IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. Nos. 4-5, 10, 11

in CA 9813/2011 and 9833/2011

IN THE MATTER OF:

SAHARA INDIAN REAL ESTATE CORPORATION & OTHERS ... PETITIONERS

VERSUS

SECURITIES AND EXCHANGE BOARD OF INDIA & ANOTHER ... RESPONDENTS

WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR INDIA

I. INTRODUCTION

1. In Indian Constitutional jurisprudence, freedom of the press is at the heart of right of freedom of speech and expression under Article 19. This freedom is at the foundation of democratic organizations.

2. An important facet of freedom of the press is the dissemination of information regarding judicial proceedings. As Jeremy Bentham, the 18th century British philosopher put it,

> "Where there is no publicity, there is no justice. Publicity is the very soul of justice."

Journalists thus play a pivotal role in informing the public about judicial proceedings and orders throughout the country.

3. The Canadian Judicial Council's paper *Canadian Justice System and the Media* brings out the importance of the pivotal role played by journalists in informing the public about what happens in courtrooms throughout the country. It is stated that:

> *"The Canadian Judicial Council ("CJC") recognizes the pivotal role journalists play in informing the public about what happens in courtrooms throughout the country. Courts are public places; practically speaking, however, relatively few members of the public ever have the opportunity to witness courtroom proceedings first-hand. And that's what makes the work of a free press vitally important.*
>
> *The media is the public's surrogate, observing and reporting on matters of interest and concern to the public. We've all heard it said that justice must not just be done, it must be seen to be done.*
>
> *It's a valuable public service; it can also be a weighty responsibility, primarily because legal processes and proceedings can be inordinately complex*" (emphasis supplied)

4. The laying down of proper guidelines for reporting of proceedings of Courts has to necessarily take into account and balance:

   (a) the contours and the dynamics of the right of freedom of speech of the press and

   (b) the effect of improper reporting on the administration of justice

5. No such exercise of laying down guidelines for the media can fail to take into account the pressures and the difficulties faced by the media.

II. THE DIFFICULTIES/PRESSURES FACED BY THE MEDIA

6. The media faces various pressures from within when it comes to reporting.

7. One of the major pressures faced by the media, which sometimes leads to misleading news, is the pressure to be 'first with the news'. In the *Guidelines for the Media, Reporting in Western Australian Courts,* it is stated that the media works under pressure to be first with the news.

> *"The media works under pressure to be first with the news and must also cope with time and space constraints. However, the media has an obligation to the people involved in cases to report proceedings accurately and fairly. There is also a wider obligation to ensure that justice is properly conveyed to the community."*

8. This race to be first with the news invariably leads to hasty reports, and consequently inaccurate, which tend to sensationalize the proceedings of Court.

9. It has also to be understood that court processes and proceedings are not always observer-friendly. As the Canadian Judicial Council observed in its paper:

> *"Many journalists refer to the language of the judicial system as "legal-ese" although, to state the obvious, there's nothing "easy" about it. And it's apparently the mother tongue of the entire courthouse, since support staff speak it almost exclusively as well.*
>
> *It should be noted that the justice environment is far from being the only professional milieu in which the ordinary working language would be incomprehensible to an outsider. Most judges (or anyone else outside the realm of journalism), for example, would have a hard time deciphering the jargon of a newsroom's daily editorial or production meeting, with its talk of "vis" and "graphs" and "stand-ups."That being said, a newsroom production meeting is not a public process, whereas a criminal trial is, which is why judges, where reasonably possible, are taking greater pains to make the language of the courtroom accessible to journalists and other spectators. But this can't always happen, primarily because the legal process is a complex one; as a result, there are times*

> *in which there is simply no easier way to advance or explain the concepts at play.*
>
> *"Sometimes the fear that comes from a lack of knowledge about the law can kill a story the public should know," journalist and lawyer Michael Crawford notes in The Journalist's Legal Guide. "On the flip side, ignorance or recklessness in publishing or broadcasting news can end up distorting the truth." The CJC is alive to both problems – to stories that get ignored because they're inaccessible to reporters, as well as stories that are inadvertently distorted or misreported. In both cases, the root cause is the same – a lack of understanding of the process."*

10. Another difficulty faced by the media is the lack of audibility. This leads to an incomplete understanding of what has actually transpired in court.

