IN THE HIGH COURT OF DELHI AT NEW DELHI
WRIT PETITION (CIVIL) NO. 11901 OF 2015

IN THE MATTER OF:

PUBLIC RESOURCE ORGANISATION, INC. & ORS. …PETITIONERS

VERSUS

UNION OF INDIA & ANR. …RESPONDENTS

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SUPREME COURT CASES

1982 — VOL. 1

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(1982) 1 Supreme Court Cases 1

(BEFORE Y. V. CHANDRACHUD, C.J. AND A. P. SEN AND BAHARUL ISLAM, JJ.)

SMT. PRABHA DUTT .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition No. 8193 of 1981†, decided on November 7, 1981

Constitution of India — Articles 19(1)(a) and 32 — Right of Press to interview convicts in jail — Held, not absolute but inter alia subject to consent of the interviewee and rules and regulations of Jail Manual — Rules 549(4) and 559-A of the Manual do not prohibit such interviews — But authorities can deny such interviews on weighty reasons which must be recorded in writing — In case of unjustified refusal of interviews, Court can direct the jail authorities to grant interviews to the petitioner Press Reporters — But Court cannot direct the authorities to allow representatives of the Press to be present in the jail at the time of execution of the convicts sentenced to death — Prisons — Jail Manual, Rules 549(4), 552-A and 559-A

Held:

Article 19(1)(*a*), which includes the freedom of the Press, is not an absolute right and does not confer any right on the Press to have an unrestricted access to means of information. The Press is entitled to exercise its freedom of speech and expression by publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India, the security of the State, public order, decency and morality. (Para 2)

However, a right to means of information through the medium of an interview of the convicted prisoners, instead of right to express any particular view or opinion, cannot be claimed by the Press unless in the first instance, the person sought to be interviewed is willing to be interviewed. The existence of a free Press does not imply or spell out any legal obligation on the citizens to supply information to the Press, such for example, as there is under Section 161(2) of the Criminal Procedure Code. (Para 2)

The interviews can be permitted to the Press only subject to the rules and regulations contained in the Jail Manual, such as Rule 552-A. Although journalists or newspapermen are not expressly referred to in Rule 549(4) of the Manual, but that does not mean that they can always and without

†Under Article 32 of the Constitution of India

good reasons be denied the opportunity to interview a condemned prisoner. If in any given case, there are weighty reasons for doing so, which is expected always to be recorded in writing, the interview may be appropriately refused. Rule 559-A also does not provide that no newspapermen will be allowed to interview condemned prisoners. (Paras 3, 4 and 5)

In the present case it can be assumed that the convicted prisoners were willing to be interviewed. Therefore, denial of right to the petitioner Press Reporter to interview two convicts in Tihar Jail who have been sentenced to death, in absence of any weighty consideration therefor, is not justified. The petitioners must therefore be allowed to interview the convicts. (Paras 3 and 8)

However, the Court cannot direct the Jail Superintendent to allow the representatives of the newspapers to be present at the time of the execution of the death sentence imposed on the said two convicts. If such an application is made to the Jail Superintendent, he will be free to consider the same on merits and in accordance with the jail regulations. (Para 10)

R-M/5593/CR

Advocates who appeared in this case:

R. K. Garg, Senior Advocate (*C. S. Vaidyanathan*, Advocate, with him), for the Petitioner;
Miss A. Subhashini, Advocate, for Respondent 1;
N. C. Talukdar, Senior Advocate (*K. S. Gurumoorty* and *R. N. Poddar*, Advocates, with him), for Respondents 2 to 4;
P. N. Lekhi, Senior Advocate and *K. C. Dua*, Advocate, for the Applicants (India Today);
P. K. Bhardwaj, in person (The Times of India);
PTI and UNI, in person.

ORDER

1. This is a petition under Article 32 of the Constitution by the Chief Reporter of The Hindustan Times, Smt. Prabha Dutt, asking for a writ of mandamus or any other appropriate writ or direction directing the respondents, particularly the Delhi Administration and the Superintendent of Jail, Tihar, to allow her to interview two convicts Billa and Ranga who are under a sentence of death. We may mention that the aforesaid two prisoners have been sentenced to death for an offence under Section 302, Indian Penal Code and the petitions filed by them to the President of India for commutation of the sentence are reported to have been rejected by the President recently.

2. Before considering the merits of the application, we would like to observe that the constitutional right to freedom of speech and expression conferred by Article 19(1)(*a*) of the Constitution, which includes the freedom of the Press, is not an absolute right, nor indeed does it confer any right on the Press to have an unrestricted access to means of information. The Press is entitled to exercise its freedom of speech and expression by publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India, the security of the State, public order, decency and morality. But in the instant case, the right claimed by the petitioner is not the right to express any particular view or opinion but the right to means of information through the medium of an

interview of the two prisoners who are sentenced to death. No such right can be claimed by the Press unless in the first instance, the person sought to be interviewed is willing to be interviewed. The existence of a free Press does not imply or spell out any legal obligation on the citizens to supply information to the Press, such, for example, as there is under Section 161(2) of the Criminal Procedure Code. No data has been made available to us on the basis of which it would be possible for us to say that the two prisoners are ready and willing to be interviewed. We have, however, no data either that they are not willing to be interviewed and, indeed, if it were to appear that the prisoners themselves do not desire to be interviewed, it would have been impossible for us to pass an order directing that the petitioner should be allowed to interview them. While we are on this aspect of the matter, we cannot overlook that the petitioner has been asking for permission to interview the prisoners right since the President of India rejected the petitions filed by the prisoners for commutation of their sentence to imprisonment for life. We are proceeding on the basis that the prisoners are willing to be interviewed.

3. Rule 549(4) of the Manual for the Superintendence and Management of Jails, which is applicable to Delhi, provides that every prisoner under a sentence of death shall be allowed such interviews and other communications with his relatives, friends and legal advisers as the Superintendent thinks reasonable. Journalists or newspapermen are not expressly referred to in clause (4) but that does not mean that they can always and without good reasons be denied the opportunity to interview a condemned prisoner. If in any given case, there are weighty reasons for doing so, which we expect will always be recorded in writing, the interview may appropriately be refused. But no such consideration has been pressed upon us and therefore we do not see any reason why newspapermen who can broadly, and we suppose without great fear of contradiction, be termed as friends of the society be denied the right of an interview under clause (4) of Rule 549.

4. Rule 559-A also provides that all reasonable indulgence should be allowed to a condemned prisoner in the matter of interviews with relatives, friends, legal advisers and approved religious ministers. Surprisingly, but we do not propose to dwell on that issue, this rule provides that no newspapers should be allowed. But it does not provide that no newspapermen will be allowed.

5. Mr. Talukdar who appears on behalf of the Delhi Administration contends that if we are disposed to allow the petitioner to interview the prisoners, the interviews can be permitted only subject to the rules and regulations contained in the Jail Manual. There can be no doubt about this position because, for example, Rule 552-A provides for a search of the person who wants to interview a prisoner. If it is thought necessary that such a search should be taken, a person who desires to interview a prisoner

may have to subject himself or herself to the search in accordance with the rules and regulations governing the interviews. There is a provision in the rules that if a person who desires to interview a prisoner is a female, she can be searched only by a matron or a female warden.

6. Taking an overall view of the matter, we do not see any reason why the petitioner should not be allowed to interview the two convicts Billa and Ranga.

7. During the course of the hearing of this petition, representatives of The Times of India, India Today, PTI and UNI also presented their applications asking for a similar permission. What we have said must hold good in their cases also and they, in our opinion, should be given the same facility of interviewing the prisoners as we are disposed to give to the petitioner in the main writ petition.

8. We therefore direct that the Superintendent of the Tihar Jail shall allow the aforesaid persons, namely the representatives of The Hindustan Times, The Times of India, India Today, the Press Trust of India and the United News of India to interview the aforesaid two prisoners, namely, Billa and Ranga, today. The interviews may be allowed at 4 o'clock in the evening. The representatives agree before us that all of them will interview the prisoners jointly and for not more than one hour on the whole.

9. There will be no order as to costs.

10. Mr. Lekhi who appears on behalf of the magazine India Today as also Mr. Jain who appears on behalf of The Hindustan Times has requested us to direct the Superintendent of Jail to allow the aforesaid representatives to be present at the time of the execution of the death sentence. That is not a matter for us to decide. If such an application is made to the Superintendent of Jail, he will be free to consider the same on merits and in accordance with the jail regulations.

(1982) 1 Supreme Court Cases 4

(BEFORE D. A. DESAI AND R. S. PATHAK, JJ.)

SMT. GANGABAI w/o RAMBILAS GILDA .. Appellant;

Versus

SMT. CHHABUBAI w/o PUKHARAJJI GANDHI .. Respondent.

Civil Appeal No. 1537 of 1970†, decided on November 6, 1981

Civil Procedure Code, 1908 — Section 11 — Small Cause Court's declaration regarding title to immovable property would only be incidental to the main issue in the suit — Held, therefore, would not operate as res judicata in a subsequent civil suit in which question of title directly raised

†Appeal by special leave from the Judgment and Order dated June 10/30, 1969 of the Bombay High Court, Nagpur Bench, Nagpur in Appeal No. 90 of 1962

carriage of justice or of equity. In the premises it would be unjust under Article 136 of the Constitution to interfere or keep the finding at bay.

2. The special leave petition fails and is, therefore, dismissed.

(1988) 4 Supreme Court Cases 592

(BEFORE SABYASACHI MUKHARJI AND S. RANGANATHAN, JJ.)

RELIANCE PETROCHEMICALS LTD. Appellant :

Versus

PROPRIETORS OF INDIAN EXPRESS NEWSPAPERS, BOMBAY PVT. LTD. AND OTHERS . . Respondents.

Civil Miscellaneous Petitions Nos. 21903-906 of 1988†, decided on September 23, 1988

Constitution of India — Articles 19(1)(a), 139-A, 32 and 226 — Freedom of Press and administration of justice — Interim injunction issued by Supreme Court against a newspaper restraining publication of articles, comments and reports on matter of public interest but sub judice — Whether should be allowed to continue — Test of imminent danger applied — Consideration of the right to know of the public — Balance of convenience to be seen — On facts held, the injunction need not further continue — Hence vacated — Injuuction — Supreme Court Rules, 1966 — Part IV-A — Contempt of Court Act, 1971, Section 2(c)(ii) and (iii)

Civil Procedure Code, 1908 — Order 39 and fundamental right — Grant of injunction where fundamental right affected — Constitution of India, Articles 19(1)(a) and 21

Constitution of India — Article 141 — Foreign decisions are not binding but have only persuasive value (Para 37)

The petitioner-company, with a view to set up what was claimed to be the largest petrochemical complex in the private sector for the manufacture of critically scarce raw material, issued 12.5 per cent secured convertible debentures which, it was asserted, was of global and national importance. The public issue was due to open on August 22, 1988 and was scheduled to be closed on August 31, 1988. Certain writ petitions and a suit were filed in some High Courts and court challenging the grant of consent or sanction for the issue of the debentures. In some of these proceedings orders of injunction had been obtained. Thereupon on August 18, 1988 the petitioner-company moved an application for transfer of these proceedings under Article 139-A of the Constitution read with Part IV-A of the Supreme Court Rules, 1966. It was contended that

†Under Article 139-A(i) of the Constitution of India

there was no ground for the High Court to grant injunction or stay of the issue in the facts and circumstances particularly when enormous amounts had already been spent by the company and that the Supreme Court should vacate those orders and transfer the applications pending in different courts to the Supreme Court. The Supreme Court by its order dated August 19, 1988 vacated all orders of injunction and directed that the issue be proceeded with "without let or hindrance", notwithstanding any proceedings instituted or that may be instituted in or before any court or tribunal or other authority. On August 25, 1988 the respondent-newspaper published an article in which it claimed that the Controller of Capital Issues had not acted properly and legally in granting the sanction to the issue for various reasons stated therein and that the issue was not a prudent or a reliable venture. The petitioner then moved an application before the Supreme Court contending that by the article the respondents had commented on a matter which was sub judice and that the article was intended to undermine the effect of the interim order passed by the Court and the ultimate decision of the Court and unless restrained by the Court the respondents would continue to publish such articles. The Supreme Court directed that cognizance of contempt would only be considered after the necessary sanction from the Attorney General was obtained but issued an order of injunction restraining all the respondents from publishing any article, comment, report or editorial in any of the issues of the Indian Express or their related publications questioning the legality or validity of any of the consents, approvals or permissions to the said issue of debentures. Meanwhile the shares had been over-subscribed though the day of allotment had not yet expired and before the allotment the subscribers could withdraw their subscriptions. In those circumstances, Supreme Court was invited to consider the question whether there was any necessity for the continuance of the order of injunction granted by it on August 25, 1988. On behalf of the petitioner it was submitted that the danger still persists and the injunction should continue. On the other hand on behalf of the respondents it was submitted that the injunction should be vacated.

Held :

Per Mukharji, J.

The injunction against publication in the order dated August 25, 1988, need not further continue. (Para 39)

There must be reasonable ground to believe that the danger apprehended in continuance of the injunction is real and imminent. This test is acceptable on the basis of balance of convenience. Supreme Court has not yet found or laid down any formula or test to determine how the balance of convenience in a situation of this type, or how the real and imminent danger should be judged in case of prevention by injunction of publication of an article in a pending matter. (Para 34)

Charlotte Anita Whitney v. People of the State of California, 71 L Ed 1095, approved

The people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of the Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take up the responsibility to inform. (Para 34)

The question of contempt must be judged in a particular situation. The process of due course of administration of justice must remain unimpaired. Public interest demands that there should be no interference with judicial process and the effect of the judicial decision should not be pre-empted or circumvented by public agitation or publications. (Para 35)

In the present case the order was passed on August 19, 1988 as reiterated on August 25, 1988 taking into account the overall balance of convenience and having due regard to the sums of money involved and the progress already made. The continuance of this injunction would amount to interference with the freedom of press in the form of preventive injunction and it must, therefore, be based on reasonable grounds for the sole purpose of keeping the administration of justice unimpaired. In the peculiar facts of this case now that the subscription to debentures has closed and, indeed, the debentures have been over-subscribed, and as such the issue is not going to affect the general public or public life nor any jury is involved, it would be proper and legal, on an appraisal of the balance of convenience between the risk which will be caused by the publication of the article and the damage to the fundamental right of freedom of knowledge of the people concerned and the obligation of press to keep people informed, there is no such imminent danger of the subscription being withdrawn before the allotment and as to make the issue vulnerable by any publication of article. On a balance of convenience, continuance of injunction is no longer necessary. (Paras 34, 36 and 37)

Publications, if any, however, would be subject to the decision of the Court on the question of the contempt of court, namely, prejudging the issue and thereby interfering with the due administration of justice. Preventive remedy in the form of an injunction is no longer necessary. Whether punitive remedy will be available or not, will depend upon the facts and the decision of the matter after ascertaining the consent or refusal of the Attorney General. (Para 38)

Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, (1985) 1 SCC 641 : 1985 SCC (Tax) 121, relied on

Express Newspapers (Pvt.) Ltd. v. Union of India, 1959 SCR 12 : AIR 1958 SC 578 : (1961) 1 LLJ 339 ; Re P. C. Sen, (1969) 2 SCR 649 : AIR 1970 SC 1821: 1970 Cri LJ 1525 and C. K. Daphtary v. O. P. Gupta, (1971) 1 SCC 626 : 1971 SCC (Cri) 286 : 1971 Supp SCR 76, distinguished

Attorney General v. British Broadcasting Corpn., 1981 AC 303 : (1980) 3 All ER 161 ; Harry Bridges v. State of California, 86 L Ed 252 : 159 ALR 1346 ; Romesh Thapar v. State of Madras, 1950 SCR 594 :

AIR 1950 SC 124 : 51 Cri LJ 1514 ; Brij Bhushan v. State of Delhi, 1950 SCR 605 : AIR 1950 SC 129 : 51 Cri LJ 1525 ; State of Travancore-Cochin v. Bombay Co. Ltd., 1952 SCR 1112 : AIR 1952 SC 366 : (1952) 3 STC 434 ; State of Bombay v. R. M. D. Chamarbaugwala, 1957 SCR 874 : AIR 1957 SC 699 ; Abrams v. United States, 1963 L Ed 1173 ; P. N. Duda v. P. Shiv Shanker, (1988) 3 SCC 167 : 1988 SCC (Cri) 589 : AIR 1988 SC 1208 ; John D. Pennekamo v. State of Florida, (1945) 90 L Ed 331 ; Nebraska Press Association v. Hugh Stuart, 49 L Ed 2d 683 : 427 US 539 ; United States v. Dennis, 183 F 2d 201 ; Attorney General v. British Broadcasting Corpn., (1979) 3 All ER 45 ; Attorney General v. Times Newspapers Ltd., 1974 AC 273 : (1973) 3 All ER 54 and Re Truth and Sportsman Ltd., ex parte Bread Manufacturers Ltd., (1937) 37 SR (NSW) 242, referred to

Per Ranganathan, J. (concurring)

There is no justification for the continuance of the interim order any longer. (Para 46)

The question is whether any article that may be published by the respondents, even assuming that it touches on the issues of validity or legality of the approvals, consents and permissions to the issue of debentures, will so clearly and obviously prejudice or tend to prejudice the course of the proceedings, now pending in Supreme Court, that such publication should be injuncted by, what the respondents describe as, a "gagging order". In view of the change in the position i.e. the issue has since been over-subscribed, now there is no immediate cause for apprehension on the part of the petitioner that the publication of any such article could abort the debenture issue in the manner it could have done before August 31, 1988. Therefore, pending adjudication on the issue of validity raised in the various suits, the balance of convenience required that there should be no order of any court or tribunal staying the debenture issue. Should any newspaper publish any such matter, it will be doing so at its own risk and subject to its liability for being proceeded against by the petitioner or others for defamation, contempt of court or otherwise. (Paras 41, 42 and 46)

In Re P. C. Sen, (1969) 2 SCR 649 : AIR 1970 SC 1821 : 1970 Cri LJ 1525 ; Attorney General v. Times Newspapers Ltd , 1974 AC 273 : (1973) 3 All ER 54 ; Attorney General v. British Broadcasting Corpn., (1979) 3 All ER 45 ; Attorney General v. British Broadcasting Corpn., 1981 AC 303 : (1980) 3 All ER 161 : Harry Bridges v. State of California, 86 L Ed 252 : 159 ALR 1346 and John D. Pennekamp v. State of Florida, 90 L Ed 1295, referred to

It cannot be said that when the Court passed the order dated August 19, 1988 it formed any prima facie opinion on the question whether the debenture issue had been validly approved or consented to by the various authorities. What predominantly influenced the Court to pass the order dated August 19, 1988 was that, even assuming, prima facie, as contended in the various writ petitions and suits, that there could be some doubt regarding the validity or otherwise of the consent orders etc., the restraint

by any court or tribunal on the issue of debentures at a late stage might prove catastrophic, and cause irreparable loss or damage, to the petitioner. (Para 42)

Further, the article published by the respondents, though not violative of the terms of the injunction granted by the Supreme Court, could have the effect of circumventing the order of this Court and rendering it ineffective. It had, prima facie, a tendency to affect the efficacy of, and defeat the object with which the Court had passed the interim order dated August 19, 1988. This is the reason why the Court passed the second order dated August 25, 1988 and also declined to modify or vary it at the request of the respondent-newspapers. The said order was rightly passed and the contention that no such injunction ought to have been granted at all is not acceptable. (Para 43)

R-M/9034/C

Advocates who appeared in this case :

F. S. Nariman, V. C. Kotwal and M. H. Baig, Senior Advocates (Harish N. Salve, Mrs P. S. Shroff, S. A. Shroff, A. K. Desai and S. S. Shroff, Advocates, with them), for the Appellant ;

G. Ramaswamy, Additional Solicitor General, Ram Jethmalani, Senior Advocate (C. V. Subba Rao, Ms A. Subashini, Mrs Sushma Suri, P. Parmeshwaran, Mukul Rohtagi, Ms Bina Gupta, Ms Madhu Khatri, Parveen Anand, Anil Sachthey, B. L. Bagaria, P. K. Jain, P. S. Goyal, Arun Jaitley, R. F. Nariman, Rajan Karanjawala and Mrs Manik Karanjawala, Advocates, with them), for the Respondents.

