the case of ***Subramanian Swamy*** (supra) are as under:-

> *"**The International Covenants***
>
> ***31.*** *Various International Covenants have stressed on the significance of reputation and honour in a person's life. The Universal Declaration on Human Rights, 1948 has explicit provisions for both, the right to free speech and right to reputation. Article 12 of the said Declaration provides that:-*
>
> *"12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*"
>
> ***32.*** *The International Covenant on Civil and Political Rights (CICCPR) contains similar provisions. Article 19 of the Covenant expressly subjects the right of expression to the rights and reputation of others. It reads thus:-*
>
> "*19. (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 imprint, in the form of art, or through any other media of his choice.*
>
> *(3) The exercise of the rights provided for in Para (2) of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (order public), or of public health or morals*".

NEUTRAL CITATION

2023:GUJHC:34259

32. *Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provide:-*

"***8. Right to respect for private and family life. -*** *(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

(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 wellbeing 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.

* * * *

"***10. Freedom of expression****. - (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, maybe subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

34. *The reference to international covenants has a definitive purpose. They reflect the purpose and concern and recognize reputation as an inseparable right of an individual. They juxtapose the right to freedom of speech and expression and the right of reputation thereby accepting restrictions, albeit as per law and necessity. That apart, they explicate that the individual honour and reputation is of great value to human existence being attached to dignity and all constitute an inalienable part of*

NEUTRAL CITATION
2023:GUJHC:34259

a complete human being. To put it differently, sans these values, no person or individual can conceive the idea of a real person, for absence of these aspects in life makes a person a non-person and an individual to be an entity only in existence perceived without individuality.

Perception of the Courts in United Kingdom as regards reputation

35. *Now, we shall closely cover the judicial perception of the word "reputation" and for the said purpose, we shall first refer to the view expressed by other Courts and thereafter return home for the necessary survey.*

36. *Lord Denning explained the distinction between character and reputation in Plato Films Ltd. v. Spiedel, (1961) 1 All. E.R. 876 in a succinct manner. We quote:-*

"..... A man's "character," it is sometimes said, is what he in fact is, whereas his "reputation" is what other people think he is. If this be the sense in which you are using the words, then a libel action is concerned only with a man's reputation, that is, with what people think of him: and it is for damage to his reputation, that is, to his esteem in the eyes of others, that he can sue, and not for damage to his own personality or disposition. That is why Cave J. spoke of "reputation" rather than "character."

The truth is that the word "character" is often used, and quite properly used, in the same sense as the word "reputation." Thus, when I say of a man that "He has always "borne a good character," I mean that he has always been thought well of by others: and when I want to know what his "character" is, I write, not to him, but to others who know something about him. In short, his "character" is the esteem in which he is held by others who know him and are in a position to judge his worth. A man can sue for damage to his character in this sense, even though he is little known to the outside world. If it were said of Robinson Crusoe that he murdered Man Friday, he would have a cause of action, even though no one had ever heard of him before. But a man's "character," so understood, may become known to others beyond his immediate circle. In so far as the estimate spreads outwards from those who know him and circulates among people generally in an increasing range, it becomes his "reputation," which is entitled to the protection of the law

NEUTRAL CITATION
2023:GUJHC:34259

just as much as his character. But here I speak only of a reputation which is built upon the estimate of those who know him. No other reputation is of any worth. The law can take no notice of a reputation which has no foundation except the gossip and rumour of busybodies who do not know the man. Test it this way. Suppose an honourable man becomes the victim of groundless rumour. He should be entitled to damages without having this wounding gossip dragged up against him. He can call people who know him to give evidence of his good character. On the other hand, suppose a "notorious rogue" manages to conceal his dishonesty from the world at large. He should not be entitled to damages on the basis that he is a man of unblemished reputation. There must, ones would think, be people who know him and can come and speak to his bad character."

(emphasis in original)

37. *In regard to the importance of protecting an individual's reputation Lord Nicholls of Birkenhead observed in Reynolds v. Times Newspapers Ltd. [Reynolds v. Times Newspapers Ltd., (2001) 2 AC 127 : (1999) 3 WLR 1010 (HL)]:*

"Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others."