11. It is impossible for a journalist to be omnipresent in all courts. His task is nevertheless to file copies. He, of necessity, has to rely on second hand reports.

12. The very same problem which deals with first-to-the-press has led to an element of competitiveness between the media and the reluctance to share stories. It is necessary to promote greater interaction between journalists in the Press Room.

13. Whilst it is accepted that a journalist cannot be omnipresent, the problem of journalists who are never present also needs to be considered. Reconstruction of court reports by armchair journalists on the basis of second hand and even third hand news leads to wrong reports.

III. THE IMPORTANCE OF THE RIGHT OF FREEDOM OF SPEECH AND EXPRESSION OF THE PRESS : IT IS NOT ABSOLUTE BUT REQUIRES TO BE BALANCED

14. In **Romesh Thappar v. State of Madras, AIR 1950 SC 124**, it was held that the freedom of propagation of ideas was integral to the freedom of speech and expression. 'Liberty of circulation' was as essential to the freedom as the liberty of publication. In this regard, the relevant portion of the judgment reads as follows:

> ***"6.*** *Turning now to the merits, there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. "Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value"*

15. In **Indian Express Newspapers v. Union of India, (1985) 1 SCC 641**, a 3-Judge Bench of this Hon'ble Court emphasized the importance of freedom of press in a democratic society and the role of courts. Paragraphs 22 to 39 of the judgment elucidate the nature of the right. In paragraph 32, this Hon'ble Court observed:

> *"**32**. In today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments."* (emphasis supplied)

16. The observations made by Justice A.P. Sen, as he then was, in **Express Newspapers (P) Ltd. v. Union of India, (1986) 1 SCC 133** are pertinent, and extracted hereunder:

> ***"75.*** *I would only like to stress that the freedom of thought and expression, and the freedom of the press are not only valuable freedoms in themselves but are basic to a democratic form of Government which proceeds on the theory that*

> *problems of the Government can be solved by the free exchange of thought and by public discussion of the various issues facing the nation. It is necessary to emphasize and one must not forget that the vital importance of freedom of speech and expression involves the freedom to dissent to a free democracy like ours. Democracy relies on the freedom of the press. It is the inalienable right of everyone to comment freely upon any matter of public importance. This right is one of the pillars of individual liberty—freedom of speech, which our Court has always unfailingly guarded. I wish to add that however precious and cherished the freedom of speech is under Article 19(1)(a), this freedom is not absolute and unlimited at all times and under all circumstances but is subject to the restrictions contained in Article 19(2). That must be so because unrestricted freedom of speech and expression which includes the freedom of the press and is wholly free from restraints, amounts to uncontrolled licence which would lead to disorder and anarchy and it would be hazardous to ignore the vital importance of our social and national interest in public order and security of the State."* (emphasis supplied)

17. In **Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd**., **(1988) 4 SCC 592**, this Hon'ble Court noticed the development of the law relating to freedom of speech and expression in America and England (paragraphs 10 to 29 of the judgment).

18. This Hon'ble Court, in **Harijai Singh, In re, (1996) 6 SCC 466**, held that:

> ***"8.*** *It may be relevant here to recall that the freedom of press has always been regarded as an essential prerequisite of a democratic form of Government. It has been regarded as a necessity for the mental health and the well-being of the society…*
>
> ***9.*** *It is thus needless to emphasise that a free and healthy press is indispensable to the functioning of a true democracy. In a democratic set-up, there has to be an active and intelligent participation of the people in all spheres and affairs*

> *of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. To achieve this objective the people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and viewpoints on such matters and issues and select their further course of action. The primary function, therefore, of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion and can be an instrument of social change. It may be pointed out here that Mahatma Gandhi in his autobiography has stated that one of the objectives of the newspaper is to understand the proper feelings of the people and give expression to it; another is to arouse among the people certain desirable sentiments; and the third is to fearlessly express popular defects. It, therefore, turns out that the press should have the right to present anything which it thinks fit for publication."* (emphasis supplied)

IV. THE PROBLEM OF IMPROPER REPORTING AND ITS EFFECT ON THE ADMINISTRATION OF JUSTICE

19. While it is undoubtedly true that the right of freedom of speech and expression of the press is sacrosanct, it is also equally true that improper reporting of court proceedings can, at times, severely affect and impede the process of administration of justice. The media is powerful; it is constructive, when it is responsible. When it is not, it is deadly and destructive. The difficulties arise from the fact that people believe what is stated in print. A 'clarification' or a 'denial' cannot undo the damage.