The Judgments of the Court were delivered by

SABYASACHI MUKHARJI, J.—At this stage, we are concerned with the question whether there is need for the continuance of the order of injunction passed by this Court on August 25, 1988. In order to appreciate the question it is necessary to state a few facts. A petition was moved before this Court on August 19, 1988 under the Contempt of Courts Act, 1971 for initiation of contempt proceedings against the proprietors of Indian Express Newspapers Bombay Pvt. Ltd., Shri Arun Shourie, Indian Express Newspapers Bombay Pvt. Ltd., Shri Hari Jaisingh, Resident Editor, Indian Express Newspapers Bombay Pvt. Ltd., Shri A. C. Saxena, News Editor, Indian Express Newspapers Pvt. Ltd., Delhi, Shri H. K. Dua, Chief, New Delhi Bureau, Indian Express Newspapers Pvt. Ltd., New Delhi, and Shri V. Ranganathan, Indian Express Newspapers Bombay Pvt. Ltd. The petition was moved on behalf of Reliance Petrochemicals Ltd. (hereinafter called "Reliance Petrochemicals"). It was stated therein that this Court should take cognisance of the contempt alleged to have been committed by the respondents and it was further prayed that pending the consideration of the question of criminal contempt, this Court should pass an order restraining the Express Group of Newspapers and their related publications from publishing any materials or articles in relation

to the subject matter of the proceedings in the Transfer Petitions Nos. 192 and 193 of 1988 which was sub-judice issue in Writ Petition No. 1276 of 1988 in Karnataka High Court, Writ Petition No. 1791 of 1988 in Delhi High Court, Writ Petition No. 1988 *Radhey Shyam Goel* v. *Union of India,* Suit No. 1172 of 1988 *K. S. Brahmabhatt* v. *Reliance Petrochemicals Ltd.* and MRTP proceedings instituted in *J. P. Sharma* v. *Reliance Petrochemicals Ltd.* as the same was alleged to be calculated to affect the Reliance debenture issue which was to open on August 22, 1988 till the decision of the transfer petitions pending herein.

2. The subject matter of dispute related to the public issue by the petitioner company of 12.5 per cent Secured Convertible Debentures of Rs 200 each for cash at par aggregating to Rs 593·40 crores (inclusive of retention of 15 per cent excess subscription of Rs 77·40 crores). It was stated that Reliance Petrochemicals was to set up what was claimed to be the largest petrochemical complex in the private sector for the manufacture of critically scarce raw material known as Mono Ethylene Glycol (MEG) and plastic raw materials like High Density Polyethylene (HDPE) and Poly Vinyl Chloride (PVC) which are used for making various articles from films to pipes, auto-parts to cable coating, containers to furnishings. It was asserted that the issue was of global and national importance. It was claimed that Reliance's public issue was the largest public issue in India till date and the second largest issue in the world. The public issue was due to open on Monday, August 22, 1988 and was scheduled to be closed on August 31, 1988.

3. It was the claim of the petitioner that the debentures were being issued after obtaining the consent of the Controller of Capital Issues and on the basis of schedule indicated therein, and after complying with all the requirements of the Companies Act and otherwise. Certain writ petitions and a suit had been filed in some High Courts, namely, Karnataka, Bombay, Rajasthan, Delhi and later on in Allahabad challenging the grant of consent or sanction for the issue of debentures. Such applications in the different High Courts and the courts were filed at the last moment when enormous amount of money had already been spent, it was claimed. It was stated that enormous monies on publicity had been spent. In some of these proceedings orders of injunction had been obtained. It was contended that issue was prima facie legal and valid and the consent and permission of the necessary authorities specially the Controller of Capital Issues had been obtained properly. In such circumstances an application for transfer of these proceedings under Article 139-A of the Constitution of India read with Part IV-A of the Supreme Court Rules, 1966 was moved by Reliance Petrochemicals Ltd. against the Union of India,

Controller of Capital Issues and the petitioner in the suit in Bangalore and writ petition in Delhi. It was stated that the Certificate of Incorporation was granted to the petitioner on or about January 11, 1988 and the Certificate of Commencement of Business was granted on January 21, 1988. On May 4, 1988 an application was made to the Controller of Capital Issues for raising Equity Share Capital/Cumulative Convertible Preference Shares/Convertible Debentures for financing the proposed projects for manufacture of PVC, HDPE and MEG. On July 4, 1988, as mentioned before, the consent of the Controller of Capital Issues was granted to the petitioner for capital issue of 5,75,00,000 Equity Shares of Rs 10 each inclusive of retainable excess subscription of Rs 7·5 crores and for 2,96,70,000 12.5 per cent Secured Fully Convertible Debentures of Rs 200 each for cash at par to public. It is not necessary for the present purpose to set out the details of the same. It is stated that the consent of the Controller of Capital Issues was given on July 4, 1988 on certain terms which are again not relevant to be set out for the present purpose. The consent order of the Controller was modified and further condition of obtaining the Reserve Bank of India's permission for allotment of debentures to non-residents as required under FERA 1973 and for allotment of debentures to employees on certain terms was imposed on July 19, 1988. On July 27, 1988 a prospectus was filed with the Registrar of Companies, Gujarat, Ahmedabad, for the public issue of 12.5 per cent Secured Fully Convertible Debentures of Rs 200 each for cash at par, as indicated before.

4. A petition was filed in the Karnataka High Court on August 17, 1988 by one Shri Balkrishna Pillai. In the Delhi High Court another writ petition was filed on August 18, 1988. On August 18, 1988 a transfer petition was filed in this Court. It was claimed that any injunction order after the satisfaction of the Central Government, through the Controller of Capital Issues would make the public issue stillborn and sums in excess of Rs 4·5 crores had already been incurred for the public issue as pre-issue expenses and a sum of Rs 20 crores was allocated as Issue Expenses for what was popularly known as "Mega Issue". It was claimed that grave prejudice would be caused to the petitioner company as well as the public at large who were investing in the issue, if the issue is not allowed to go through. It was claimed that there was no ground for the High Court to grant injunction or stay order in the facts and circumstances of this issue and this Court should vacate those orders and transfer the applications pending in different courts to this Court.

5. On that application being moved on August 19, 1988, this Court issued notices to all concerned making the same returnable on September 9, 1988 in terms of prayer (*a*) and paragraphs 2 and 4 of

the affidavit of Mr Balkrishna Bhandari affirmed on August 18/19, 1988. This Court further directed as follows :

> The issue of 2,96,70,000, 12.5 per cent Secured Convertible Debentures of Rs 200 each by the petitioner company under the prospectus dated July 27, 1988 filed with the Registrar of Companies Gujarat and with the stock exchanges at Ahmedabad and Bombay to be proceeded with, without let or hindrance, notwithstanding any proceedings instituted or that may be instituted in or before any court or tribunal or other authority.
>
> Any order, direction or injunction of any court, tribunal or authority in any proceeding already passed or which may be passed will by operation of this order be and remain suspended till further orders of this Court.

6. In substance the order was that the issue be proceeded with "without let or hindrance", notwithstanding any proceedings instituted or that may be instituted in or before any court or tribunal or other authority. This Court vacated all orders of injunction in respect of the said issue. It was asserted on behalf of the petitioner that this Court must have been prima facie satisfied that there was no legal infirmity which should stand in the way of the public issue of the said debentures going through and further, in any event, must have been satisfied that there should not be any let or hindrance to the said public issue. The petitioner had drawn our attention to an article published on August 25, 1988, under the heading "Infractions of Law has Unique Features RPL Debentures". It is not necessary for the present purpose to set out the said article. It was claimed in the said article that the Controller of Capital Issues had not acted properly and legally in granting the sanction to the issue for various reasons stated therein. It was further stated that the issue was not a prudent or a reliable venture. It was contended that by this article the respondents have commented on a matter which is sub-judice and was intended to undermine the effect of the interim order passed by this Court and the ultimate decision of the court, and they threatened to punish such articles unless restrained by this Court. It was contended that trial by newspapers on issues which are sub-judice is one of the grossest modes of interference with the due administration of justice and any threat of that interference should be prevented by both punitive action of contempt and preventive order of injunction of wrong anticipated to be committed by the delinquent. The publication threatened or expected to be published would cause very grave interference with the due administration of justice, and should, therefore, be prohibited.

7. On that application being moved on August 25, 1988, this

Court directed that cognizance of contempt would only be considered after the necessary sanction from the Attorney General is obtained. This Court on the facts of the alleged contempt declined to take cognizance on that application without the views of the Attorney General. This Court, however, issued an order of injunction restraining all the six respondents mentioned therein from publishing any article, comment, report or editorial in any of the issues of the *Indian Express* or their related publications questioning the legality or validity of any of the consents, approvals or permissions to which the petitioners in the Transfer Petitions Nos. 192-193 of 1988 have made reference in the Prospectus dated July 27, 1988 for the issue of 12.5 per cent Secured Full Convertible Debentures. Notice of that application was made returnable on September 9, 1988 and the same was to come up with other related matters. The respondents were further given liberty to move this Court for variation or vacation of the order upon notice to the petitioner. Upon that the six respondents had filed an affidavit in opposition on August 26, 1988 the very next day asking for variation or vacation of the interim order passed by this Court on August 25, 1988. Attention of the court was drawn to an article proposed to be published in the *Indian Express* which was Annexure 'B' to the said affidavit. Submissions were made on the validity or the propriety of the interim order. Upon hearing learned counsel for both the parties, this Court observed that it was sufficient to say that the article proposed to be published and forming part of Annexure 'B' did not violate the order of injunction passed by this Court on August 25, 1988. In other words, this Court was of the view that the article in question which was intended to be published and shown to this Court on August 26, 1988 did not question the legality or the validity of the order which was in issue in the proceedings in this Court. In those circumstances no question of variation or vacation of the said interim order arose. The said article proposed at that time has since been published before August 31, 1988. It was stated in the affidavit as well as in the submissions made from the Bar that the shares have been over-subscribed but the day of allotment, of course, has not yet expired and before the allotment the subscribers, it was submitted, could withdraw their subscriptions. In those circumstances, this Court was invited to consider the question whether there was any necessity for the continuance of the order of injunction granted by this Court on August 25, 1988. On behalf of the petitioner it was submitted that the danger still persists and the injunction should continue. On the other hand on behalf of the respondents it was submitted that the injunction should be vacated.

8. Elaborate arguments were advanced by counsel for both sides. It was contended that there was no contempt of courts involved herein and furthermore, it was contended that pre-stoppage of newspaper article

or publication on matters of public importance was uncalled for and contrary to freedom of press enshrined in our Constitution and in our laws. The publication was on a public matter, so public debate cannot and should not be stopped. On the other hand, it was submitted that due administration of justice must be unimpaired. We have to balance in the words of Lord Scarman in the House of Lords in *Attorney General* v. *British Broadcasting Corporation*[1] between the two interests of great public importance, *freedom of speech* and *administration of justice*. A balance, in our opinion, has to be struck between the *requirements of free press* and *fair trial* in the words of Justice Black in *Harry Bridges* v. *State of California*[2].

9. Therefore, in considering the question posed before us whether there should be continuance of the order of injunction we have to bear in mind and apply the basic principles of law to the facts and circumstances of this case. The point at issue has been canvassed very ably and vehemently on behalf of the petitioner by Shri M. H. Baig, assisted as he was by Shri S. S. Shroff and Smt. P. S. Shroff. They submit that the danger still persists and the publication of any article which would jeopardise the allotment of those debentures, should be prevented. On the other hand, Shri Ram Jethmalani and Shri Anil P. Diwan, senior counsel assisted as they were by Shri R. F. Nariman and Shri C. R. Karanjawala, urged before us that the injunction should no longer continue. In view of the delicacy of the problem in the question posed before us, it is well to remember the legal background. We may refer to our constitutional provisions in Article 19(1)(*a*) and (2) which provide as follows :

> 19. *Protection of certain rights regarding freedom of speech, etc.*—(1) All citizens shall have the right—
>
> (*a*) to freedom of speech and expression ;
>
> (*b*) to assemble peaceably and without arms ;
>
> (*c*) to form associations or unions ;
>
> (*d*) to move freely throughout the territory of India ;
>
> (*e*) to reside and settle in any part of the territory of India ;
>
> (*f*) [*Omitted* by the Constitution (Forty-fourth Amendment) Act, 1978. Sub-clause (*f*) read "to acquire, hold and dispose of property ; and"]
>
> (*g*) to practise any profession, or to carry on any occupation, trade or business.
>
> (2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making

1. 1981 AC 303, 354 : (1980) 3 All ER 161, 177 (HL)
2. 86 L Ed 192 : 314 US 252, 260 : 159 ALR 1346, 1354

any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

10. The effect of Article 19 on the freedom of press, was analysed in the decision of this Court in *Express Newspapers (Pvt.) Ltd.* v. *Union of India*[3], where at page 120 onwards of the report, Bhagwati, J. referring to the decision of this Court in *Romesh Thapar* v. *State of Madras*[4], referred to the observations of Patanjali Sastri, J. and further referred to the decision of this Court in *Brij Bhushan* v. *State of Delhi*[5]. Referring to these two decisions, Bhagwati, J. expressed his view that these were the only two decisions which evolved the interpretation of Article 19(1)(*a*) of the Constitution and they only laid down that the freedom of speech and expression included freedom of propagation of ideas which freedom was ensured by the freedom of circulation and that the liberty of the press consisted in allowing no previous restraint upon publication. Referring to the fact that there is a considerable body of authority to be found in the decisions of the Supreme Court of America bearing on this concept of the freedom of speech and expression, Bhagwati, J. observed that it was trite knowledge that the fundamental right to the freedom of speech and expression enshrined in our Constitution was based on the provisions in the First Amendment to the Constitution of the U.S.A. and, hence, it would be legitimate and proper to refer to those decisions of the Supreme Court of the U.S.A., in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by this Court against the use of American and other cases, in *State of Travancore-Cochin* v. *Bombay Co. Ltd.*[6] and *State of Bombay* v. *R. M. D. Chamarbaugwala*[7].

11. Our Constitution is not absolute with respect to freedom of speech and expression, as enshrined by the First Amendment to the American Constitution. Our attention was drawn to the decision of this Court in *In Re P. C. Sen*[8] where this Court upheld the order of conviction against the Chief Minister of West Bengal for broadcasting a speech justifying an order, the validity of which was challenged in

3. 1959 SCR 12 : AIR 1958 SC 578 : (1961) 1 LLJ 339
4. 1950 SCR 594, 597 : AIR 1950 SC 124 : 51 Cri LJ 1514
5. 1950 SCR 605 : AIR 1950 SC 129 : 51 Cri LJ 1525
6. 1952 SCR 1112 : AIR 1952 SC 366 : (1952) 3 STC 434
7. 1957 SCR 874, 918 : AIR 1957 SC 699
8. (1969) 2 SCR 649 : AIR 1970 SC 1821 : 1970 Cri LJ 1525

proceedings pending before the court. The West Bengal Government had issued an order under Rule 125 of the Defence of India Rules, placing certain restrictions upon the right of persons carrying on business in milk products. The validity of this order was challenged by a writ petition. After the rule nisi had been issued on the petition and served on the State Government, the State Chief Minister broadcast a speech seeking to justify the propriety of the order. The High Court issued a rule requiring the Chief Minister to show cause why he should not be committed for contempt of court. The High Court found him guilty of contempt and fined him. The matter came up before this Court and the conviction was upheld. It was held that the speech was ex facie calculated to interfere with the administration of justice. This Court reiterated that in all cases of comment on pending proceedings, the question is not whether the publication did interfere, but whether it tended to interfere, with the due course of justice. The question is not so much of the intention of the contemnor as whether it is calculated to interfere with the administration of justice. But for the instant case this decision cannot be of much assistance. Firstly, the contents of the speech of the Chief Minister were entirely different. The Chief Minister in his speech had characterised the preparation of any food with milk product as amounting to a crime. There was a tendency in the speech of the Chief Minister of intimidating the litigants or the potential litigants in respect of the issue pending in the court.