38. *While deliberating on possible balance between the right to reputation and freedom of expression, in Campbell v. MGN Ltd [Campbell v. MGN Ltd., (2004) 2 AC 457 : (2004) 2 WLR 1232 : 2004 UKHL 22 at para 55], it has been stated : (AC pp. 473-74, para 55)*

"55. .... Both reflect important civilized values, but, as often happens, neither can be given effect in full measure without restricting the other, How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need. (see : Sedley L.J. in Doughlas v. Hellol Ltd. [Douglas v. Hello! Ltd., 2001 QB 967 : (2001) 2 WLR 992 (CA)])."

(emphasis in original)

View of the courts in the United States

39. *In Wisconsin v. Constantineau, [Wisconsin v. Constantineau, 400 US 433 (1971) : 1971 SC Online US SC 12 : 27 L Ed 2d 515] it has been observed that:- (SCC Online US SC para 9)*

"9. Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."

40. *In Rosenblatt v. Baer, 383 US 75 (1966) : 1966 SCC Online US SC 22 : 15 L Ed 2d 597], Mr.Stewart, J. observed that : (SCC Online US SC para 33), Mr. Justice Stewart observed that: (SCC Online US SC para 33)*

"33. The right of a man to the protection of his own

NEUTRAL CITATION
2023:GUJHC:34259

reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty."

58. In the case of ***Subramanian Swamy*** (supra), the Hon'ble Supreme Court, thereafter, highlighted the importance of human dignity in the context of Section 499 and analysed it in context of Article 1991)(a). The said portion of the judgment is as under:-

*"**132.** The principles being stated, the attempt at present is to scrutinize whether criminalization of defamation in the manner as it has been done under Section 499 IPC withstands the said test. The submission of the respondents is that right to life as has been understood by this Court while interpreting Article 21 of the Constitution covers a wide and varied spectrum. Right to life includes the right to life with human dignity and all that goes along with it, namely, the bare necessities of life such as nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forums, freely moving about and mixing and commingling with fellow human beings and, therefore, it is a precious human right which forms the arc of all other rights [See : Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others, (1981) 1 SCC 608 : 1981 SCC (Cri) 212])]. It has also been laid down in the said decision that the right to life has to be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance dignity of an individual and worth of a human being. In Chameli Singh and others v. State of U.P. and another, (1996) 2 SCC 549, the Court has emphasized on social and economic justice which includes the right to shelter as an inseparable component of meaningful right to life. The respect for life, property has been regarded as essential requirement of any civilized society in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514].*

NEUTRAL CITATION
2023:GUJHC:34259

Deprivation of life, according to Krishna Iyer, J. in Babu Singh and others v. State of U.P., (1978) 1 SCC 579 : 1978 SCC (Cri) 133] has been regarded as a matter of grave concern. Personal liberty, as used in Article 21, is treated as a composition of rights relatable to various spheres of life to confer the meaning to the said right. Thus perceived, the right to life under Article 21 is equally expansive and it, in its connotative sense, carries a collection or bouquet of rights. In the case at hand, the emphasis is on right to reputation which has been treated as an inherent facet of Article 21. In Haridas Das v. Usha Rani Banik and others, (2007) 14 SCC 1 : (2009) 1 SCC (Cri.) 750], it has been stated that a good name is better than good riches. In a different context, the majority in [S.P. Mittal v. Union of India and others, (1983) 1 SCC 51 : AIR 1983 SC 1], has opined that man, as a rational being, endowed with a sense of freedom and responsibility, does not remain satisfied with any material existence. He has the urge to indulge in creative activities and effort is to realize the value of life in them. The said decision lays down that the value of life is incomprehensible without dignity.

133. [Ed. : Para 133 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2016 dated 4-8-2016.] *In Charu Khurana and others v. Union of India and others, (2015) 1 SCC 192 : (2015) 1 SCC (L & S) 161], it has been ruled that dignity is the quintessential quality of a personality, for it is a highly cherished value. Thus perceived, right to honour, dignity and reputation are the basic constituents of right under Article 21. Submission of the learned counsel for the petitioners is that reputation as an aspect of Article 21 is always available against the highhanded action of the State. To state that such right can be impinged and remains unprotected inter se private disputes pertaining to reputation would not be correct. Neither this right be overridden and blotched notwithstanding malice, vile and venal attack to tarnish and destroy the reputation of another by stating that curbs and puts unreasonable restriction on the freedom of speech and expression. There is no gainsaying that individual rights form the fundamental fulcrum of collective harmony and interest of a society. There can be no denial of the fact that the right to freedom of speech and expression is absolutely sacrosanct. Simultaneously, right to life as is understood in the expansive horizon of Article 21 has its own significance. We cannot forget the rhetoric utterance of Patrick Henry:*

NEUTRAL CITATION
2023:GUJHC:34259

"Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take, but as for me, give me liberty, or give me death!." [Patrick Henry, Speech in House of Burgesses on 23-3-1775 (Virginia).]