20. In **Saibal Kumar v. B.K. Sen, AIR 1961 SC 633**, it was held that trial by newspapers, when there is a trial by a regular tribunal of the country going on, should be prevented.

21. In **Harijai Singh's** case (dealt with above), this Hon'ble Court held that the right of freedom of the press is not absolute, unlimited, and unfettered, and the protective cover of press freedom is not available for wrongdoings of the press, and that if a newspaper publishes what is improper, mischievously false, or illegal, the media would face legal consequences. The Court observed that a false report of the media is, in fact, a disservice to the public, by misguiding them with false news. Paragraph 10 of the judgment reads as follows:

> ***"10.*** *But it has to be remembered that this freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of speech and expression would amount to an uncontrolled licence. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the journalists. In an organised society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by court of law. The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself. To quote from the report of Mons Lopez to the Economic and Social Council of the United Nations "If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation and discipline". It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information*

received by them and to be published as a news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression."

22. This Hon'ble Court, in **State of Maharashtra v. Rajendra Jawanmal Gandhi, (1997) 8 SCC 386**, held that a trial by press or electronic media is the very antithesis of rule of law, and can lead to miscarriage of justice. The relevant part of paragraph is extracted hereunder:

> ***"37.*** *... A trial by press, electronic media or public agitation is the very antithesis of rule of law. It can well lead to miscarriage of justice. A Judge has to guard himself against any such pressure and he is to be guided strictly by rules of law. If he finds the person guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law."*

23. In **M.P. Lohia v. State of West Bengal, (2005) 2 SCC 686,** this Hon'ble Court deprecated the practice of articles appearing in newspapers which tend to interfere with the administration of justice, and cautioned against trial by media when the issue was *sub judice*. In this regard, the relevant part of paragraph 10 reads as follows:

> ***"10. ..*** *Even then an article has appeared in a magazine called "Saga" titled "Doomed by Dowry" written by one Kakoli Poddar based on her interview of the family of the deceased, giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The facts narrated therein are all materials that may be used in the forthcoming trial in this case and we have no hesitation that these type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who were responsible for the said article against indulging in such trial by media when the issue is sub judice. However, to prevent any further issue being raised in this regard, we treat this matter as closed and hope that the others concerned in*

journalism would take note of this displeasure expressed by us for interfering with the administration of justice."

24. In **Rajendra Sail v. M.P. High Court Bar Assn., (2005) 6 SCC 109**, this Hon'ble Court was constrained to observe that improper reporting can lead to undermining the institution of the judiciary and mechanisms may have to be devised to check improper publication. In paragraph 31 of the judgment, the Court observed that for rule of law and an orderly society, a free, responsible press and an independent judiciary are both indispensable. Paragraph 31 reads as follows:

> ***"31.*** *The reach of the media, in the present times of 24-hour channels, is to almost every nook and corner of the world. Further, large number of people believe as correct that which appears in media, print or electronic. It is also necessary to always bear in mind that the judiciary is the last resort of redressal for resolution of disputes between State and the subject, and high and low. The confidence of the people in the institution of judiciary is necessary to be preserved at any cost. That is its main asset. Loss of confidence in institution of judiciary would be end of rule of law. Therefore, any act which has such tendency deserves to be firmly curbed. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected."*

25. In paragraph 32, the Court categorically observed that some mechanism had to be devised to check improper publication, which has the tendency to undermine the institution of the judiciary. Paragraph 32 reads as follows:

> ***"32.*** *The judgments of courts are public documents and can be commented upon, analysed and criticised, but it has to be in dignified manner without attributing motives. Before placing before public, whether on print or electronic media, all concerned have to see whether any such criticism has crossed the limits as aforesaid and if it has, then resist every*

temptation to make it public. In every case, it would be no answer to plead that publication, publisher, editor or other concerned did not know or it was done in haste. Some mechanism may have to be devised to check the publication which has the tendency to undermine the institution of judiciary."