12. In the instant case we are, however, not concerned directly with the question of whether the respondents have in fact committed contempt of court by interfering with the due administration of justice. The question whether comments on an issue, directly or indirectly, in court amount to pre-judging of an issue and transferring a trial by the court to the trial by the newspapers, is another matter which will be decided when the contempt application will be taken up. At the moment, we are concerned with the short but difficult question i.e. whether there is need for preventing publication of an article on a matter of public interest but on an issue which is sub-judice. In this case, as at this stage we are not dealing with the question of punitive action of committal for contempt of court for publication pending trial of an issue in court, the decision of this Court in *P. C. Sen case*[8] in view of the facts involved, is not of much aid to us. The case of gross contempt was discussed by this Court in *C. K. Daphtary* v. *O. P. Gupta*[9]. However, in view of the facts involved therein, that decision cannot give us much guidance at present.

13. The law on this aspect has been adverted to in the decision of this Court in *Indian Express Newspapers (Bombay) Pvt. Ltd.* v.

9. (1971) 1 SCC 626 : 1971 SCC (Cri) 286 : 1971 Supp SCR 76

Union of India[10], where at page 659 of the report, Venkataramiah, J. referred to the importance of freedom of press in a democratic society and the role of courts. Though the Indian Constitution does not use the expression 'freedom of press' in Article 19 but it is included as one of the guarantees in Article 19(1)(*a*). The freedom of press, as noted by Venkataramiah, J., is one of the items around which the greatest and the bitterest of constitutional struggles have been waged in all countries where liberal constitutions prevail. Article 19 of the Universal Declaration of Human Rights, 1948 declares the freedom of press and so does Article 19 of the International Covenant on Civil and Political Rights, 1966. Article 10 of the European Convention on Human Rights, provides as follows :

> Article 10. (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, may be 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.

14. The First Amendment to the Constitution of the U.S.A. provides as follows :

> Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ; or abridging the freedom of speech, or of the press ; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

15. Keeping the constitutional requirements of the Indian law in the background, it would be appropriate to refer to certain American decisions to which our attention was drawn. We have mentioned the observations of Justice Black in the case of *Harry Bridges* v. *State of California*[2]. There, Justice Black observed that free speech and fair trial are the two most cherished values of our civilisation and it would be a trying task, and if we may say so, a difficult one to choose between

10. (1985) 1 SCC 641 : 1985 SCC (Tax) 121

them. But in case of need a choice has to be made. He emphasised that a public utterance or publication is not to be denied the constitutional protection of freedom of speech and press merely because it concerns a judicial proceeding still pending in the courts, upon the theory that in such a case it must necessarily tend to obstruct the orderly and fair administration of justice. In America, in view of the absolute terms of the First Amendment, unlike the conditional right of freedom of speech under Article 19(1)(*a*) of our Constitution, it would be worthwhile to bear in mind the "present and imminent danger" theory.

16. Justice Black quoted from the observations of Justice Holmes in *Abrams* v. *United States*[11], where the latter observed that to justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practised. There must be reasonable ground to believe that the danger apprehended is imminent. Justice Black concluded that there must be clear and present danger and that would provide a workable principle in preventing publication consistent with the First Amendment. But in our case Shri Baig submitted that our Article 19(1)(*a*) as it is termed anything that interferes with the due administration of justice, should be prevented if it is a threat to the due administration of justice. His submission was that the article published or proposed to be published herein, undermines the effect or pre-empts the effect of the order of injunction which was to help or boost up the chances of the debentures being subscribed.

17. Shri Baig drew our attention to page 282 (ALR p. 1366) of the said report[2] where Justice Frankfurter had observed that free speech was not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. The administration of justice by an impartial judiciary has been basic to the conception of freedom ever since Magna Carta. Justice Frankfurter further reiterated that the *dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible.* (emphasis supplied) "The role of courts of justice in our society" said Frankfurter "has been the theme of statesmen and historians and constitution makers, and best expressed in the Massachusetts Declaration of Rights as the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit".

11. 1963 L Ed 1173, 1180

18. Justice Frankfurter dissenting in his judgment, and with whom Chief Justice Stone, Justice Roberts and Justice Byrnes agreed, reiterated at page 284 of the report (ALR p. 1367) that the Constitution is an instrument of Government and was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. It is well to remember that Justice Frankfurter recognised that one cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment and at the same time leave (*sic* read) out the age old means employed by States for securing the calm course of justice. He emphasised that the Fourteenth Amendment does not forbid a State to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgement of freedom of speech or press, as these phases of liberty have heretobefore been conceived even by the stoutest libertarians. Actually, there liberties themselves depend "upon an untrammeled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extrajudicial considerations".

19. The test of imminent and present danger as the basis of Justice Holmes's ideas has been referred to by this Court in *P. N. Duda* v. *P. Shiv Shanker*[12].

20. This question again cropped up in *John D. Pennekamo* v. *State of Florida*[13] and Justice Frankfurter reiterated that the 'clear and present danger' conception was never used by Mr Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context. He reiterated that the judiciary could not function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavour. A free press is vital to a democratic society for its freedom gives it power.

21. In 1976, in *Nebraska Press Association* v. *Hugh Stuart*[14], where the facts of the case were entirely different to the present ones, Chief Justice Burger delivered the opinion of the court saying that to the extent that the order prohibited the reporting of evidence adduced at the open preliminary hearing in a murder trial it was bad. Chief

12. (1988) 3 SCC 167 : 1988 SCC (Cri) 589 : AIR 1988 SC 1208
13. (1945) 90 L Ed 331
14. 49 L Ed 2d 683 : 427 US 539

Justice Burger reiterated that a responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. The observations of Learned Hand[15] referred to at page 699 indicate "the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger", as the test. Hence, we must examine the gravity of the evil. In other words, a balance of convenience in the conventional phrase of Anglo-Saxon Common Law Jurisprudence would, perhaps, be the proper test to follow.

22. In this background it would be appropriate to refer to some of the English decisions to which our attention was drawn. Mr Jethmalani relied on the observations of Lord Denning in the Court of Appeal in *Attorney General* v. *British Broadcasting Corpn.*[16], where the Master of the Rolls Lord Denning characterised some of these similar type of injunctions as "gagging injunctions". Shri Baig, however, protested that in view of the terms in which the injunction was issued in the instant case, the order did not "gag" anything that was legitimate. The House of Lords, however, did not approve the observations of Lord Denning. We may refer to the observations of the House of Lords in *Attorney General* v. *B.B.C.*[1], wherein the Attorney General brought proceedings for an injunction to restrain the defendants from broadcasting a programme dealing with matters which related to an appeal pending before a local valuation court on the ground that the broadcast would be a contempt of court. The Divisional Court of the Queen's Bench Division, on the single issue before it, held that a local valuation court was a court for the purposes of the powers of the High Court relating to contempt. On appeal, the Court of Appeal, by a majority, affirmed that decision. The House of Lords, however, allowed the appeal and held that the jurisdiction of the Divisional Court in relation to contempt did not extend to a local valuation court because it was a court which discharged administrative functions and was not a court of law and the Divisional Court's jurisdiction only extended to courts of law and when it referred to 'inferior courts' it must be taken as inferior courts of law and though the local valuation court has some of the attributes of the long-established 'inferior courts' public policy required in the interests of freedom of speech and freedom of the press that the principles relating to contempt of court should not apply to it or to the host of other modern tribunals which might be regarded as 'inferior courts'.

23. There, however, Lord Scarman emphasised that the due

15. In United States v. Dennis, 183 F 2d 201, 212
16. (1979) 3 All ER 45, 51 (CA)

administration of justice should not, at all, be hampered. Lord Denning in the Court of Appeal referred to Borrie & Lowe, *The Law of Contempt* (1973) and mentioned that professionally trained judges are not easily influenced by publications. This is a point which was emphasised before us also. Lord Denning referred to the question whether there was contempt of court by the BBC. He emphasised that there was no accused. The House of Lords, however, in appeal held that valuation court is not a court where the concept of contempt of court would apply. But it did make observations that such broadcasting or publication might affect a judge. Viscount Dilhorne at page 335 of the report observed as follows : (All ER pp. 163-64)

> It is sometimes asserted that no judge will be influenced in his judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a judicial office does his utmost not to let his mind be affected by what he has seen or heard or read outside the court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of judicial duties. Nevertheless it should, I think, be recognised that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it. As Lord Denning, M.R. said, the stream of justice must be kept clean and pure. It is the law, and it remains the law until it is changed by Parliament, that the publication of matter likely to prejudice the hearing of a case before a court of law will constitute a contempt of court punishable by fine or imprisonment or both.
>
> In this appeal we do not have to pronounce on whether the proposed broadcast would have prejudicially affected the hearing before the local valuation court. Although it clearly was likely to have aroused hostility to the Exclusive Brethren, it by no means follows that it would have prejudiced their claim to relief from rates. The mere assertion in the course of the broadcast that they were not entitled to that relief was in my view unlikely to have affected in any way a decision on whether their meeting room was a place of public religious worship coming within Section 39.

24. Lord Edmund-Davies at page 354 of the report emphasised that only a very short question arose, namely, whether the local valuation court comes within the jurisdiction of the High Court or not. Before that Lord Scarman had occasion to refer to the observations of the

European Court of Human Rights which criticised the judgment of the House of Lords in *Attorney General* v. *Times Newspapers Ltd.*[17] and emphasised that neither the Convention nor the European Court's decision, as part of the English law, which related to Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

25. In *Attorney General* v. *Times Newspapers Ltd.*[17], between 1959-61 a company made and marketed under licence a drug containing thalidomide. About 450 children were born with gross deformities to mothers who had taken that drug during pregnancy. In 1968, 62 actions against the company begun within 3 years of the births of the children were compromised by lump sum payments conditional on the allegations of negligence against the company being withdrawn. Thereafter leave to issue writs out of time was granted ex parte in 261 cases, but apart from a statement of claim in one case and a defence delivered in 1969 no further steps had been taken in those actions. A further 123 claims had been notified in correspondence. In 1971 negotiations began on the company's proposal to set up a £ 3¼ million charitable trust fund for those children outside the 1968 settlement conditional on all the parents accepting the proposal. Five parents refused. An application to replace those parents by the Official Solicitor as next friend was refused by the Court of Appeal in April 1972. Negotiations for the proposed settlement were resumed. On September 24, 1972, a national Sunday newspaper published the first of a series of articles to draw attention to the plight of the thalidomide children. The company complained to the Attorney General that the article was a contempt of court because litigation against them by the parents of some of the children was still pending. The editor of the newspaper justified the article and at the same time sent to the Attorney General and to the company for comment an article in draft, for which he claimed complete factual accuracy, on the testing, manufacture and marketing of the drug. On the Attorney General's motion, the Divisional Court of the Queen's Bench Division granted an injunction restraining publication on the ground that it would be a contempt of court. After the grant of the injunction on November 17, 1972, and while the newspaper's appeal was pending, the thalidomide tragedy was on November 29 debated in Parliament and speeches were made and reported which expressed opinions and stated facts similar to those in the banned article. Thereafter, there was a national campaign in the press and among the general public directed to bringing pressure on the company to make a better offer for the children and their parents ; and the company in fact made a substantially increased offer.

17. 1974 AC 273 : (1973) 3 All ER 54

26. The Court of Appeal having discharged the injunction, the Attorney General appealed to the House of Lords. It was held that it was a contempt of court to publish material which pre-judged the issue of pending litigation or was likely to cause public pre-judgment of that issue, and accordingly the publication of this article, which in effect charged the company with negligence, would constitute a contempt, since negligence was one of the issues in the litigation. The House of Lords granted injunction prohibiting the Times Newspaper from publishing the proposed publication. Reference was made to Oswald's *Contempt of Court*, 3rd edn. (1910), where it was emphasised that the contempt of court involves 3 objects, namely, (*i*) to enable the parties to come to the courts without interference ; (*ii*) to enable the courts to try cases without interference ; and (*iii*) to ensure that the authority and administration of the law is maintained. *There was no room for the balancing suggested by the respondents between the public interest in free discussion of matters of public concern and the public interest that judicial proceedings should not be interfered with.* (emphasised by Shri Baig)

27. Lord Reid referred to the observations of the Chief Justice Jordan in *Re Truth and Sportsman Ltd., ex parte Bread Manufacturers Ltd.*[18] to the following effect : (quoted at All ER pp. 61-62)

> It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested ; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant. It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that person whose conduct is being

18. (1937) 37 SR (NSW) 242, 249

publicly criticised has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter.

28. Lord Reid made certain observations upon which Mr Baig relied, i.e. at page 300 which is as follows : (All ER p. 65)

> I think that anything in the nature of pre-judgment of a case or of specific issues in it is objectionable not only because of its possible effect on that particular case but also because of its side effects which may be far reaching. Responsible "mass media" will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth disrespect for the processes of the law could follow, and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of pre-judging of issues fall within the existing authorities on contempt. I do not think that the freedom of the press would suffer, and I think that the law would be clearer and easier to apply in practice if it is made a general rule that it *is not permissible to pre-judge issues in pending cases.* (emphasis supplied)

29. Lord Diplock stated at page 309 of the report (All ER p. 72) that the due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities ; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law ; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law.

30. Lord Simon of Glaisdale at page 315 emphasised as follows : (All ER pp. 77-78)

> The first public interest involved is that of freedom of discussion in democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument. *This is the justification for investigative and campaign journalism. Of course it can be abused — but so may anything*

of value. The law provides some safeguards against abuse; though important ones (such as professional propriety and responsibility) lie outside the law. (emphasis supplied)

31. Lord Cross of Chelsea at page 322 of the report observed as follows : (All ER pp. 83-84)

> "Contempt of court" means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to anyone who defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens, whether on the left or the right or in the centre, should be anxious to safeguard. When the alleged contempt consists in giving utterance either publicly or privately to opinions with regard to or connected with legal proceedings, whether civil or criminal, the law of contempt constitutes an interference with freedom of speech, and I agree with my noble and learned friend that we should be careful to see that the rules as to 'contempt' do not inhibit freedom of speech more than is reasonably necessary to ensure that the administration of justice is not interfered with. The proposed article which is the subject of this appeal consists of a detailed examination of the question whether or not Distillers were guilty of negligence in putting thalidomide on the market at the time, and in the circumstances in which they did. That is, of course, one of the issues in the pending actions and, again, I agree with my noble and learned friend that we should maintain the rule that any "prejudging" of issues, whether of fact or of law, in pending proceedings — whether civil or criminal — is in principle an interference with the administration of justice although in any particular case the offence may be so trifling that to bring it to the notice of the court would be unjustifiable.

32. Shri Baig emphasised that there is an inherent jurisdiction to restrain by injunction any publication that interferes with a fair trial or a pending case or with the administration of justice in general. He further urged that trial of newspaper in sub-judice matter is wrong. Publication is permissible provided it does not amount to pre-judgment or prejudice of a matter in court. Liberty or freedom of press must subserve the due administration of justice. He submitted that there is need to continue the injunction because contribution to the debentures could be withdrawn as the final allotment has not yet been made.

33. On the other hand, Shri Divan submitted that there is no

jury trial involved here and no likelihood of the trial being prejudiced because trial is by professionally trained judges. Public have a right to know about this issue of debentures which is a matter of public concern. It affects the public interest, so public have a right to know and the newspapers have an obligation to inform.

34. We must see whether there is a present and imminent danger for the continuance of the injunction. It is difficult to lay down a fixed standard to judge as to how clear, remote or imminent the danger is. The order passed on August 19, 1988 as reiterated on August 25, 1988 stated that there must be no legal impediment in the issue of the debentures or in the progress of the debentures, taking into account the overall balance of convenience and having due regard to the sums of money involved and the progress already made. It is necessary to reiterate that the continuance of this injunction would amount to interference with the freedom of press in the form of preventive injunction and it must, therefore, be based on reasonable grounds for the sole purpose of keeping the administration of justice unimpaired. In the words of Mr Justice Brandeis of the American Supreme Court concurring in *Charlotte Anita Whitney* v. *People of the State of California*[19], there must be reasonable ground to believe that the danger apprehended is real and imminent. This test we accept on the basis of balance of convenience. This Court has not yet found or laid down any formula or test to determine how the balance of convenience in a situation of this type, or how the real and imminent danger should be judged in case of prevention by injunction of publication of an article in a pending matter. In the context of the facts of this case we must judge whether there is such an imminent danger which calls for continuance of the injunction. Incidentally, it may be mentioned that the so-called informed press may misrepresent the court proceedings. We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform.

35. The question of contempt must be judged in a particular situation. The process of due course of administration of justice must remain unimpaired. Public interest demands that there should be no interference with judicial process and the effect of the judicial decision should not be pre-empted or circumvented by public agitation or

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publications. It has to be remembered that even at turbulent times through which the developing countries are passing, contempt of court means interference with the due administration of justice.

36. In the peculiar facts of this case now that the subscription to debentures has closed and, indeed, the debentures have been over-subscribed, we are inclined to think that there is no such imminent danger of the subscription being withdrawn before the allotment and as to make the issue vulnerable by any publication of article. On a balance of convenience, we are of the opinion that continuance of injunction is no longer necessary.