134. *In this context, we also think it apt to quote a passage from Edmund Burke:-*

"Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters. [Alfred Howard, The Beauties of Burke (T. Davison, London) 109.]."

135. *The thoughts of the aforesaid two thinkers, as we understand, are not contrary to each other. They relate to different situations and conceptually two different ideas; one speaks of an attitude of compromising liberty by accepting chains and slavery to save life and remain in peace than to death, and the other view relates to "qualified civil liberty" and needed control for existence of the society. Contexts are not different and reflect one idea. Rhetorics may have its own place when there is disproportionate restriction but acceptable restraint subserves the social interest. In the case at hand, it is to be seen whether right to freedom and speech and expression can be allowed so much room that even reputation of an individual which is a constituent of Article 21 would have no entry into that area. To put differently, in the name of freedom of speech and expression, should one be allowed to mar the other's reputation as is understood within the ambit of defamation as defined in criminal law."*

NEUTRAL CITATION
2023:GUJHC:34259

59. In this manner, the Hon'ble Supreme Court has highlighted the need, requirement and the constitutional principles involved in understanding the offence of Section 499. In the present case, in order to gauge the seriousness of the offence, another factor which compounds the case against the petitioner is that the defamation alleged was of a large identifiable class and not just an individual. Due to the said fact, the conviction partakes the character of an offence affecting a large section of the public and by definition, the society at large and not just a case of an individual centric defamation case.

60. Further, the fact that the petitioner is a senior leader of the oldest political party in India with a large presence and a prominent figure in the realm of the Indian political landscape, also ensures that every utterance of the petitioner automatically gets large scale publicity. In the modern electronic media environment, this large scale publicity is lightning quick, difficult to contain and leaves a permanent imprint in the form of website links, videos, etc. The petitioner is assumed to be aware of the same and being a public personality is vested with the duty to

NEUTRAL CITATION
2023:GUJHC:34259

exercise this vast power at his disposal with caution ensuring that dignity and reputation of a large number of persons or any identifiable class is not jeopardised due to his political activities or utterances.

61. In the present case, in light of the above, the following additional countervailing factors operate against the petitioner which increase the seriousness of the offence in the present facts and circumstances:

* Defamation is an offence of public character wherein the fundamental right to reputation and dignity is involved;
* The conviction of the petitioner involves the impairment of the cherished fundamental right to dignity and reputation of a large segment of the population;
* The public standing of the petitioner and the fact that any utterance of the petitioner attracts large scale publication gravely impairs and damages the reputation of the complainant and the identifiable class in question.

NEUTRAL CITATION
2023:GUJHC:34259

62. Therefore, the mere fact that the maximum punishment is of two years, would not come to the aid of the petitioner in order to convince the Court to disregard the seriousness of the present offence. The present conviction is a serious matter affecting a large segment of the society and needs to be viewed by this Court with the gravity and significance it commands.

63. In fact, the applicant is trying to seek stay of his conviction on absolutely non-existent grounds. It is well-settled principle of law that stay of conviction is not a rule but an exception to be resorted to in rare cases. Disqualification is not limited only to M.Ps/M.L.As. Moreover, as many as ten criminal cases are pending against the applicant. It is now need of the hour to have purity in politics. Representatives of people should be man of clear antecedent. It also appears from the record that after filing of the said complaint, another complaints came to be filed against the present accused, out of which, one complaint was filed by the grandson of Vir Sawarkar in concerned Court of Puna when the accused used defamation utterances against Vir Sawarkar at Cambridge and another complaint was also filed in

concerned Court of Lucknow.

64. In the backdrop of the said circumstances, refusal to stay the conviction would not, in any way, result in injustice to the applicant.

65. In view of the foregoing discussions, in my considered opinion, there is no reasonable ground to stay the conviction of the applicant in the facts and circumstances of the case. The impugned order passed by the appellate court is just, proper and legal and do not call for any interference. However, it is hereby requested to the concerned learned District Judge to decide the criminal appeal on its own merits and in accordance with law as expeditiously as possible.

66. In view of the above, the present criminal revision application deserves to be dismissed and accordingly it is dismissed. Rule is discharged.

(HEMANT M. PRACHCHHAK,J)

V.R. PANCHAL