V. CAN THIS BE ADDRESSED BY SELF-REGULATION? WILL THIS SOLVE THE PROBLEM?

26. In paragraphs 33 and 34 in **Rajendra Sail's** case, the Court observed that the general mechanism for regulation ought to be usually self-regulation. Paragraphs 33 and 34 reads as follows:

> ***"33.*** *Regarding the general mechanism to be devised, it may be noted that in United Kingdom, Robertson & Nicol on Media Law expresses the view that media's self-regulation has failed in the United Kingdom. According to the author, blatant examples of unfair and unethical media behaviour like damaging reputation by publishing falsehoods, invasion of privacy and conducting partisan campaigns towards individuals and organisations have led to demands for more statutory controls, which media industries have sought to avoid by trumpeting the virtues of "self-regulation". The media industry has established tribunals that affect to regulate media ethics through adjudicating complaints by members of the public who claim to have been unfairly treated by journalists and editors. Complaints about newspapers and journals may be made to the Press Complaints Commission, a private body funded by newspaper proprietors. The Press Complaints Commission has formulated a code of practice to be followed by the press. It has no legal powers, but its adjudications will be published by the paper complained against, albeit usually in small print and without prominence. The Press Complaints Commission has been regarded as public relations operation, funded by media industries to give the impression to Parliament that the media organisations can really put their houses in ethical order without the need for legislation. Similarly, the National Union of Journalists has a code for its members, which they are all expected to follow. However, the code is seldom enforced.*

> ***34****. Having noted the views as aforesaid, in the present case, it is enough to only note that we too have Press Council. The only aspect, we wish to emphasise is that the present matter reinforces the need to ensure that the right to freedom of media is exercised responsibly. It is for media itself and others concerned to consider as to how to achieve it."*

27. In paragraph 35, it was held that in respect of institutions such as the judiciary, it was held that the media can consider having a mechanism to prevent improper publication. Paragraph 35 reads as follows:

> ***"35.*** *Regarding the institution like judiciary which cannot go public, media can consider having an internal mechanism to prevent these types of publications. There can be an efficient and stringent mechanism to scrutinise the news reports pertaining to such institutions, which because of the nature of their office, cannot reply to publications which have tendency to bring disrespect and disrepute to those institutions. As already noted such publications are likely to be believed as true. Such a mechanism can be the answer to pleas like the one in the present case by the Editor, Printer and Publisher and correspondent that either they did not know or it was done in a hurry and similar pleas and defences."*

28. This Hon'ble Court, in paragraph 36, further deprecated the practice of making news for the purpose of sensationalism. Paragraph 36 reads as follows:

> ***"36.*** *The power and reach of the media, both print as well as electronic is tremendous. It has to be exercised in the interest of the public good. A free press is one of very important pillar on which the foundation of rule of law and democracy rests. At the same time, it is also necessary that freedom must be exercised with utmost responsibility. It must not be abused. It should not be treated as a licence to denigrate other institutions. Sensationalism is not unknown. Any attempt to make news out of nothing just for the sake of sensationalism has to be deprecated. When there is temptation to sensationalise, particularly at the expense of those institutions or persons who from the nature of their office*

cannot reply, such temptation has to be resisted, and if not, it would be the task of the law to give clear guidance as to what is and what is not permitted."

29. In **Destruction of Public and Private Properties, In re v. State of Andhra Pradesh, (2009) 5 SCC 212**, this Hon'ble Court referred to the Nariman Committee, which suggested self-regulation instead of a statutory structure. The suggestions of the Nariman Committee, contained in paragraph 32, read as follows:

> ***"32.*** *The Nariman Committee has recommended the following suggestions:*
>
> *(i) India has a strong, competitive print and electronic media.*
>
> *(ii) Given the exigencies of competition, there is a degree of sensationalism, which is itself not harmful so long as it preserves the essential role of the media viz. to report news as it occurs and eschew comment or criticism. There are differing views as to whether the media (particularly the electronic media) has exercised its right and privilege responsibly. But generalisations should be avoided. The important thing is that the electronic (and print) media has expressed (unanimously) its wish to act responsibly.*
> *The media has largely been responsible and more importantly, it wishes to act responsibly.*
>
> *(iii) Regulation of the media is not an end in itself; and allocative regulation is necessary because the 'air waves' are public property and cannot technically be free for all but have to be distributed in a fair manner. However, allocative regulation is different from regulation per se. All regulation has to be within the framework of the constitutional provision.*
> *However, a fair interpretation of the constitutional dispensation is to recognise that the principle of proportionality is built into the concept of reasonableness whereby any restrictions on the media follow the least invasive approach. While emphasising the need for media responsibility, such an approach would strike the correct balance between free speech and the independence of the media.*