37. In this peculiar situation our task has been difficult and complex. The task of a modern judge, as has been said, is increasingly becoming complex. Furthermore, the lot of a democratic judge is heavier and thus nobler. We cannot escape the burden of individual responsibilities in a particular situation in view ot the peculiar facts and circumstances of the case. There is no escape in absolute. Having regard, however, to different aspects of law and the ratio of the several decisions, by which though we are not bound, except the decisions of this Court referred to hereinbefore, about which we have mentioned, there is no decision dealing with this particular problem, we are of the opinion that as the issue is not going to affect the general public or public life nor any jury is involved, it would be proper and legal, on an appraisal of the balance of convenience between the risk which will be caused by the publication of the article and the damage to the fundamental right of freedom of knowledge of the people concerned and the obligation of press to keep people intormed, that the injunction should not continue any further.

38. In the aforesaid view of the matter, we direct that there is no further need for the continuance of the injunction. Publications, if any, however, would be subject to the decision of the court on the question of contempt of court, namely, pre-judging the issue and thereby interfering with the due administration of justice. Preventive remedy in the form of an injunction is *no longer* necessary. Whether punitive remedy will be available or not, will depend upon the facts and the decision on the matter after ascertaining the consent or refusal of the Attorney General.

39. The application for the present purpose is, therefore, disposed of with the direction that the injunction against publication in the order dated August 25, 1988, need not further continue.

RANGANATHAN, J. (*concurring*)—I agree. I would, however, like to add a few words, having regard to the range of the arguments addressed before us.

41. The principal ground urged in support of the prayer for the continuance of the injunction already granted is that it was very restricted in terms and injuncted only the publication of articles, comments and reports on the validity or legality of the various consents, approvals and permissions obtained by Reliance in relation to the debenture issue. This is precisely the subject matter of the writ petitions and suit withdrawn to this Court in the transfer petitions. It is urged, strongly relying on the speeches of the various Law Lords in the *Thalidomide* case (*Attorney General* v. *Times Newspapers Limited*[17]) the observations of this Court in *Re P. C. Sen*[6] and the provision contained in Section 2(*c*)(iii) of the Contempt of Courts Act, 1971, that any such publication would tend to interfere with the fair administration of justice and so constitute criminal contempt and would be liable not merely to punitive action after publication but also to stoppage by a preventive order before publication. On the other hand, for the respondents, it is contended that, in the decisions relied upon for the petitioners, the publications alleged to constitute contempt were of such a nature that they were seen to affect the course of actions actually pending in courts, that even otherwise the decision of the House of Lords has been widely criticised and should not be followed and that the views expressed by Lord Denning, M.R. in *Attorney General* v. *B.B.C.*[16] — though reversed by the House of Lords[1] — and by the American Courts in *Bridges* v. *State of California*[2] and in *John D. Pennekamp* v. *State of Florida*[20] should be preferred as more appropriate to present day conditions, particularly in the context of the freedom of press guaranteed under Article 19(1)(*a*) of the Constitution of India, and also incorporated in Article 19 of the Universal Declaration of Human Rights, 1948, Article 10 of the European Convention of Human Rights and Article 19 of the International Convention on Civil and Political Rights, 1966. I do not think we are called upon to decide this wider question at this stage. As already pointed out, the contempt petition filed by the petitioners in respect of the article published by the respondents on August 25, 1988 has not been taken cognisance of by us in the absence of the consent of the learned Attorney General. At the moment we have to assess whether any article that may be published by the respondents, even assuming that it touches on the issues of validity or legality of the approvals, consents and permissions referred to in our order of August 19, 1988, will so clearly and obviously prejudice or tend to prejudice the course of the proceedings, now pending in this Court, that such publication should be injuncted by what the respondents describe as, a "gagging order". I agree with my learned brother that there is no such imminent danger or apprehension in the circumstances

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present here, as calls for such an extreme step curtailing the freedom of a newspaper. It is sufficient, I think, to clarify, if at all any such clarification were needed, that should any newspaper publish any such matter, it will be doing so at its own risk and subject to its liability for being proceeded against by the petitioner or others for defamation, contempt of court or otherwise.

42. A somewhat narrower ground, as I understand it, put forward for the petitioner was that the grant of ex parte injunction by us on August 19, 1988 and August 25, 1988 was the result of our prima facie conclusion that consents, approvals or permissions from the concerned authorities for the debenture issue had been duly and validly obtained by the petitioner and that any article, liberty for the publication of which is sought for by the vacation of the interim order, would contain views contrary to or inconsistent with the prima facie view of this Court. Persons reading the newspaper might be taken in by and believe in the statements made by the respondents in such articles and, if they start acting upon such beliefs, then the effect of the order of this Court, upholding, prima facie, the validity of the debenture issue on the above aspects would stand undermined. In my view this contention is untenable. I do not think that the contention proceeds on a correct analysis of the ratio of our order dated August 25, 1988 or the earlier order dated August 19, 1988. It should be remembered that the proceedings, which gave rise to the transfer applications, were writ petitions and a suit filed in various courts challenging, inter alia, the validity or regularity of the debenture issue of the petitioner company. If these matters had been heard by the various High Courts or other subordinate courts, there was a possibility that one or more of the courts, satisfied with the prima facie tenability of the contentions of the petitioners therein might issue an order staying the debenture issue pending disposal of the suit or writ petition. In fact, also, it seems that interim orders of this nature had been obtained. The petitioner was apprehensive that, if any such interim order was passed, all the time, labour and money expended in floating the debenture issue might be nullified at the last moment. The petitioner, therefore, moved for the transfer of all the various proceedings to this Court and for an interim order permitting it to issue the debentures as planned without let or hindrance and without being hampered by any interim stay order from any court. I do not think it would be correct to say that, when we passed the order dated August 19, 1988, we formed any prima facie opinion on the question whether the debenture issue had been validly approved or consented to by the various authorities. Though it is true that there were averments in the transfer petitions stating that all the legal formalities had been properly complied with, what predominantly influenced us

to pass the order dated August 19, 1988 was that, even assuming, prima facie, as contended in the various writ petitions and suits, that there could be some doubt regarding the validity or otherwise of the consent orders etc., the restraint by any court or tribunal on the issue of debentures at a late stage might prove catastrophic, and cause irreparable loss or damage, to the petitioner. We were also of the opinion that, pending adjudication on the issue of validity raised in the various suits, the balance of convenience required that there should be no order of any court or tribunal staying the debenture issue.

43. Now, I shall turn to the circumstances in which the order dated August 25, 1988 were passed. Subscriptions to the debenture issue were open between August 22, 1988 and August 31, 1988. It was during this interim period that the first article was published by the respondent newspaper attacking the validity of the consent granted by the Controller of Capital Issues to the issue of the debentures. I do not go into the merits of the article. But, when it was pointed out to us that this article had been published at a very crucial time when the subscription to the issue had started flowing in, we saw that it would have the indirect effect of achieving exactly what this Court wanted to prevent by its order dated August 19, 1988. Though this Court, in view of the allegations raised in the transfer petitions, referred in its order only to stay orders from courts restraining the progress of the debenture issue, it was the intention of this Court that the debenture issue should go ahead without any obstacles placed in the way of the collection of subscriptions therefor on the grounds on which stay orders had been sought to be obtained from courts. The article published by the respondents, though not violative of the terms of the injunction granted by this Court, could have the effect of circumventing the order of this Court and rendering it ineffective. It had, prima facie, a tendency to affect the efficacy of, and defeat the object with which this Court had passed the interim order dated August 19, 1988. This is the reason why we passed the second order dated August 25, 1988 and also declined to modify or vary it at the request of the counsel for the newspapers on the next day. I am of opinion that the said order was rightly passed and that the contention of learned counsel for the respondent that no such injunction ought to have been granted at all is not acceptable.

44. The position today, however, has radically changed. We are told that the issue has been over-subscribed. In my opinion, this stage having been completed, there is no necessity to continue the interim order passed by us on August 25, 1988.

45. Counsel for the petitioner, however, vehemently contended that there has been no material change in the situation. He submitted

that many lakhs of people have subscribed to the debentures and, within a strict time schedule laid down by the statute, the petitioner is bound to scrutinise all the applications, decide on the issue of allotment and send out allotment letters or refund the application moneys received. It is submitted that even at this stage there is a potential danger that continued publication of articles by the respondents attacking the validity of the debenture issue will have the effect of causing a large number of applicants for the debentures to panic and to seek refund of the application moneys already paid by them. In fact, it is said, a writ petition of that nature has already been filed in the Allahabad High Court. Counsel submitted that, in a sensitive matter like issue of debentures, even the request for return of money by any one person could trigger off several applications of the same type and that the danger, that the petitioner company might be asked to refund moneys sent in respect of subscriptions already made on the basis of the allegations in such articles as the one already published, is real and imminent. He submitted that it is therefore as much necessary today to continue the injunction as it was when it was granted on August 25, 1988.

46. I have given careful thought to this contention urged on behalf of the petitioner company. It is of course difficult in the absence of any reliable data for any person to come to a conclusion as to how exactly the publication of articles of the type published by the respondents would cause prejudice in the manner contended for by the petitioner. It seems to me, however, that the danger apprehended by the petitioner company is not so real or substantial as to warrant the continuance of the injunction order passed by us on August 25, 1988. Even if, for the purpose of argument, one were to assume that such claims for refund will be made, they cannot straightway harm the interests of the petitioner company. There is no possibility that, pending determination of the issues raised, any court will order interim relief to such applicants by way of grant of such refunds. The petitioner will be liable to make any such refund only if it is ultimately decided by this Court or any other court that the issue of debentures is invalid and that the application moneys have to be refunded. That of course the company will have to do in any event. There is, however, no immediate cause for apprehension on the part of the petitioner that the publication of any such article could abort the debenture issue in the manner it could have done before August 31, 1988. I, therefore, agree that there is no justification for the continuance of the interim order dated August 25, 1988 any longer.

except Todal, A 8 the names of the rest of the persons were mentioned even at the earliest stage. This was a supporting factor which according a to the learned Judges lent assurance so far those four accused were concerned. Coming to Todal, A 8 it is pointed out that the evidence of the witnesses was that he gave a lathi blow and on that ground he is also convicted along with other four accused. The High Court gave the benefit of doubt to the rest of the accused.

b **6.** In the FIR only four names are mentioned i.e. Accused 1, 2, 3 and 10 and there is a general allegation that others also participated. The fact that these four names were mentioned in the earliest stage in the FIR weighed very much with the High Court. The other accused were acquitted taking this factor into consideration. In our view the same prin- c ciple applies to the case of Todal, A 8. In a case of this nature where the allegation is omnibus, one of the tests to be applied is whether the names are mentioned in the FIR. No doubt, that by itself is not conclusive. The same, however, lends assurance regarding their participation. In this view of the matter we give the benefit of doubt to Todal, A 8. We are of the d view that the remaining four appellants along with some others i.e. more than five persons participated in the occurrence. In the result we set aside the conviction and sentence awarded against Todal, A 8. However, the convictions and sentences of other appellants are confirmed. The bail bond of Todal A 8 stands cancelled. The other appellants shall surrender e to serve out the sentences. Accordingly, this appeal is allowed so far as Todal A 8 is concerned and dismissed so far as other appellants are concerned.

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f (BEFORE A.M. AHMADI AND M.M. PUNCHHI, JJ.)

Civil Appeal No. 1254 of 1990

LIFE INSURANCE CORPORATION OF INDIA .. Appellant;

Versus

PROF. MANUBHAI D. SHAH .. Respondent.

g *With*

Civil Appeal No. 2643 of 1992

UNION OF INDIA THROUGH ITS SECRETARY AND OTHERS .. Appellants;

h *Versus*

CINEMART FOUNDATION .. Respondent.

Civil Appeal Nos. 1254 of 1990† and 2643 of 1992‡, decided on July 22, 1992

† From the Judgment and Order dated June 17, 1980 of the Gujarat High Court in Special Civil Application No. 2711 of 1979 : AIR 1981 Guj 15

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‡ From the Judgment and Order dated September 27, 1990 of the Delhi High Court in Civil Writ Petition No. 212 of 1989

Constitution of India — Arts. 19(1)(a), 19(2) and 14 — Right of a citizen to publication in house magazine of an instrumentality of State (LIC) — Research study paper criticizing LIC of adopting discriminatory practice affecting interest of large number of policy holders, prepared and widely circulated by respondent trustee of a research organisation — Counter prepared by a member of LIC as well as rejoinder prepared by respondent published in a newspaper — LIC thereafter publishing the counter in its in-house magazine but refusing to publish respondent's rejoinder therein — Study paper or the rejoinder not containing any material which could be restricted under Art. 19(2) — Held, LIC being 'State' within the meaning of Art. 12 and its house magazine being financed by public funds, its refusal to publish respondent's rejoinder was unfair, unreasonable and arbitrary and amounted to denial of his right under Art. 19(1)(a) — This right cannot be allowed to be defeated by accepting LIC's plea that the rejoinder became stale by passage of time and lost relevance for publication, more so when respondent considers it to be still live and relevant — LIC bound to publish the rejoinder in its magazine — However this ruling given on the peculiar facts of the case should not be understood to provide a right to all citizens to have their articles published in the LIC magazine on ground of it being financed by public funds

Constitution of India — Art. 12 — 'State' — LIC covered by the definition

Administrative Law — Natural justice — Fairness — Publication in house magazine financed by public funds — An instrumentality of the State, while publishing its own viewpoint in its house magazine, obliged in fairness to publish in it the critical viewpoint of a citizen

The respondent, the executive trustee of the Consumer Education & Research Centre (CERC), Ahmedabad, after undertaking research into the working of the Life Insurance Corporation (LIC) published a study paper titled "*A Fraud on Policy Holders — A Shocking Story*". This study paper portrayed the discriminatory practice adopted by LIC by pointing out that unduly high premiums are charged by the LIC from those taking out life insurance policies thereby denying access to insurance coverage to a vast majority of people who cannot afford to pay the high premiums. The study paper is a research document containing statistical information to support the conclusions reached by the author. Copies of the study paper were circulated to a few informed citizens with a request to disseminate the contents thereof through articles, speeches, etc. and thus it was widely circulated. A member of the LIC wrote a counter article "*LIC and its Policy Holders*" and published the same as an article in *The Hindu*, a daily newspaper, challenging the conclusions reached by the respondent in his study paper. The respondent prepared a rejoinder which was published in the same newspaper. The member of LIC then published his own counter article in LIC's house magazine called *Yogakshema*. The respondent thereupon requested the LIC to also publish his rejoinder to the said article in the said magazine but his request was turned down. He thereupon filed a writ petition before the High Court contending that the refusal to publish his rejoinder in the magazine violated his fundamental right under Articles 14 and

19(1)(*a*). The LIC denied this right on the ground that their magazine was an in-house magazine circulated amongst subscribers who were policy holders, officers, employees and agents of the Corporation. The High Court rejected this contention on two grounds in the main, viz., (*i*) it is available to anyone on payment of subscription and (*ii*) members of the public are invited to contribute articles for publication. Even on the assumption that it is an in-house magazine the High Court observed "under the pretext and guise of publishing a house magazine, the Corporation cannot violate the fundamental rights of the petitioner if he has any". According to the High Court a house magazine cannot claim any privilege against the fundamental rights of a citizen. Rejecting the appeal by LIC, the Supreme Court

Held :

No serious exception can be taken to this approach which commended itself to the High Court. The LIC is a State within the meaning of Article 12. The statute viz. the L.I.C. Act, 1956 requires it to function in the best interest of the community. The community is, therefore, entitled to know whether or not this requirement of the statute is being satisfied in the functioning of the LIC. The respondent's effort in preparing the study paper was to bring to the notice of the community that the LIC had strayed from its path by pointing out that its premium rates were unduly high when they could be low if the LIC avoided wasteful indulgences. The endeavour was to enlighten the community of the drawbacks and shortcomings of the Corporation and to pin-point the areas where improvement was needed and was possible. By denying information contained in the rejoinder prepared by the respondent to the consumers as well as other subscribers the LIC cannot be said to be acting in the best interest of the community. It is not the case of the LIC that the rejoinder contains anything offensive in the sense that it would fall within any of the restrictive clauses of Art. 19(2) or that it is in any manner prejudicial to the members of the community or that it is based on imaginary or concocted material. That being so on the fairness doctrine the LIC was under an obligation to publish the rejoinder since it had published counter to the study paper. The respondent's fundamental right of speech and expression clearly entitled him to insist that his views on the subject should reach those who read the magazine so that they have a complete picture before them and not a one-sided or distorted one.

(Paras 11 and 12)

The attitude on the part of LIC refusing to publish the rejoinder in their magazine financed from public funds can be described as both unfair and unreasonable; unfair because fairness demanded that both view-points were placed before the readers, however limited be their number, to enable them to draw their own conclusions and unreasonable because there was no logic or proper justification for refusing publication. A monopolistic State instrumentality which survives on public funds cannot act in an arbitrary manner on the specious plea that the magazine is an in-house one and it is a matter of its exclusive privilege to print or refuse to print the rejoinder. (Para 12)

However, the above view has been taken in the peculiar facts of the case and it should not be understood as laying down an absolute proposition that

merely because the LIC is a State and is running a magazine with public funds it is under an obligation to print any matter that any informed citizen may forward for publication. (Para 13)

It is not possible to accept the contention that since the rejoinder of the respondent was in response to the counter of the member of LIC printed in December 1978, the same has become stale by passage of time and has lost its relevance and hence the High Court's direction to the LIC to print and publish the same in its magazine should be annulled. By refusing to print and publish the rejoinder the LIC had violated the respondent's fundamental right. A wrong doer cannot be heard to say that its persistent refusal to print and publish the article must yield the desired result, namely to frustrate the respondent. The Court must be careful to see that it does not, even unwittingly, aid the effort to defeat a party's right. Besides, if the respondent thinks that the issue is live and relevant and desires its publication, his assessment must be accepted. However, in order that the reader knows and appreciates why the rejoinder has appeared after such long years it is directed that the LIC will, while publishing the rejoinder as directed by the High Court, print an explanation and an apology for the delay. With this modification, the LIC's appeal must fail. (Para 14)

Constitution of India — Arts. 19(1)(a) and 19(2) — Every citizen has right under Art. 19(1)(a) to publish, circulate, propagate and disseminate his ideas as also his answer to criticism levelled against them through the communication channels including print and electronic media subject to the reasonable restrictions under Art. 19(2)

Every free citizen has an undoubted right to lay what sentiments he pleases before the public. Freedom to air one' views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. The Supreme Court has always placed a broad interpretation on the value and content of Article 19(1)(*a*), making it subject only to the restrictions permissible under Article 19(2). Efforts by intolerant authorities to curb or suffocate this freedom have always been firmly repelled, more so when public authorities have betrayed autocratic tendencies. (Paras 8 and 10)

The words 'freedom of speech and expression' must be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media i.e. periodicals, magazines or journals or through any other communication channel e.g. the radio and the television. The right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him. The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy. These communication channels are great purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on vital issues of national importance. Modern communication mediums advance public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant

functioning of a democracy. Therefore, in any set-up, more so in a democratic set-up like ours, dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2). This freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest.

