IN THE SUPREME COURT OF INDIA
CIVIL APPEALATE JURISDICTION

CIVIL APPEAL NO. 9813 and 9833 OF 2011

IN THE MATTER OF:

Sahara India Real Estate Corp. Ltd & Ors …Petitioners

Versus

Securities and Exchange Board of India & Anr …Respondents

WRITTEN SUBMISSIONS ON BEHALF OF SHRI SHANTI BHUSHAN,

SENIOR ADVOCATE,

Most Respectfully Submitted:-

1. The Constitution Bench is considering the framing of Guidelines for Media reporting on sub-judice matters.

2. Any guidelines framed by the court must not infringe the Constitution of India. The court has to take note of the fact that the Constitution has constituted India into a Sovereign Democratic Republic on the lines of United States of America. In such a republic ***"the people, and not the government possess the absolute sovereignty."***

3. The Republican form of Government is altogether different from the British form of Government under which the Crown was Sovereign and the people were subjects. In a republican form of Government, the censorial power is in the people over the Government and not in the Government over the people. The government in this context means all institutions of governance which would include the executive, the legislature as well as the Judiciary.

4. In a democratic republic, it is not only the right, but also the duty of the people to oversee the functioning of all institutions including the Judiciary. In this *'function',* the media has to play a very important part. It was to enable the people and the Media to vigorously perform this role, that following the American Constitution, the Indian Constitution conferred two fundamental rights in Article 19 :

(i) to assemble peaceably and without arms; and

(ii) to have freedom of speech and expression.

The Parliament can impose only reasonable restrictions on these fundamental rights.

5. Every important issue needs to be vigorously debated by the people and the Press, even if the issue is sub-judice in a case. It is well known that in many cases, which were sub-judice, gross injustice has been avoided only on account of a vigorous debate among the people and the Media, and there is no known case in which on account of an open public debate, the court has decided wrongly and *'injustice'* was the result.

6. It is for this reason, that it has been recognized that even while vigorously criticizing an action of a public authority, if some incorrect statements have been made, even that would not justify placing restrictions on the people and the Media, exercising their right of free speech.

7. Even in the case of Judges, it has been held by the U.S. Supreme Court that even the concern for the reputation of courts, did not justify punishment for criminal contempt even if the statement contained half truths and misinformation.

The reason given for this view was that if a critic of official conduct was required to guarantee the truth of all his factual assertions, it would lead to 'self censorship', which would deter not only false speech but also true speech. The critic would thereby be deterred from voicing his criticism even though he believed that the facts were true and even in fact they were true because he may entertain a doubt whether he could prove in court that the facts were true or may like to avoid the expense of proving them to be true. This would be grossly detrimental to the great cause for which freedom of speech was guaranteed. So the rule recognized was that the critic must not make any statement with actual malice that is with the knowledge that it was false or with reckless disregard of whether it was false or not.

8. In this connection, the following extracts from the decision of the U.S. Supreme Court in ***New York Times v. L.B.Sullivan*** **11 L'ed (2d) 686** are extremely instructive:

> ***"The general proposition that freedom of expression upon public questions is secured by the First Amendment has long***

been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly, but we have staked upon it our all." Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, gave the principle its classic formulation:

"Those who won our independence believed . . . that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that

fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth--whether administered by judges, juries, or administrative officials--and especially one that puts the burden of proving truth on the speaker. The

constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." As Madison said, "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. In Cantwell v. Connecticut, the Court declared:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive," NAACP v. Button, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:Cases which impose

liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate.

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation." Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism, and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment.That statute made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the "Alien and Sedition Acts," passed at the last session of Congress. . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly

and positively forbidden by one of the amendments thereto--a power which, more than any other, ought to produce universal alarm because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right. Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government and not in the Government over the people." Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the

common law. On this footing, the freedom of the press has stood; on this foundation it yet stands. . . The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.

... ...

"A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions--and to do so on pain of libel judgments virtually unlimited in amount--leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless

he proves that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not. "

9. This celebrated decision of the U.S Supreme Court has been referred to by this court in ***R Rajgopal v. State of Tamil Nadu***, **1994 6 SCC 632** in **Paras 16 to 23**, and several important passages from the U.S judgment have also been extracted.It has also been pointed out in this judgment that the principle of New York Times v. Sullivan was carried forward by the English courts particularly by the House of Lords in the ***"Spy catcher case".***

10. It is submitted that the only guidelines which would be constitutional would be that the media would not publish anything which it knows is not true or which has been published with reckless disregard of whether it was false or not.

Date: April 09, 2012 **Shanti Bhushan.**