(iv) Although the print media has been placed under the supervision of the Press Council, there is need for choosing effective measures of supervision—supervision not control.

(v) As far as amendments mooted or proposed to the Press Council Act, 1978 are concerned this Committee would support such amendments as they do not violate Article 19(1)(a), which is a preferred freedom.

(vi) Apart from the Press Council Act, 1978, there is a need for newspapers and journals to set up their own independent mechanism.

(vii) The pre-censorship model used for cinema under the Cinematograph Act, 1952 or the supervisory model for advertisements is not at all appropriate, and should not be extended to live print or broadcasting media.

(viii) This Committee wholly endorses the need for the formation of:

(a) principles of responsible broadcasting, and

(b) institutional arrangements of self-regulation.

But the Committee emphasised the need not to drift from self-regulation to some statutory structure which may prove to be oppressive and full of litigative potential.

(ix) The Committee approved of NBA model as a process that can be built upon both at the broadcasting service provider level as well as the industry level and recommend that the same be incorporated as guidelines issued by this Court under Article 142 of the Constitution of India, as was done in Vishaka case."

(Also see paragraph 30 of the judgment)

30. In **R.K. Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106**, this Hon'ble Court in the context of sting operations by the media, held that to insist that a report concerning a pending trial would be released only with the prior consent and permission of the Court would tantamount to

pre-censorship of reporting of Court proceedings and would be violative of Article 19(1). However, the Court cautioned that this is not to say that the media is free to publish any kind of report concerned a *sub judice* matter. In this regard, paragraphs 289 to 291 read as follows:

> ***"289.*** *We are also unable to agree with the submission made by Mr P.P. Rao that the TV channel should have carried out the stings only after obtaining the permission of the trial court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the court before its telecast. Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the court. On little consideration the idea appears to be quite repugnant both from the points of view of the court and the media.*
>
> ***290.*** *It would be a sad day for the court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the court would tantamount to pre-censorship of reporting of court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution.*
>
> ***291.*** *This is, however, not to say that media is free to publish any kind of report concerning a sub judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment."*

31. In **S. Khushboo v. Kanniammal, (2010) 5 SCC 600**, this Hon'ble Court observed that it is not only desirable, but also imperative, that electronic and news media should also play a positive role as to what actually transpires during the course of the hearing and it should not be published in such a manner so as to get unnecessary publicity for its own paper or news channel. In this regard, paragraph 53 reads as follows:

> ***"53.*** *Admittedly, all those persons who have sent letters to us were not present on that particular date but must have gathered information from the print and electronic media which evoked their sentiments to such an extent that they prayed for review. It is, therefore, not only desirable but imperative that electronic and news media should also play positive role in presenting to general public as to what actually transpires during the course of the hearing and it should not be published in such a manner so as to get unnecessary publicity for its own paper or news channel. Such a tendency, which is indeed growing fast, should be stopped. We are saying so as without knowing the reference in context of which the questions were put forth by us, were completely ignored and the same were misquoted which raised unnecessary hue and cry. We hope and trust in future, they would be a little more careful, responsible and cautious in this regard."*

32. In **Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1**, this Hon'ble Court observed that there is danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom in respect of pending trials. In this regard, paragraphs 296 to 299, and 302 are reproduced hereunder:

> ***"296.*** *Cardozo, one of the great Judges of the American Supreme Court in his Nature of the Judicial Process observed that the judges are subconsciously influenced by several forces. This Court has expressed a similar view in P.C. Sen, In re—and Reliance Petrochemicals Ltd. v. Indian Express Newspapers, Bombay (P) Ltd.*

297. *There is danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which outrightly hold the suspect or the accused guilty even before such an order has been passed by the court.*