Romesh Thappar v. *State of Madras,* 1950 SCR 594: AIR 1950 SC 124; *Indian Express Newspapers (Bombay) Pvt. Ltd.* v. *Union of India,* (1985) 1 SCC 641: (1985) 2 SCR 287: 1985 SCC (Tax) 121; *Odyssey Communications Pvt. Ltd.* v. *Lokvidayan Sanghatana,* (1988) 3 SCC 410; *S. Rangarajan* v. *P. Jagjivan Ram,* (1989) 2 SCC 574, *relied on*

Interpretation of the Constitution — Constitutional provisions, particularly fundamental rights, should be broadly construed unless context otherwise requires — Constitution of India, Part III

A constitutional provision is never static, it is ever-evolving and ever-changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach. The Constitution-makers employed a broad phraseology while drafting the fundamental rights so that they may be able to cater to the needs of a changing society. Therefore, constitutional provisions must receive a broad interpretation and the scope and ambit of such provisions, in particular the fundamental rights, should not be cut down by too astute or too restricted an approach, unless the context otherwise requires. (Paras 6 and 7)

Sakal Papers (P) Ltd. v. *Union of India,* (1962) 3 SCR 842: AIR 1962 SC 305, *relied on*

Dennis v. United States, 341 US 494: 95 L Ed 1137 (1951); *Joseph Burstyn, Inc.* v. *Wilson,* 343 US 495; *Mutual Film Corporation* v. *Industrial Commission of Ohio,* 236 US 230, *referred to*

Constitution of India — Arts. 32 and 226 — Pleading — State violating fundamental right of a citizen — Plea taken by the State which has the effect of indirectly defeating the very right of the citizen cannot be allowed — Practice and procedure (Para 14)

II

Constitution of India — Arts. 19(1)(a), 19(2) and 14 — Right of film-maker to have his award winning film telecast on TV — Denial of — Burden on Doordarshan to justify its stand — Documentary film depicting true appraisal of Bhopal gas leak disaster, prepared by respondent, granted 'U' certificate by censors and given the Golden Lotus award being best non-feature film of 1987 — But Doordarshan refusing to telecast the film on grounds of its contents being outdated and having lost relevance, it lacking moderation, restraint, fairness and balance; raising of issues by political parties concerning the tragedy; and compensation claims being sub judice — Held, grounds not made out — Doordarshan being State controlled agency financed by public funds, not justified in refusing to telecast the film — High Court's direction for telecasting the film affirmed — Cinematograph Act, 1952, Ss. 5-A and 5-B

Constitution of India — Arts. 19(1)(a), 19(2) and 14 — Freedom of expression through movies — Prior restraint on, by way of censorship permis-

sible — But heavy burden lies on the authorities imposing the restriction to justify the same as being reasonable and not violative of Art. 14 — Cinematograph Act, 1952, S. 5-B

The respondent produced a documentary film on the Bhopal Gas Disaster entitled "*Beyond Genocide*". This film was awarded the Golden Lotus, being the best non-feature film of 1987. At the time of the presentation of awards the Central Minister for Information & Broadcasting had made a declaration that the award winning short films will be telecast on Doordarshan. The respondent submitted for telecast of his film to Doordarshan. Though Doordarshan recognised that the documentary was"an appraisal of what exactly transpired in Bhopal on the date the gas leak occurred" but it refused to telecast the film on grounds that (*i*) the film was outdated (*ii*) it had lost its relevance (*iii*) it lacked moderation and restraint (*iv*) it was not fair and balanced (*v*) political parties were raising various issues concerning the tragedy and (*vi*) claims for compensation by victims were sub judice. In addition to these grounds the film was also not found fit for telecast as it was likely to create commotion to the already charged atmosphere and because the film criticised the action of the State Government, which was not permissible under the guidelines. The respondent filed a writ petition before the High Court challenging the refusal to telecast the film on the ground of violation of his fundamental right under Article 19(1)(*a*) and for a mandamus to Doordarshan to telecast the same. In the counter filed to the writ petition it was contended that although a decision was taken to arrange a fixed fortnightly telecast of award winning documentaries, no decision was taken to telecast all national award winning documentaries. It was emphasised that the parameters applied for selection of a film for national award were not the same as applied by the Film Selection Committee of Doordarshan for selection of a film for telecast. It was submitted that the Screening Committee found that the respondent's film did not satisfy the accepted norms for display of documentary films on Doordarshan. These norms were:

"(*i*) Criticism of friendly countries;

(*ii*) Attack on religions and communities;

(*iii*) Anything obscene and defamatory;

(*iv*) Incitement of violence or anything against maintenance of law and order;

(*v*) Anything amounting to contempt of court;

(*vi*) Attack on a political party by name;

(*vii*) Hostile criticism of any State or Centre."

The High Court came to the conclusion that the respondent's right under Article 19(1)(*a*) obligated the Doordarshan to telecast the film since the guidelines or norms on which the refusal was based were purely executive in character and not law within the meaning of Article 19(2). It, therefore, directed the Doordarshan to telecast the film "*Beyond Genocide*" at a time and date convenient to it keeping in view the public interest and on such terms and conditions as it would like to impose in accordance with law. Before the

Supreme Court it was contended on behalf of the Doordarshan that S. 5-B(2) of the Cinematograph Act, 1952 empowers the Central Government to issue directions setting out the principles which shall guide the authority competent to grant certificates under the Act in sanctioning films for public exhibition and since the exemption granted to Doordarshan under Section 9 of the Act from the provisions relating to certification of films in Part II of the Act and Rules made thereunder by notification dated October 16, 1984 (see para 18) subject to the condition that while clearing programmes for telecast Doordarshan shall keep in view the film certification guidelines issued by the Central Government under Section 5-B of the Act, the guidelines clearly have statutory flavour and would, therefore, fall within the protective umbrella of Article 19(2) and the High Court was wrong in brushing them aside as mere departmental/executive directions or notings on a file not having the force of law. Rejecting the appeal of Doordarshan

Held :

Once it is recognised that a film-maker has a fundamental right under Article 19(1)(*a*) to exhibit his film, the onus lies on the party which claims that it was entitled to refuse enforcement of this right by virtue of law made under Article 19(2) to show that the film did not conform to the requirements of that law; in the present case the guidelines relied upon. The respondent had a right to convey his perception of the gas disaster in Bhopal through the documentary film prepared by him. This film not only won the Golden Lotus award but was also granted the 'U' certificate by the censors. It has been conceded that the film faithfully brings out the events that took place at Bhopal on that fateful night. Therefore, the respondent cannot be accused of having distorted the events subsequent to the disaster and that it was not fair and balanced and lacked in moderation and restraint. It is nowhere stated which part of the film lacks moderation and/or restraint nor is it shown how the film can be described as not fair and balanced. Merely because it is critical of the State Government, perhaps because of its incapacity to cope with an unprecedented situation, is no reason to deny selection and publication of the film. So also pendency of claims for compensation does not render the matter sub judice so as to shut out the entire film from the community. In fact the community was keen to know what actually had happened, what is happening, what remedial measures the State authorities are taking and what are the likely consequences of the gas leak. To bring out the inadequacy of the State effort or the indifference of the officers, etc., cannot amount to an attack on any political party if the criticism is genuine and objective and made in good faith. If the norm for appraisal was the same as applied by the censors while granting the 'U' certificate, Doordarshan cannot refuse to exhibit it. It is not that it was not sent for being telecast soon after the disaster that one could say that it is outdated or has lost relevance. It is even today of relevance and the press has been writing about it periodically. It has not been pointed out how it could be said that the film was not consistent with the accepted norms set out earlier. The refusal to telecast was not based on the ground that the list of award winning films was long and on the basis of inter se priority amongst such films and the time allocated for telecasting such films, it was not possible to telecast the film. Doordarshan being a State controlled

agency funded by public funds could not have denied access to the screen to the respondent except on valid grounds. (Paras 20, 24 and 19)

The freedom conferred on a citizen by Article 19(1)(*a*) includes the freedom to communicate one's ideas or thoughts through a newspaper, a magazine or a movie. Traditionally prior restraints, regardless of their form, are frowned upon as threats to freedom of expression since they contain within themselves forces which if released have the potential of imposing arbitrary and at times irrational decisions. However, the right must be so exercised as not to come in direct conflict with the right of another citizen. It must, therefore, be so exercised as not to jeopardise the right of another or clash with the paramount interest of the State or the community at large. Movie is a powerful mode of communication and has the capacity to make a profound impact on the minds of the viewers and it is, therefore, essential to ensure that the message it conveys is not harmful to the society or even a section of the society. Censorship by prior restraint, therefore, seems justified for the protection of the society from the ill-effects that a motion picture may produce if unrestricted exhibition is allowed. Censorship is thus permitted to protect social interests enumerated in Article 19(2) and Section 5-B of the Act. For this reason need for prior restraint has been recognised and our laws have assigned a specific role to the censors as such is the need in a rapidly changing societal structure. But since permissible restrictions, albeit reasonable, are all the same restrictions on the exercise of the fundamental right under Article 19(1)(*a*), such restrictions are bound to be viewed as anathema, in that, they are in the nature of curbs or limitations on the exercise of the right and are, therefore, bound to be viewed with suspicion, thereby throwing a heavy burden on the authorities that seek to impose them to show that the restrictions are reasonable and permissible in law. Such censorship must be reasonable and must answer the test of Article 14. (Paras 22, 21 and 23)

K.A. Abbas v. *Union of India,* (1970) 2 SCC 780: (1971) 2 SCR 446; *Ramesh* v. *Union of India,* (1988) 1 SCC 668: 1988 SCC (Cri) 266; *S. Rangarajan* v. *P. Jagjivan Ram,* (1989) 2 SCC 574, *relied on*

New York Times Company v. *United States,* 403 US 713, *referred to*

R-M/T/11438/C

Advocates who appeared in this case :

K.T.S. Tulsi, Additional Solicitor-General and P.P. Rao, Senior Advocate (Kailash Vasdev, Ms Alpana Kirpal, A. Subba Rao, Hemant Sharma and C.V.S. Rao, Advocates, with them) for the Appellant;

P.H. Parekh, B.K. Brar, Ashok Aggarwal and P.D. Sharma, Advocates, for the Respondent.

[Ed.: While dilating on the scope of the freedom of speech and expression to include the freedom of circulation and propagation of ones ideas and views "in periodicals, magazines and journals or through the electronic media" (para 8) and that "the right extends to the citizen being permitted to use the media to answer the media criticism levelled against the view propagated by him" (para 8), the Court has not as a law laid down any general right of access to the media owned by others. In fact the Court has been quick to point out in para 13 that the view it was taking "is in the peculiar facts of the case" and the Court should

not be understood as laying down an absolute proposition that merely because the LIC is a State and is running a magazine with public funds it is under an obligation to print any matter that any informed citizen may forward for publication. This is rightly so as the essence of Art. 19(1)(*a*) is the freedom to express one's own view without unreasonable restriction by the State and so in essence means freedom to circulate and propagate one's ideas naturally to the extent of one's own resources and reach. Surely it cannot extend to a right to publish or propagate one's views in the media owned by another having rival or opposing views as that would be impinging on the freedom of expression of that party by preying on his resources which he would otherwise utilise for exercise of his freedom of speech and expression. [For a scintillating discussion of the "right of reply" and "right of access" and their conflict with the freedom of the press *see* Veena Bakshi: " *'Right of Reply': A Dissonant Note in the System of Freedom of Expression — Perspectives on the Yogakshema case"*, (1982) 1 SCC (Jour) 1-26, being a comment on the High Court's judgment in the present case.]

It seems what weighed more with the Courts in the LIC matter was the plea of fairness based on Art. 14. Perhaps the decision would have been different if the rejoinder had not at all been published in *The Hindu* and had only been published in *Yogakshema* with full details of publication of the petitioner's article in *The Hindu*. In our view, it is the republication of the rejoinder alone that introduced the element of unfairness.

What should develop is a comity amongst the media that whenever a refutation or rejoinder is published or aired, full footnote or reference is given about the publication under comment so that a reader or viewer has the necessary details to access it. Newspapers, magazines and journals may well emulate the citation system perfected by law reports and used in all legal publications.]

The Judgment of the Court was delivered by

AHMADI, J.— Special leave granted in SLP (C) No. 339 of 1991.

2. These two appeals though arising out of different circumstances and concerning different parties, relate to the scope of our constitutional policy of freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. The importance of the constitutional question prompted this Court to grant special leave to appeal under Article 136 of the Constitution. We may properly begin the discussion of this judgment by stating the factual background of the two cases in the light of which we are required to examine the scope of the constitutional liberty of speech and expression.

3. Civil Appeal No. 1254 of 1980 arises out of the decision of the Gujarat High Court in Special Civil Application No. 2711 of 1979 decided by a Division Bench on June 17, 1980††. The respondent, the executive trustee of the Consumer Education & Research Centre

†† Reported as *Prof. Manubhai D. Shah* v. *Life Insurance Corporation of India*, AIR 1981 Guj 15. See case-comment at (1982) 1 SCC (J) 1-26

(CERC), Ahmedabad, after undertaking research into the working of the Life Insurance Corporation (LIC) published on July 10, 1978 a study paper titled "*A Fraud on Policy Holders — A Shocking Story*". This study paper portrayed the discriminatory practice adopted by the LIC which adversely affected the interest of a large number of policy holders. This study paper was widely circulated by the respondent. Mr N.C. Krishnan, a member of the LIC prepared a counter to the respondent's study paper and published the same as an article in *The Hindu*, a daily newspaper, challenging the conclusions reached by the respondent in his study paper. The respondent prepared a rejoinder which was published in the same newspaper. The LIC publishes a magazine called *Yogakshema* for informing its members, staff and agents about its activities. It is the contention of the LIC that this magazine is an in-house magazine and is not put in the market for sale to the general public. Mr Krishnan's article which was in the nature of a counter to the respondent's study paper was published in this magazine. The respondent thereupon requested the LIC to publish his rejoinder to the said article in the said magazine but his request was spurned. The respondent thereafter met the Chairman of the LIC and requested him to revise the decision and to publish the article in the magazine but to no avail. Thereupon he filed the petition contending that the refusal to publish his rejoinder in the magazine violated his fundamental right under Articles 14 and 19(1)(*a*) of the Constitution. The High Court came to the conclusion that the LIC's stand that the magazine was an in-house magazine was untenable for two reasons, namely (1) it was available to anyone on payment of subscription; and (2) it invited articles for publication therein from members of the public. The High Court took the view that merely because the magazine finds circulation among officers, employees and agents of the Corporation, it does not acquire the character of an in-house magazine since the same can be purchased by any member of the public on payment of subscription and members of the public are invited to contribute articles for publication in the said magazine. It further held that assuming that the magazine was an in-house magazine as contended by the LIC, the Corporation cannot under the guise of publication of an in-house magazine violate the fundamental right of the respondent. Taking note of the fact that the LIC was 'state' within the meaning of Article 12 of the Constitution and the in-house magazine was published with the aid of public funds and public money, the High Court held that in the interest of democracy and free society the magazine should be available to both, an admirer and a critic, for dissemination of information. In this view of the matter the High Court concluded that the LIC had violated the respondent's fundamental right under Article 19(1)(*a*) of the Constitution by

refusing to publish his rejoinder to Mr Krishnan's counter to his study paper. It also concluded that the refusal of the LIC was arbitrary and violative of Article 14 of the Constitution as well. The High Court, therefore, directed the LIC to publish in the immediate next issue of *Yogakshema* the respondent's rejoinder to Mr Krishnan's reply to his study paper of July 10, 1978. This view of the Gujarat High Court is assailed by the LIC in the first appeal.