298. *Despite the significance of the print and electronic media in the present day, it is not only desirable but the least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.*

299. *In the present case, certain articles and news items appearing in the newspapers immediately after the date of occurrence, did cause certain confusion in the mind of public as to the description and number of the actual assailants/suspects. It is unfortunate that trial by media did, though to a very limited extent, affect the accused, but not tantamount to a prejudice which should weigh with the court in taking any different view. The freedom of speech protected under Article 19(1)(a) of the Constitution has to be carefully and cautiously used, so as to avoid interference with the administration of justice and leading to undesirable results in the matters sub judice before the courts.*

302. *In the present case, various articles in the print media had appeared even during the pendency of the matter before the High Court which again gave rise to unnecessary controversies and apparently, had an effect of interfering with the administration of criminal justice. We would certainly caution all modes of media to extend their cooperation to ensure fair investigation, trial, defence of the accused and non-interference with the administration of justice in matters sub judice."*

VI. INSTANCES OF ABERRATIONS

33. It is submitted that there have been several instances where improper reporting has led to scurrilous attacks on Judges and lowering the image of the judiciary.

34. In **Rama Dayal Markarha v. State of M.P., (1978) 2 SCC 630**, it was held that criticism of judges, which suggests that the Judge had a predisposition or which attributes motives, impedes administration of justice, and such mischief, cannot be viewed with placid equinamity. In this regard, paragraphs 13 and 14 read as follows:

> ***"13.*** *Applying the aforementioned formulated tests to the facts of this case, could it be said that the extracted offending passages with a tinge of sarcasm offer reasonable and legitimate criticism of a case which was heard and finally decided? Fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. A fair and reasonable comment would even be helpful to the Judge concerned because he will be able to see his own shortcomings, limitations or imperfection in his work. The society at large is interested in the administration of public justice because in the words of Benjamin Cardozo, "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the Judges by". Such permissible criticism would itself provide a sensible answer to sometimes ill-informed criticism of Judges as living in ivory towers. But then the criticism has to be fair and reasonable. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. It is one thing to say that a judgment on facts as disclosed is not in consonance with evidence or the law has not been correctly applied. Ordinarily, the judgment itself will be the subject-matter of criticism and not the Judge. But when it is said that the Judge had a pre-disposition to convict or deliberately took a turn in discussion of evidence because he had already resolved to convict the accused, or he*

has a wayward bend of mind, is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of the issues which would bring administration of justice into ridicule if not infamy. When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly repose in the courts of law as courts of justice, the criticism would cease to be fair and reasonable criticism as contemplated by Section 5 but would scandalise courts and substantially interfere with administration of justice. As said in Gray case, any act done or writing published calculated to bring the court or Judge of the court into contempt or to lower his authority is a contempt of the court, because nothing is more pernicious in its consequences than to prejudice the mind of the public against Judges of the court responsible for dispensing justice.

14. *It is also to be borne in mind the setting in which the court is functioning and the attack on the administration of justice. In this country justice at grass-root level is administered by courts set up in rural backward areas largely inhabitated by illiterate persons. It is they who bring their problems to the court for resolution and they are the litigants, or consumers of justice service. Their susceptibility is of a different type than the urban elite reading newspapers and exposed to wind of change or even wind of criticism. The people in rural backward areas unfortunately illiterate have different kinds of susceptibilities. A slight suspicion that the Judges pre-disposed or approaches the case with a closed mind or has no judicial disposition would immediately affect their susceptibilities and they would lose confidence in the administration of justice. There is no greater harm than infusing or instilling in the minds of such people a lack of confidence in the character and integrity of the Judge. Conversely, it makes the task of the Judge extremely difficult when operating in such area. In this case the setting is in a small backward rural area in the State of Madhya Pradesh and which aspect has especially appealed to the High Court in adjudging the appellant guilty of contempt. Again, the contemner is a lawyer belonging to the fraternity of noble and liberal profession. A criticism by him would attract greater attention than by others because of his day-to-day concern*

with the administration of justice in that area and his belief about the Judge's judicial disposition would adversely affect a large number of persons. Therefore, when in such a background it is said that the Judge has a wayward bend of mind and wields a wayward pen and that he took a deliberate turn in the discussion of evidence because he had resolved to convict the accused would indicate that the Judge has no judicial disposition and that he prejudges the issues and there cannot be a greater infamy and calumny apart from the Judge of the Court. People around would lose all confidence in him and in the ultimate analysis the administration of justice would considerably suffer, and, therefore, would constitute contempt."