4. In the other appeal the facts reveal that Shri Tapan Bose, Managing Trustee of the respondent trust, had produced a documentary film on the Bhopal Gas Disaster titled *"Beyond Genocide"*. This film was awarded the Golden Lotus, being the best non-feature film of 1987. The respondent contended that at the time of the presentation of awards the Central Minister for Information & Broadcasting had made a declaration that the award winning short films will be telecast on Doordarshan. The respondent submitted for telecast his film to Doordarshan but Doordarshan refused to telecast the same on the ground : "the contents being outdated do not have relevance now for the telecast". The respondent represented to the Minister for Information & Broadcasting, but to no avail. He, therefore, filed the writ petition, being Civil Writ Petition No. 212 of 1989, challenging the refusal on the ground of violation of his fundamental right under Article 19(1)(*a*) of the Constitution and for a mandamus to Doordarshan to telecast the same. In the counter filed to the writ petition it was contended that although a decision was taken to arrange a fixed fortnightly telecast of award winning documentaries, no decision was taken to telecast all national award winning documentaries. It was emphasised that the parameters applied for selection of a film for national award were not the same as applied by the Film Selection Committee of Doordarshan for selection of a film for telecast. Emphasis was laid by Doordarshan on socially relevant films which were fair and balanced and the respondent's film which was previewed by a duly constituted Screening Committee was not found to meet that requirement for telecast on Doordarshan. The Ministry of Information & Broadcasting had reconsidered the matter in the light of the respondent's representation but did not see any reason to depart from the view taken by the Screening Committee. The Screening Committee had founded its decision on the accepted norms for display of the documentary films on Doordarshan and since the respondent's film did not satisfy the norms for the reason that it lacked moderation and restraint in judging things and expressing opinions, it was found not suitable for telecast. It also took into consideration the fact that while most of the claims for compensation for the victims of Bhopal Disaster were sub judice and political parties were raising certain issues, it was inexpedient and unwise to

telecast the film. It was also feared that it would only end in further vitiating the atmosphere and will serve no social purpose. The High Court came to the conclusion that the respondent's right under Article 19(1)(*a*) of the Constitution obligated Doordarshan to telecast the film since the guidelines or norms on which the refusal was based were purely executive in character and not law within the meaning of Article 19(2) of the Constitution. It, therefore, came to the conclusion that no restriction could be placed on the fundamental right guaranteed by Article 19(1)(*a*) of the Constitution save and except by law permitted by Article 19(2) and not by executive or non-statutory guidelines on the basis of which Doordarshan had refused to telecast the film. It took the view that these norms were for internal guidance and cannot interfere with the fundamental right guaranteed by Article 19(1)(*a*) of the Constitution. It, therefore, directed Doordarshan to telecast the film "*Beyond Genocide*" at a time and date convenient to it keeping in view the public interest and on such terms and conditions as it would like to impose in accordance with law. It is against this direction of the High Court that the second appeal is preferred.

5. Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feelings to others. Freedom of speech and expression is thus a natural right which a human being acquires on birth. It is, therefore, a basic human right. "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims the Universal Declaration of Human Rights (1948). The people of India declared in the Preamble of the Constitution which they gave unto themselves their resolve to secure to all citizens liberty of thought and expression. This resolve is reflected in Article 19(1)(*a*) which is one of the Articles found in Part III of the Constitution which enumerates the Fundamental Rights. That Article reads as under:

> "19. *Protection of certain rights regarding freedom of speech, etc.*— (1) All citizens shall have the right—
>
> (*a*) to freedom of speech and expression;"

Article 19(2) which has relevance may also be reproduced:

> "19. (2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or

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

6. A constitutional provision is never static, it is ever-evolving and ever-changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach. If such an approach had been adopted by the American Courts, the First Amendment — (1791) — "Congress shall make no law abridging the freedom of speech, or of the press" — would have been restricted in its application to the situation then obtaining and would not have catered to the changed situation arising on account of the transformation of the print media. It was the broad approach adopted by the Court which enabled them to chart out the contours of ever-expanding notions of press freedom. In *Dennis* v. *United States*[1] Justice Frankfurter observed:

> "... The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illuminated by the presuppositions of those who employed them."

Adopting this approach in *Joseph Burstyn, Inc.* v. *Wilson*[2] the Court rejected its earlier determination to the contrary in *Mutual Film Corporation* v. *Industrial Commission of Ohio*[3] and concluded that expression through motion pictures is included within the protection of the First Amendment. The Court thus expanded the reach of the First Amendment by placing a liberal construction on the language of that provision. It will thus be seen that the American Supreme Court has always placed a broad interpretation on the constitutional provisions for the obvious reason that the Constitution has to serve the needs of an ever-changing society.

7. The same trend is discernible from the decisions of the Indian courts also. It must be appreciated that the Indian Constitution has separately enshrined the fundamental rights in Part III of the Constitution since they represent the basic values which the people of India cherished when they gave unto themselves the Constitution for free India. That was with a view to ensuring that their honour, dignity and self respect will be protected in free India. They had learnt a bitter lesson from the behaviour of those in authority during the colonial rule. They were, therefore, not prepared to leave anything to chance. They, therefore, considered it of importance to protect specific basic human rights by incorporating a Bill of Rights in the Constitution in the form of fundamental rights. These fundamental rights were intended to serve genera-

1 341 US 494 : 95 L Ed 1137 (1951)
2 343 US 495
3 236 US 230

tion after generation. They had to be stated in broad terms leaving scope for expansion by courts. Such an intention must be ascribed to the Constitution-makers since they had themselves made provisions in the Constitution to bring about a socio-economic transformation. That being so, it is reasonable to infer that the Constitution-makers employed a broad phraseology while drafting the fundamental rights so that they may be able to cater to the needs of a changing society. It, therefore, does not need any elaborate argument to uphold the contention that constitutional provisions in general and fundamental rights in particular must be broadly construed unless the context otherwise requires. It seems well settled from the decisions referred to at the Bar that constitutional provisions must receive a broad interpretation and the scope and ambit of such provisions, in particular the fundamental rights, should not be cut down by too astute or too restricted an approach. See *Sakal Papers (P) Ltd.* v. *Union of India*[4].

8. The words "freedom of speech and expression" must, therefore, be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy. Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. It cannot be gainsaid that modern communication mediums advance public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. Therefore, in any set-up, more so in a democratic set-up like ours, dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2) of the Constitution. It follows that a citizen for propagation of his or her ideas has a right to publish for circulation his views in periodicals, magazines and journals or through the electronic media since it is well known that these communication channels are great purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on

4 (1962) 3 SCR 842: AIR 1962 SC 305

vital issues of national importance. Once it is conceded, and it cannot indeed be disputed, that freedom of speech and expression includes freedom of circulation and propagation of ideas, there can be no doubt that the right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him. Every free citizen has an undoubted right to lay what sentiments he pleases before the public; to forbid this, except to the extent permitted by Article 19(2), would be an inroad on his freedom. This freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest. It is manifest from Article 19(2) that the right conferred by Article 19(1)(*a*) is subject to imposition of reasonable restrictions in the interest of, amongst others, public order, decency or morality or in relation to defamation or incitement to an offence. It is, therefore, obvious that subject to reasonable restrictions placed under Article 19(2) a citizen has a right to publish, circulate and disseminate his views and any attempt to thwart or deny the same would offend Article 19(1)(*a*).

9. We may now refer to the case-law on the subject. In *Romesh Thappar* v. *State of Madras*[5] this Court held that the freedom of speech and expression includes freedom of propagation of ideas and this freedom is ensured by the freedom of circulation. It pointed out that freedom of speech and expression are the foundation of all democratic organisations and are essential for the proper functioning of the processes of democracy. This view was reiterated in *Sakal Papers Pvt. Ltd.*[4] wherein this Court observed that the freedom of speech and expression guaranteed by Article 19(1)(*a*) includes the freedom of the press. For propagating his ideas a citizen had the right to publish them, to disseminate them and to circulate them, either by word of mouth or by writing. In *Indian Express Newspapers (Bombay) Pvt. Ltd.* v. *Union of India*[6] this Court after pointing out that communication needs in a democratic society should be met by the extension of specific rights e.g., the right to be informed, the right to inform, the right to privacy, the right to participate in public communications, the right to communicate, etc., proceeded to observe at page 316 as follows: (SCC p. 664, para 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

5 1950 SCR 594: AIR 1950 SC 124
6 (1985) 1 SCC 641: 1985 SCC (Tax) 121: (1985) 2 SCR 287

public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to governments and other authorities. The authors of the articles which are published in the newspapers have to be critical of the actions of government in order to expose its weaknesses. Such articles tend to become an irritant or even a threat to power."

This Court pointed out that the constitutional guarantee of the freedom of speech and expression is not so much for the benefit of the press as it is for the benefit of the public. The people have a right to be informed of the developments that take place in a democratic process and the press plays a vital role in disseminating this information. Neither the Government nor any instrumentality of the Government or any public sector undertaking run with the help of public funds can shy away from articles which expose weaknesses in its functioning and which in given cases pose a threat to their power by attempting to create obstacles in the information percolating to the members of the community. In *Odyssey Communications Pvt. Ltd.* v. *Lokvidayan Sanghatana*[7] a public interest litigation was commenced under Article 226 of the Constitution to restrain the authorities from telecasting the serial "*Honi Anhony*" on the plea that it was likely to spread false and blind beliefs and superstition amongst the members of the public. The High Court by an interim injunction restrained the authorities from telecasting the serial which led the producer thereof to approach this Court under Article 136 of the Constitution. This Court while allowing the appeal held that the right of a citizen to exhibit films on the Doordarshan subject to the conditions imposed by the Doordarshan being a part of the fundamental right of freedom of expression could be curtailed only under circumstances set out in Article 19(2) and in no other manner. The right to exhibit the film was similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisement hoardings, etc. More recently in *S. Rangarajan* v. *P. Jagjivan Ram*[8] this Court was required to consider if the Madras High Court was justified in revoking the 'U' certificate issued to a Tamil Film "*Ore Oru Gramathile*" for public exhibition. The fundamental point urged before this Court was based on the freedom enshrined in Article 19(1)(*a*). This Court after pointing out the difference in language between the U.S. First Amendment clause and Article 19(1)(*a*), proceeded to observe in paragraph 10 as under: (SCC p. 582)

7 (1988) 3 SCC 410
8 (1989) 2 SCC 574

"Movie doubtless enjoys the guarantee under Article 19(1)(*a*) but there is one significant difference between the movie and other modes of communication. The movie cannot function in a free marketplace like the newspaper, magazine or advertisement. Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The focussing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for everyone who sees it. In view of the scientific improvements in photography and production the present movie is a powerful means of communication."

This Court emphasised that the freedom of expression means the right to express one's opinion by word of mouth, writing, printing, picture or in any other manner. It would thus include the freedom of communication and the right to propagate or publish opinion. Concluding the discussion this Court observed in paragraph 53 as under: (SCC p. 599)

"We end here as we began on this topic. Freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1)(*a*) can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself."

10. From the above resume of the case-law it is evident that this Court has always placed a broad interpretation on the value and content of Article 19(1)(*a*), making it subject only to the restrictions permissible under Article 19(2). Efforts by intolerant authorities to curb or suffocate this freedom have always been firmly repelled. More so when public authorities have betrayed autocratic tendencies.

11. The question then is whether the respondent of the first appeal could as a matter of right insist that the LIC print his rejoinder in their magazine. The LIC denied this right on the ground that their magazine was an in-house magazine circulated amongst subscribers who were policy holders, officers, employees and agents of the Corporation. The High Court rejected this contention on two grounds in the main, viz., (*i*) it is available to anyone on payment of subscription and (*ii*) members of

the public are invited to contribute articles for publication. Even on the assumption that it is an in-house magazine the High Court observed "under the pretext and guise of publishing a house magazine, the Corporation cannot violate the fundamental rights of the petitioner if he has any". According to the High Court a house magazine cannot claim any privilege against the fundamental rights of a citizen. No serious exception can be taken to this approach which commended itself to the High Court. In the first place it must be remembered that it is not the case of the LIC that the respondent's study paper contains any material which can be branded as offensive, in the sense that it would fall within any one of the restrictive clauses of Article 19(2). The study paper is a research document containing statistical information to support the conclusions reached by the author. The underlying idea is to point out that unduly high premiums are charged by the LIC from those taking out life insurance policies thereby denying access to insurance coverage to a vast majority of people who cannot afford to pay the high premiums. The forwarding letter of July 10, 1978 would show that copies of the study paper were circulated to a few informed citizens with a request to disseminate the contents thereof through articles, speeches, etc. Mr N.C. Krishnan wrote a counter "*LIC and its Policy Holders*" which appeared in *The Hindu* of November 6, 1978. This article begins by adverting to the study paper circulated by the respondent. The respondent prepared a rejoinder "*Raw deal for Policy Holders*" which too was published in *The Hindu* of December 4, 1978. The LIC then printed and published the article of Mr Krishnan in its magazine *Yogakshema* (December 1978 issue). On the respondent learning about the same, he requested that in fairness his rejoinder which was already published in *The Hindu* should also be published in the said magazine to present a complete picture to the reader. The LIC refused to accede to this request and hence this litigation.

12. There is no dispute that the LIC is a State within the meaning of Article 12 of the Constitution, vide *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*[9]. It is created under an Act, namely, the Life Insurance Corporation Act, 1956, and is charged with the duty "to carry on Life Insurance business, whether in or outside India". It is further charged with the duty to so exercise its powers under the Act as "to secure that life insurance business is developed to the best advantage of the community" [Section 6(1)]. It is, therefore, obvious that the LIC must function in the best interest of the community. The community is, therefore, entitled to know whether or not this requirement of the statute is being satisfied in the functioning of the LIC. The respondent's

9 (1975) 1 SCC 421: 1975 SCC (L&S) 101

effort in preparing the study paper was to bring to the notice of the community that the LIC had strayed from its path by pointing out that its premium rates were unduly high when they could be low if the LIC avoided wasteful indulgences. The endeavour was to enlighten the community of the drawbacks and shortcomings of the Corporation and to pin-point the areas where improvement was needed and was possible. With a view to stimulating a debate a study paper was prepared and circulated which Mr Krishnan, a member of LIC, countered. Since Mr Krishnan had tried to demolish some of the points raised by the respondent in his study paper, the respondent had published a rejoinder in *The Hindu*. However, the LIC refused to publish it in their magazine financed from public funds. Such an attitude on the part of the LIC can be described as both unfair and unreasonable; unfair because fairness demanded that both view-points were placed before the readers, however limited be their number, to enable them to draw their own conclusions and unreasonable because there was no logic or proper justification for refusing publication. A monopolistic State instrumentality which survives on public funds cannot act in an arbitrary manner on the specious plea that the magazine is an in-house one and it is a matter of its exclusive privilege to print or refuse to print the rejoinder. It is difficult to understand why the LIC should feel shy of printing the rejoinder if it has nothing to fear. By denying information to the consumers as well as other subscribers the LIC cannot be said to be acting in the best interest of the community. It is not the case of the LIC that the rejoinder to Mr Krishnan's article is in any manner prejudicial to the members of the community or that it is based on imaginary or concocted material. That being so on the fairness doctrine the LIC was under an obligation to publish the rejoinder since it had published Mr Krishnan's counter to the study paper. The respondent's fundamental right of speech and expression clearly entitled him to insist that his views on the subject should reach those who read the magazine so that they have a complete picture before them and not a one-sided or distorted one.

13. For the above reasons we do not find any infirmity in the view taken by the High Court on the LIC's obligation to print the rejoinder in its magazine. We must clarify that we should not be understood as laying down an absolute proposition that merely because the LIC is a State and is running a magazine with public funds it is under an obligation to print any matter that any informed citizen may forward for publication. The view that we are taking is in the peculiar facts of the case.

14. It was contended by the learned counsel for the LIC that since the rejoinder of the respondent is to Mr Krishnan's article printed in December 1978, the same has become stale by passage of time and has

lost its relevance and hence this Court should annul the High Court's directive to the LIC to print and publish the same in its magazine. Counsel for the respondent submitted that the issue raised by the respondent regarding high premium rates is still live as the situation has not improved from what it was in 1978. It may be that the statistical information in the rejoinder may be outdated but, contends the learned counsel, the issue that the LIC is charging unduly high premium rates by refusing to prune its avoidable expenses, is still relevant. He submits that if the court accedes to the submission of the learned counsel for the LIC it would result in placing a premium on the recalcitrant attitude of the LIC. We see force in this submission. By refusing to print and publish the rejoinder the LIC had violated the respondent's fundamental right. A wrong doer cannot be heard to say that its persistent refusal to print and publish the article must yield the desired result, namely to frustrate the respondent. The Court must be careful to see that it does not, even unwittingly, aid the effort to defeat a party's right. Besides, if the respondent thinks that the issue is live and relevant and desires its publication, we think we must accept his assessment. However, in order that the reader knows and appreciates why the rejoinder has appeared after such long years we direct that the LIC will, while publishing the rejoinder as directed by the High Court, print an explanation and an apology for the delay. With this modification, the LIC's appeal must fail.

15. That takes us to the appeal involving Doordarshan's refusal to telecast the documentary "*Beyond Genocide*" based on the Bhopal Gas Disaster. There is no dispute that this film won the Golden Lotus award as the best non-feature film of 1987. Yet, as the judgment of the High Court reveals, Doordarshan refused to telecast it on the ground that "the contents being outdated do not have relevance now for the telecast". It was emphasised that since the parameters applied for selection of a film for national award were different from those applied by the Film Selection Committee of Doordarshan when it comes to selecting a film for telecast, the mere fact that a film has won a national award is not sufficient for all national award winning films are not ipso facto fit for telecast on television. It was said that unless a film is socially relevant and fair and balanced it is not cleared for telecast. The film in question did not satisfy this broad norm since it was found lacking in moderation and restraint and hence it was not cleared for telecast. Lastly it was said that since claims for compensation of the victims of the tragedy were pending and political parties were raising various issues, it was thought inexpedient to screen the film. It is, however, admitted in paragraph 2 of the special leave petition: "The documentary is an appraisal of what exactly transpired in Bhopal on the date the gas leak occurred". Admittedly the

said film was granted a 'U' certificate by the Central Board of Film Certification under Section 5-A of the Cinematograph Act, 1952 (hereinafter called 'the Act').

16. In the High Court, Doordarshan had by way of an additional affidavit contended that before refusing to telecast the film, its selection committee had examined the film with a view to finding out if it conformed to the norms laid down for selection of a documentary film for telecast. These norms on which reliance was placed have been extracted in the judgment of the High Court and read as under:

"(*i*) Criticism of friendly countries;

(*ii*) Attack on religions and communities;

(*iii*) Anything obscene and defamatory;

(*iv*) Incitement of violence or anything against maintenance of law and order;

(*v*) Anything amounting to contempt of court;

(*vi*) Attack on a political party by name;

(*vii*) Hostile criticism of any State or Centre."

The High Court observes that these guidelines were purely departmental/executive instructions or notings on the file for internal guidance which cannot curtail the freedom conferred by Article 19(1)(*a*) and not being "law" could not claim the protection of Article 19(2) of the Constitution. The learned Additional Solicitor General submitted that the High Court had completely misdirected itself in not appreciating that these norms were fixed keeping in mind the requirement of Section 5-B of the Act which section was consistent with Article 19(2) extracted earlier. We may now examine the scheme of the Act.

17. The Act was enacted to provide for the certification of cinematograph films for exhibition and for regulating their exhibition. Section 3 of the Act empowers the Central Government to constitute a Board consisting of a Chairman, five whole time members and six honorary members, three of whom must be persons engaged or employed in the film industry, for the purpose of sanctioning films for public exhibition. Section 3-B empowers the Board so constituted to constitute by special or general order an Examining Committee for the examination of any film or class of films and a Revising Committee for reconsidering, if necessary, the recommendations of the Examining Committee. Any person desiring to exhibit any film has to make an application as provided by Section 4 to the Board in the prescribed manner for a certificate and the Board may after examination of the film sanction the film for unrestricted public exhibition or sanction the film for public exhi-

bition restricted to adults or to direct the applicant to carry out such excisions and modifications in the film as it thinks necessary before sanctioning it for unrestricted public exhibition or for public exhibition restricted to adults or refuse to sanction the film for public exhibition. Section 4-A provides for the examination of films by the Examining Committee and in the case of difference of opinions amongst the members of the Examining Committee for further examination by the Revising Committee. Section 5-A provides for certification of films. If after examination the Board considers that the film is suitable for unrestricted public exhibition or that although not suitable for such exhibition, it is suitable for public exhibition restricted to adults, it is required to issue a 'U' certificate in the case of the former and an 'A' certificate in the case of the latter. Section 5-B provides for laying down principles for guidance in the matter of certification of films. This section to the extent relevant for our purpose reads as under:

> "5-B. *Principles for guidance in certifying films.*— (1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the sovereignty and integrity of India the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence.
>
> (2) Subject to the provisions contained in sub-section (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition."

Section 5-C provides for the constitution of Appellate Tribunals, whereas Section 5-D provides for appeals against the Board's decision refusing to grant the certificate or granting only 'A' certificate or directing the applicant to carry out any excisions or modifications. In addition thereto revisional powers have been conferred on the Central Government to call for the record of any proceeding in relation to any film at any stage where it is not made the subject matter of appeal, to enquire into the matter and make such order in relation thereto as it thinks fit and where necessary give a direction that the exhibition of the film should be suspended for a period not exceeding two months. Sub-section (5) of Section 6 lays down that the Central Government may, if satisfied in relation to any film in respect of which an order has been made by an appellate Tribunal under Section 5-B that it is necessary so to do in the interests of (*i*) the sovereignty and integrity of India or (*ii*) the security of the State or (*iii*) friendly relations with foreign States or (*iv*) public order

or decency or morality, make such enquiry into the matter as it deems necessary and pass such order in relation thereto as it thinks fit. Thereupon the Board must dispose of the matter in conformity with such order. Section 7 lays down the penalties for contravention of the requirements of Part II of the Act. Section 8 confers power to make rules and Section 9 empowers the Central Government to exempt the exhibition or export of any film or class of films from any of the provisions of the said part or of any rules made thereunder subject to such conditions and restrictions, if any, as it may impose. Part III of the Act deals with the regulation of exhibitions by means of cinematograph with which we are not concerned. This in brief is the scheme of the statute.

18. In exercise of power conferred by sub-section (2) of Section 5-D of the Act the Central Government issued a notification dated January 7, 1978 laying down the principles which should guide the authorities in sanctioning the films for public exhibition. These guidelines came to be enlarged by a subsequent notification dated August 11, 1989. The guidelines laid down by these two notifications require the Board of Film Certification to ensure that:

"(*i*) Anti-social activities such as violence are not glorified or justified;

(*ii*) The modus-operandi of criminals or other visuals or words likely to incite the commission of any offence are not depicted;

(*ii-a*) Scenes showing involvement of children in violence, either as victims or as perpetrators, or showing child abuse or abuse of physically and mentally handicapped persons are not presented in a manner which is needlessly prolonged or exploitative in nature;

(*iii*) Pointless or avoidable scenes of violence, cruelty and horror are not shown;

(*iii-a*) Scenes which have the effect of justifying or glorifying drinking and drug addiction are not shown;

(*iv*) Human sensibilities are not offended by vulgarity, obscenity and depravity;

(*iv-a*) Visuals or words depicting women in any ignoble servility to man or glorifying such servility as a praiseworthy quality in women are not presented;

(*iv-b*) Scenes involving sexual violence against women like attempt to rape, gang rape, murder or any other form of molestation or scenes of a similar nature shall be avoided and if for any reason such things are found to be inevitable for the sequence of a theme, they shall be properly scrutinised so as to ensure that

they do not create any adverse impression on viewers and the duration of the scenes shall be reduced to the shortest span;

(*v*) Visuals or words contemptuous of racial, religious or other groups are not presented;

(*v-a*) Visuals or words which promote communal, obscurantist, anti-scientific and anti-national attitudes are not presented;

(*vi*) The sovereignty and integrity of India is not called in question;

(*vii*) The security of the State is not jeopardised or endangered;

(*viii*) Friendly relations with foreign States are not strained;

(*ix*) Public order is not endangered;

(*x*) Visuals or words involving defamation or contempt of court are not presented."

In following these guidelines or principles the Board of Film Certification has been cautioned to ensure that the film is judged in its entirety from the point of view of its overall impact and is judged in the light of contemporary standards of the country and the people to which the film relates. Pursuant to the issuance of these guidelines the Central Government issued a further notification dated October 16, 1984 in exercise of power under Section 9 of the Act exempting all Doordarshan programmes from the provisions relating to certification of films in Part II of the Act and the Rules made thereunder subject to the condition that while clearing programmes for telecast, the Director General, Doordarshan or the Director concerned, Doordarshan Kendra shall keep in view the film certification guidelines issued by the Central Government to the Board of Film Certification under sub-section (2) of Section 5-B of the Act.

19. It may be stated at the outset that the refusal to telecast was not based on the ground that the list of award winning films was long and on the basis of inter se priority amongst such films and the time allocated for telecasting such films, it was not possible to telecast the film. The grounds for refusal that can be culled out from the pleadings were (*i*) the film is outdated (*ii*) it has lost its relevance (*iii*) it lacks moderation and restraint (*iv*) it is not fair and balanced (*v*) political parties have been raising various issues concerning the tragedy and (*vi*) claims for compensation by victims are sub judice. In addition to these grounds which can be culled out from the judgment of the High Court, it is found from the affidavit filed in the present proceedings that the film was not found fit for telecast as it was likely to create commotion to the already charged atmosphere and because the film criticised the action of the State Government, which was not permissible under the guidelines. The last two

grounds were not before the High Court giving the impression that Doordarshan is shifting its stand. We will however not brush them aside on such technical considerations. We may however point out that Doordarshan has not placed any material suggesting why it thinks that the film does not conform to the above-stated norms.

20. Mr Tulsi, the learned counsel for Doordarshan, submitted that sub-section (2) of Section 5-B empowers the Central Government to issue directions setting out the principles which shall guide the authority competent to grant certificates under the Act in sanctioning films for public exhibition and since the exemption granted to Doordarshan under Section 9 of the Act from the provisions relating to certification of films in Part II of the Act and Rules made thereunder by notification dated October 16, 1984 is subject to the condition that while clearing programmes for telecast Doordarshan shall keep in view the film certification guidelines issued by the Central Government under Section 5-B of the Act, the guidelines clearly have statutory flavour and would, therefore, fall within the protective umbrella of Article 19(2) and the High Court was wrong in brushing them aside as mere departmental/executive directions or notings on a file not having the force of law. We will so assume for the purposes of this appeal. However, once it is recognised that a film-maker has a fundamental right under Article 19(1)(*a*) to exhibit his film, the party which claims that it was entitled to refuse enforcement of this right by virtue of law made under Article 19(2), the onus lies on that party to show that the film did not conform to the requirements of that law, in the present case the guidelines relied upon. Two questions, therefore, arise (*i*) whether the film-maker had a fundamental right to have his film telecast on Doordarshan and (*ii*) if yes, whether Doordarshan has successfully shown that it was entitled to refuse telecast as the guidelines were breached?

21. In the United States prior restraint is generally regarded to be at serious odds with the First Amendment and carries a heavy presumption against its constitutionality and the authorities imposing the same have to discharge a heavy burden on demonstrating its justification (See *New York Times Company* v. *United States*[10]). Traditionally prior restraints, regardless of their form, are frowned upon as threats to freedom of expression since they contain within themselves forces which if released have the potential for imposing arbitrary and at times irrational decisions. Since the function of any Board of Film Censors is to censor it, it immediately conflicts with the Article 19(1)(*a*) and has to be justified as falling within permissible restraint under Article 19(2) of the Constitution. A similar question came up before this Court in *K.A. Abbas* v.

10 403 US 713

Union of India[11] wherein Chief Justice Hidayatullah exhaustively dealt with the question of prior restraint in the context of the provisions of the Constitution and the Act. The learned Chief Justice after setting out the various provisions to which we have already adverted posed the question: "How far can these restrictions go and how are these to be imposed?" The documentary film *"A Tale of Four Cities"* made by K.A. Abbas portrayed the contrast between the luxurious life of the rich and the squalor and poverty of the poor in the four principal cities of the country and included therein shots from the red light district of Bombay showing scantily dressed women soliciting customers by standing near the doors and windows. The Board of Film Censors granted 'A' certificate to the film and refused the 'U' certificate sought by Abbas. This was on the ground that the film dealt with relations between sexes in such a manner as to depict immoral traffic in women and because the film contained incidents unsuitable for young persons. Abbas challenged the Board's decision on the ground (*i*) that pre-censorship cannot be tolerated as it was in violation of the freedom of speech and expression and (*ii*) even if it is considered legitimate it must be exercised on well-defined principles leaving no room for arbitrary decisions. This Court held that censorship in India had full justification in the field of exhibition of films since it was in the interest of society and if the legitimate power is abused it can be struck down. While dealing with the grounds on which the 'U' certificate was refused, the learned Chief Justice observed: (SCC p. 802, para 49)

> "The task of the censor is extremely delicate and his duties cannot be the subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved

11 (1970) 2 SCC 780: (1971) 2 SCR 446

begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth."

In *Ramesh* v. *Union of India*[12] a petition was filed to restrain the screening of the serial "*Tamas*" on the ground that it violated Articles 21 and 25 of the Constitution and Section 5-B of the Act. Based on the novel of Bhisma Sahni this serial depicted the events that took place in Lahore immediately before the partition of the country. Two Judges of the Bombay High Court saw the serial and rejected the contention that it propagates the cult of violence. This Court after referring to the observations of Hidayatullah, C.J. in *K.A. Abbas*[11] proceeded to state as under: (SCC p. 680, para 21)

"It is no doubt true that the motion picture is a powerful instrument with a much stronger impact on the visual and aural senses of the spectators than any other medium of communication; likewise, it is also true that the television, the range of which has vastly developed in our country in the past few years, now reaches out to the remotest corners of the country catering to the not so sophisticated, literary or educated masses of people living in distant villages. But the argument overlooks that the potency of the motion picture is as much for good as for evil. If some scenes of violence, some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep, strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interests, scenes depicting mutual respect and tolerance, scenes showing comradeship, help and kindness which transcend the barriers of religion. Unfortunately, modern developments both in the field of cinema as well as in the field of national and international politics have rendered it inevitable for people to face realities of internecine conflicts, inter alia, in the name of religion. Even contemporary news bulletins very often carry scenes of pitched battle or violence. What is necessary sometimes is to penetrate behind the scenes and analyse the causes of such conflicts. The attempt of the author in this film is to draw a lesson from our country's past history, expose the motives of persons who operate behind the scenes to generate and foment conflicts and to emphasise the desire of persons to live in amity and the need for them to rise above religious barriers and treat one another with kindness, sympathy and affection. It is possible only for a motion picture to convey such a message in depth and if it is able to do this, it will be an achievement of great social value."

12 (1988) 1 SCC 668: 1988 SCC (Cri) 266

This Court upheld the finding of the Bombay High Court that the serial viewed in its entirety is capable of creating a lasting impression of this message of peace and co-existence and there is no fear of the people being obsessed, overwhelmed or carried away by scenes of violence or fanaticism shown in the film.

22. As already pointed out earlier this Court in *S. Rangarajan case*[8] emphasised that the freedom conferred on a citizen by Article 19(1)(*a*) includes the freedom to communicate one's ideas or thoughts through a newspaper, a magazine or a movie. Although movie enjoys that freedom it must be remembered that movie is a powerful mode of communication and has the capacity to make a profound impact on the minds of the viewers and it is, therefore, essential to ensure that the message it conveys is not harmful to the society or even a section of the society. Censorship by prior restraint, therefore, seems justified for the protection of the society from the ill-effects that a motion picture may produce if unrestricted exhibition is allowed. Censorship is thus permitted to protect social interests enumerated in Article 19(2) and Section 5-B of the Act. But such censorship must be reasonable and must answer the test of Article 14 of the Constitution. In this decision the fundamental difference between the U.S. First Amendment and the freedom conferred by 19(1)(*a*), subject to Article 19(2) has been highlighted and we need not dwell on the same.

23. Every right has a corresponding duty or obligation and so has the fundamental right of speech and expression. The freedom conferred by Article 19(1)(*a*) is, therefore, not absolute as perhaps in the case of the U.S. First Amendment; it carries with it certain responsibilities towards fellow citizens and society at large. A citizen who exercises this right must remain conscious that his fellow citizen too has a similar right. Therefore, the right must be so exercised as not to come in direct conflict with the right of another citizen. It must, therefore, be so exercised as not to jeopardise the right of another or clash with the paramount interest of the State or the community at large. In India, therefore, our Constitution recognises the need to place reasonable restrictions on grounds specified by Article 19(2) and Section 5-B of the Act on the exercise of the right of speech and expression. It is for this reason that this Court has recognised the need for prior restraint and our laws have assigned a specific role to the censors as such is the need in a rapidly changing societal structure. But since permissible restrictions, albeit reasonable, are all the same restrictions on the exercise of the fundamental right under Article 19(1)(*a*), such restrictions are bound to be viewed as anathema, in that, they are in the nature of curbs or limitations on the exercise of the right and are, therefore, bound to be viewed with suspicion, thereby throwing

a heavy burden on the authorities that seek to impose them. The burden would, therefore, heavily lie on the authorities that seek to impose them to show that the restrictions are reasonable and permissible in law.

24. From the above discussion it follows that unquestionably the respondent had a right to convey his perception of the gas disaster in Bhopal through the documentary film prepared by him. This film not only won the Golden Lotus award but was also granted the 'U' certificate by the censors. Even according to the petitioners "the documentary is an appraisal of what exactly transpired in Bhopal on the date the gas leak occured". The petitioners, therefore, concede that the film faithfully brings out the events that took place at Bhopal on that fateful night. Therefore, the respondent cannot be accused of having distorted the events subsequent to the disaster. How then can it be alleged that it is not fair and balanced or lacks in moderation and restraint? It is nowhere stated which part of the film lacks moderation and/or restraint nor is it shown how the film can be described as not fair and balanced. Merely because it is critical of the State Government, perhaps because of its incapacity to cope with an unprecedented situation, is no reason to deny selection and publication of the film. So also pendency of claims for compensation does not render the matter sub judice so as to shut out the entire film from the community. In fact the community was keen to know what actually had happened, what is happening, what remedial measures the State authorities are taking and what are the likely consequences of the gas leak. To bring out the inadequacy of the State effort or the indifference of the officers, etc., cannot amount to an attack on any political party if the criticism is genuine and objective and made in good faith. If the norm for appraisal was the same as applied by the censors while granting the 'U' certificate, it is difficult to understand how Doordarshan could refuse to exhibit it. It is not that it was not sent for being telecast soon after the disaster that one could say that it is outdated or has lost relevance. It is even today of relevance and the press has been writing about it periodically. The learned Additional Solicitor General was not able to point out how it could be said that the film was not consistent with the accepted norms set out earlier. Doordarshan being a State controlled agency funded by public funds could not have denied access to the screen to the respondent except on valid grounds. We, therefore, see no reason to interfere with the High Court order.

25. In the result both the appeals fail and are dismissed with costs.

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(1995) 2 Supreme Court Cases 161

(BEFORE P.B. SAWANT, S. MOHAN AND B.P. JEEVAN REDDY, JJ.)

Civil Appeals Nos. 1429-30 of 1995†

SECRETARY, MINISTRY OF INFORMATION & BROADCASTING, GOVT. OF INDIA AND OTHERS .. Appellants;

Versus

CRICKET ASSOCIATION OF BENGAL AND OTHERS .. Respondents.