35. It may also be pertinent to see *P.C. Sen, In Re, AIR 1970 SC 1821, Perspective Publications (P) Ltd. & Anr. v. State of Maharashtra, AIR 1971 SC 221; Attorney-General v. Times Newspapers, (1973) 3 All ER 54; E.M. Sankaran Namboodripad v. T. Narayanan Nambiar, 1970 2 SCC 325*

VII. THE POWER OF THIS HON'BLE COURT TO FRAME GUIDELINES

36. Though this Hon'ble Court has ample power under the Constitution to frame guidelines to secure the proper administration of justice, and this Hon'ble Court has held in a series of judgments interpreting Article 142 that where there is a vacuum on account of any law or for the purposes of enforcement, the Court should evolve new mechanisms to do complete justice and frame guidelines for guidance.

37. An attempt of laying down guidelines for reporting has to take into account and balance two competing principles namely the right of free expression and to ensure that judicial proceedings are not prejudiced by improper reporting. The process of framing of guidelines has to strike a delicate balance between the aforesaid competing principles. The Canadian Judicial Council in its paper states that:

> *"No one is advocating a system in which journalists cease to criticize and scrutinize the courts – in both practice, and in judicial decision-making, Canadians believe in a free and democratic media. But all of us expect that information disseminated by the media should be reliable, and that the problems brought to the public's attention should be real shortcomings, not the product of a journalist's lack of knowledge of the system and its underlying principles."*

38. The same paper also says that balance is to be struck between good coverage of court proceedings and contempt. At times the line between contempt and fair reporting is a moving target.

> *"In real (Canadian) life, the spectre of contempt is raised when the media appears to try to usurp the role of the courts or influence the course of justice.The law of contempt protects a fundamental principle of justice: civil litigants and persons accused of crimes have a right to a fair trial. This right, however, must be balanced against the right to free expression. So just how is that balance struck? Well, therein lies the proverbial challenge.*
>
> *When it comes to contempt of court, there's no black and white, no discrete categories or boundaries – what may be considered contempt by one analysis is simply good journalism when measured by another yardstick."What information will, if published, cause real prejudice to the administration of justice?"asks media law professor Robert Martin."The honest answer is that no one really knows for sure." To add to the uncertainty, the line between contempt and fair reporting is a moving target – news outlets are becoming bolder in their coverage, while judges are recognizing that courts must be open to criticism and that media-savvy jurors can think for themselves. Local rules and practices have diverged to a point where news reports tolerated or ignored in one province are cited for contempt in another."*

39. The problems as highlighted by the Canadian Judicial Journal and which may be considered are as follows:

(i) The media can sometimes usurp the role of the court or influence the rule of the courts of justice.

(ii) There is a fine line between contempt and fair reporting.

(iii) Can the media fill in the gaps between what is stated in court and what it feels should be the issue?

(iv) Can it leave it to the audience to read between the lines?

(v) Can it try to fill up the gaps?

(vi) Can it coyly suggest the conclusions by hinting at things?

(vii) If courts proceedings are full of drama, can the media add to it?

(viii) Can the media use adjectives to describe what is stated by judges?

(ix) Can a query of the court be reported without dealing with the reply of the lawyer?

(x) Can the report find such conclusions which the court is likely to arrive at by merely hinting at things?

(xi) Can a report leave aspects of gaps and ask the reporter to fill in these gaps?

B. Having regard to the aforesaid the following issues need to be addressed.

a. The Sahara Application highlights the vexed problem of accessing documents. When reporting about filing of proceedings it is important that such reporting of filing of pleadings should be done without any embellishment and without any comment.

b. There should be no attempt to comment on the contents of the pleadings. Comments on pleadings as being inadequate or insufficient, or not addressing the issues raised, is not a matter for a report but for the Courts to decide.

c. A respectable report is one which is accurate. There is a thin line between responsibility and irresponsibility.

40. Such guidelines will be a normative exercise without coercive procedures.