With

W.P. (Civil) No. 836 of 1993‡

CRICKET ASSOCIATION OF BENGAL AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Civil Appeals Nos. 1429-30 of 1995 with W.P. (Civil) No. 836 of 1993, decided on February 9, 1995

A. **Constitution of India — Art. 19(1)(a) & (2) — Telecasting — Right of organisers of an event such as sport tournament to its live audio-visual broadcasting universally through an agency of their choice, national or foreign, if covered by Art. 19(1)(a) — Telecasting, meaning and types of — Rights of a broadcaster and of the viewers/listeners under Art. 19(1)(a) — Whether the organisers of such sports events can claim the right to sell the telecasting rights to such agency as they think best and profitable and whether they have the right to compel the Government to issue all requisite permissions, licences and facilities to enable such agency to telecast the events from Indian soil — Does the right in Article 19(1)(a) take in all such rights — If the organiser of sports does have these rights, whether the Government is not entitled to impose any conditions thereon except charging technical fees or service charges, as the case may be — Right under Art. 19(1)(a) therefore whether extends to freedom to broadcast and telecast one's views, ideas and opinions and to establishing of private radio and television stations within India for that purpose — Limitations inherent in using airwaves, a public property — State whether bound to provide all necessary licences, permits and facilities therefor — Held, organising an event of sport, where the prime motive is to promote it and to educate, inform and entertain those interested in it, is an aspect of the freedom of speech and expression protected by Art. 19(1)(a) and so can be controlled only on the grounds stated in Art. 19(2) — So also recording of the organised event cannot be prevented except by law permitted by Art. 19(2) — Right to educate, inform and entertain through the media and right to be educated, informed and entertained, held guaranteed by Art. 19(1)(a) — In respect of spontaneous, accidental and natural events, though no law can be made**

† From the Judgment and Order dated 12-11-1993 of the Calcutta High Court in F.M A.T. Nil of 1993

‡ Under Article 32 of the Constitution of India

prohibiting their recording, their telecasting can be restricted under Art. 19(2) — So also publication and communication of the recorded event through the mode of cassettes cannot be restricted or prevented except by a law permitted by Art. 19(2) — Considerations for file telecast same as for live telecast as both involve the use of a frequency or channel — Words and phrases

B Constitution of India — Arts. 19(1)(a) & (2) and 14, 38(2), Preamble — Freedom of speech and expression — Scope of — Includes freedom of citizen as viewer/listener/reader to receive and to communicate or disseminate information and ideas without interference — Expanse of the right of free speech and expression not restricted to a few persons but available to all citizens equally — State under obligation to ensure conditions in which the right can be meaningfully and effectively enjoyed by all citizens and prevent its monopolisation or domination by a few — Restrictions, if placed, must be covered by Art. 19(2) — Burden on the authority imposing them to justify

C. Constitution of India — Art. 19(1)(a) & (2) — Freedom of speech and expression — Nature and content of — Implications of the restrictions permitted under Art. 19(2) — Interest of the nation and society — In imposing reasonable restrictions whether any distinction to be drawn between the freedom of the print media and that of the electronic media such as radio and TV — Whether there are certain inherent limitations in the use of electronic media to which Art. 19(2) has no concern — Whether the electronic media necessitates more restrictions — Need for restrictions viewed from the right of viewers and listeners, not the right of broadcasters

D. Constitution of India — Art. 19(1)(a) — Broadcasting freedom — Right of access to broadcasting, of individuals and groups — Held, implicit in the freedom of speech and expression — Facets of broadcasting freedom include :

- **(*a*) freedom of the broadcaster which means freedom from State control and in particular from censorship by Government**
- **(*b*) freedom of the listeners/viewers to a variety of views and plurality of opinions based on their retaining an interest in free speech — Restraints on broadcasters justifiable on ground of free speech**
- **(*c*) right of the citizens and groups of citizens to have access to the broadcasting media — Basis of such right — Danger of certain groups getting unduly privileged or in a dominating position**
- **(*d*) right to establish private Radio/TV stations — Need for regulation by a regulatory body — Distinction between the press and broadcasting media — No citizen has a right to use airwaves, which is public property, to disseminate his views and opinions — Hence the right to establish private broadcasting stations, permanent or temporary, statutory or mobile, cannot be read in Art. 19(1)(a) — European Convention on Human Rights, Art. 10**

— Out of these facets, the right of the listeners and viewers and not of the broadcaster, is paramount — Monopoly over broadcasting, by Govt. or anybody else, held, inconsistent with free speech interest of citizens — Use of airwaves which is public property must be regulated for its optimum use for public good for the greatest number — Scarcity of frequencies calls for regulation of broadcasting — Control must be vested in independent public corporation(s) — Electronic media is more pervasive, potent and influential — Jurisprudence — Bentham's theory of utility, namely, the greatest good for the greatest number

Held :

Per Sawant and Mohan, JJ.

(1) It can hardly be denied that sport is an expression of self. In an athletic or individual event, the individual expresses himself through his individual feat. In a team event such as cricket, football, hockey etc., there is both individual and collective expression. It may be true that what is protected by Article 19(1)(*a*) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right. The degree of the element will depend upon the character of the telecaster who claims the right. (Para 75)

Telecasting is a system of communication either audio or visual or both. The present case concerns audio-visual telecommunication. The first stage in telecasting is to generate the audio-visual signals of the events or of the information which is sought to be communicated. When the event to be telecast takes place on the earth, necessarily the signals are generated on the earth by the requisite electronic mechanism such as the audio-visual recorder. This stage may be described as the recording stage. The events may be spontaneous, accidental, natural or organised. The spontaneous, accidental and natural events are by their nature uncontrollable. But the organised events can be controlled by the law of the land. (Para 4)

Since the organisation of an event is an aspect of the fundamental right to freedom of speech and expression protected by Article 19(1)(*a*), the law can be made to control the organisation of such events only for the purposes of imposing reasonable restrictions in the interest of the sovereignty and integrity of the country, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence as laid down under Article 19(2). Although, therefore, it is not possible to make law for prohibiting the recording of spontaneous, accidental or natural events, it is possible for the reasons mentioned in Article 19(2), to restrict their telecasting. As regards the organised events, a law can be made for restricting or prohibiting the organisation of the event itself, and also for telecasting it, on the same grounds as are mentioned in Article 19(2). There cannot, however, be restrictions on producing and recording the event on grounds not permitted by Article 19(2). It, therefore, follows that the organisation or production of an event and its recording cannot be prevented except by law permitted by Article 19(2). (Para 4)

For the same reasons, the publication or communication of the recorded event through the mode of cassettes cannot be restricted or prevented except under such law. All those who have got the apparatus of video cassette recorder (VCR) and the television screen can, therefore, view and listen to such recorded event. In this process, there is no demand on any frequency or channel since there is no live telecast of the event. The only additional restriction on telecasting or live telecasting of such event will be the lack of availability of the frequency or channel. (Para 4)

Per Sawant and Mohan, JJ. *(contd.)*

Though the present case concerns the right of the respondent Cricket Association of Bengal to *live* telecast the cricket match, the issues involved in file telecasting are more or less the same. Both involve the use of a frequency or a channel. (Para 5)

Telecasting can be terrestrial, by cable or by satellite. In cable telecasting no demand is made on any frequency or channel owned or controlled by the national Government or governmental agencies. The cable operator can show any event occurring in any part of the country or the world live through the frequencies if his dish antenna can receive the same. Telecasting by satellite involves the use of a frequency generated, owned or controlled by the national Government or the governmental agencies, or those generated, owned and controlled by other agencies. In the latter event the question that arises on the present facts is whether the VSNL was justified in refusing permission to the respondents to uplink to the foreign satellite the signals created by the respondents either by themselves or through their agencies. (Para 6)

An organiser such as the BCCI or CAB in the present case which are indisputably devoted to the promotion of the game of cricket, cannot be placed in the same scale as the business organisations whose only intention is to make as large a profit as can be made by telecasting the game. Whereas it can be said that there is hardly any free-speech element in the right to telecast when it is asserted by the latter, it will be a warped and cussed view to take when the former claim the same right and contend that in claiming the right to telecast the cricket matches organised by them, they are asserting the right to make business out of it. The sporting organisations such as BCCI/CAB which are interested in promoting the sport or sports are under an obligation to organise the sports events and can legitimately be accused of failing in their duty to do so. The promotion of sports also includes its popularization through all legitimate means. For this purpose, they are duty-bound to select the best means and methods to reach the maximum number of listeners and viewers. Since at present, radio and TV are the most efficacious methods, thanks to the technological development, the sports organisations like BCCI/CAB will be neglecting their duty in not exploring the said media and in not employing the best means available to them to popularize the game. That while pursuing their objective of popularizing the sports by selecting the best available means of doing so, they incidentally earn some revenue, will not convert either them into commercial organisations or the right claimed by them to explore the said means, into a commercial right or interest. (Para 75)

It must further be remembered that sporting organisations such as BCCI/CAB in the present case, have not been established only to organise the sports events or to broadcast or telecast them. The organisation of sporting events is only a part of their various objects, and even when they organise the events, they are primarily to educate the sportsmen, to promote and popularize the sports and also to inform and entertain the viewers. The organisation of such events involves huge costs. Whatever surplus is left after defraying all the expenses is ploughed back by them in the organisation itself. It will be taking a deliberately distorted view of the right claimed by such organisations to telecast the sporting event to call it an assertion of a commercial right. (Para 75)

(2) The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best

way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach (Paras 43 and 36)

As held in *LIC* v. *Manubhai D. Shah*, the words 'freedom of speech and expression' must be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media, i.e., periodicals, magazines or journals or through any other communication channel e.g. the radio and the television. (Para 20)

This fundamental right can be limited only by reasonable restrictions under a law made for the purposes mentioned in Article 19(2). (Para 44)

The burden is on the authority to justify the restrictions. Public order is not the same thing as public safety and hence no restrictions can be placed on the right to freedom of speech and expression on the ground that public safety is endangered. Unlike in the American Constitution, limitations on fundamental rights are specifically spelt out under Article 19(2) of our Constitution. Hence no restrictions can be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2). (Para 45)

Romesh Thappar v. *State of Madras*, 1950 SCR 594 . AIR 1950 SC 124, *Brij Bhushan* v. *State of Delhi*, 1950 SCR 605 · AIR 1950 SC 129; *Hamdard Dawakhana (Wakf), Lal Kuan* v. *Union of India*, (1960) 2 SCR 671 : AIR 1960 SC 554; *Sakal Papers (P) Ltd.* v. *Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305; *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 1985 SCC (Tax) 121; *Odyssey Communications (P) Ltd* v. *Lokvidayan Sanghatana*, (1988) 3 SCC 410 · 1988 Supp (1) SCR 486; *S. Rangarajan* v. *P Jagjivan Ram*, (1989) 2 SCC 574; *Printers (Mysore) Ltd.* v. *Asstt. CTO*, (1994) 2 SCC 434, *LIC* v. *Professor Manubhai D Shah*, (1992) 3 SCC 637; *National Broadcasting Co.* v. *US*, 319 US 190 : 87 L Ed 1344 (1943); *Joseph Burstyn* v. *Lewis A. Wilson*, 343 US 495 : 96 L Ed 1098 (1952); *Mutual Film Co.* v. *Industrial Commission of Ohio*, 236 US 247 · 59 L Ed 561 (1915); *Red Lion Broadcasting Co.* v *FCC*, 395 US 367 . 23 L Ed 2d 371 (1969); *Columbia Broadcasting System* v. *Democratic National Committee*, 412 US 94 · 36 L Ed 2d 772 (1973); *FCC* v. *WNCN Listeners Guild*, 450 US 582 · 67 L Ed 2d 521; *City of Los Angeles & Department of Water and Power* v. *Preferred Communications, Inc.*, 476 US 488 : 90 L Ed 2d 480 (1986), *referred to*

Civil Liberties & Human Rights authored by David Feldman, *relied on*

Jackson, ex p, 24 L Ed 877 · 96 US 727 (1877); *Lovell* v *City of Griffin*, 303 US 444 : 82 L Ed 949 (1938), *Schenck* v *United States*, 249 US 47 : 63 L Ed 470 (1919); *Terminiello* v. *Chicago*, 93 L Ed 1131 : 337 US 1 (1949), *cited*

The law on the subject makes it clear that the fundamental right to freedom of speech and expression includes the right to communicate effectively and to as large a population not only in this country but also abroad, as is feasible. There are no geographical barriers on communication. Hence every citizen has a right to use the best means available for the purpose. At present, electronic media, viz., TV and

Per Sawant and Mohan, JJ. *(contd.)*

radio, is the most effective means of communication. The restrictions which the electronic media suffers in addition to those suffered by the print media, are that (*i*) the airwaves are a public property and they have to be used for the benefit of the society at large, (*ii*) the frequencies are limited, and (*iii*) media is subject to pre-censorship. The other limitation, viz., the reasonable restrictions imposed by law made for the purposes mentioned in Article 19(2) are common to all the media. (Para 120)

(3) Based on decisions of the U.S. Supreme Court it was contended that there are inherent limitations imposed on the right to telecast/broadcast as there is scarcity of resources, i.e., of frequencies and therefore the need to use them in the interest of the largest number. There is also a pervasive presence of electronic media such as TV. It has a greater impact on the minds of the people of all ages and strata of the society necessitating the prerequisite of licensing of the programmes. It is also contended on that account that the licensing of frequencies and consequent regulation of telecasting/broadcasting would not be a matter governed by Article 19(2). Whereas Article 19(2) applies to restrictions imposed by the State, the inherent limitations on the right to telecast/broadcast are imposed by nature. But in the first instance, it must be remembered that all the decisions of the US Supreme Court relied upon in support of the above contention, are on the rights of the private broadcasters to establish their own broadcasting stations by claiming a share in or access to the airwaves or frequencies. In the United States, there is no Central Government-owned or controlled broadcasting centre. There is only a Federal Commission to regulate broadcasting stations which are all owned by private broadcasters. Secondly, the American Constitution does not explicitly state the restrictions on the right of freedom of speech and expression as our Constitution does. Hence, the decisions in question have done no more than impliedly reading such restrictions. (Paras 76 and 77)

The present case is not concerned with the right of the private broadcasters, but only with the limited right for telecasting particular cricket matches for particular hours of the day and for a particular period. It is not suggested that the said right is objectionable on any of the grounds mentioned in Article 19(2) or is against the proper use of the public resources. The only objection taken against the refusal to grant the said right is that of the limited resources. That objection is completely misplaced in the present case since the claim is not made on any of the frequencies owned, controlled and utilised by Doordarshan. The right claimed is for uplinking the signals generated by the BCCI/CAB to a satellite owned by another agency. The objection, therefore, is devoid of any merit and untenable in law. It also displays a deliberate obdurate approach. (Para 79)

There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not

disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(*a*) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like the FCC to regulate the programming.

(Para 78)

(4) What distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence. It has a greater impact on the minds of the viewers and is also more readily accessible to all including children at home. Unlike the print media, however, there is a built-in limitation on the use of electronic media because the airwaves are a public property and hence are owned or controlled by the Government or a central national authority or they are not available on account of the scarcity, costs and competition. (Para 46)

Eric Barendt · *Broadcasting Law* (1993 Edn.); Lee Bollinger : "*Freedom of the Press and Public Access*" and "*The Rationale of Public Regulation of the Media*" and in "*Democracy and the Mass Media*" [Cambridge (1990)], *referred to*

FCC v. *Pacifica Foundation*, 57 L Ed 2d 1073 : 438 US 726 (1978); *Third Television case*, 57 BVerfGE 295 (1981); *Red Lion Broadcasting Co.* v. *FCC*, 395 US 367 · 23 L Ed 2d 371 (1969), *relied on*

In conclusion :

The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving

Per Sawant and Mohan, JJ. *(contd.)*

information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution. [Para 122(*ii*)]

The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an inbuilt restriction on its use as in the case of any other public property. [Para 122(*i*)]

Per Jeevan Reddy, J.*

(1) A game of cricket like any other sports event provides entertainment — and entertainment is a facet, a part, of free speech, subject to the caveat that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing societal interests. (Para 150)

Joseph Burstyn v. *Lewis A. Wilson*, 343 US 495 : 96 L Ed 1098 (1952); *City of Los Angeles & Department of Water and Power* v *Preferred Communications, Inc.*, 476 US 488 : 90 L Ed 2d 480 (1986), *relied on*

(2) Under Article 19(1)(*a*) every citizen has a right to impart and receive information as part of his fundamental right to speech and expression. The State is, under the Constitution, not only under an obligation to respect this fundamental right of the citizens, but equally under an obligation to ensure conditions under which this right can be meaningfully and effectively be enjoyed by one and all. Freedom of speech and expression is basic to and indivisible from a democratic polity. (Paras 153 and 152)

The freedom of speech and expression is a right given to every citizen of this country and not merely to a few. No one can exercise his right of speech in such a manner as to violate another man's right of speech. One man's right to speak ends where the other man's right to speak begins. Indeed, it may be the duty of the State to ensure that this right is available to all in equal measure and that it is not hijacked by a few to the detriment of the rest. This obligation flows from the Preamble to our Constitution which seeks to secure to all its citizens liberty of thought, expression, belief and worship. State being a product of the Constitution is as much committed to this goal as any citizen of this country. Indeed, this obligation also flows from the injunction in Article 14 that "the State shall not deny to any person equality before the law" and the direction in Article 38(2) to the effect: "The State, shall, in particular — endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people...." Under our constitutional scheme, the State is not merely under an obligation to respect the fundamental rights guaranteed by Part III but under an equal obligation to ensure conditions in which those rights can be meaningfully and effectively enjoyed by one and all. (Paras 152 and 151)

(3)(*a*) A look at the grounds in clause (2) of Article 19, in the interests of which a law can be made placing reasonable restrictions upon the freedom of

* **Ed.** : As clarified by Justice Jeevan Reddy himself in paras 153 and 200, "broadcasting media" wherever used by him in his judgment denote the electronic media of radio and television now operated by AIR and Doordarshan — and not any other radio/TV services "Broadcasting" has been compendiously used for broadcast and telecast (para 159)

speech and expression goes to show that they are all conceived in the national interest as well as in the interest of society. The first set of grounds, viz., the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are grounds referable to national interest whereas the second set of grounds, viz., decency, morality, contempt of court, defamation and incitement to offence are conceived in the interest of society. The interconnection and the interdependence of freedom of speech and the stability of society is undeniable. They indeed contribute to and promote each other. Freedom of speech and expression in a democracy ensures that the change desired by the people, whether in political, economic or social sphere, is brought about peacefully and through law. That change desired by the people can be brought about in an orderly, legal and peaceful manner is by itself an assurance of stability and an insurance against violent upheavals which are the hallmark of societies ruled by dictatorships, which do not permit this freedom. The converse is equally true. The more stable the society is, the more scope it provides for exercise of right of free speech and expression. A society which feels secure can and does permit a greater latitude than a society whose stability is in constant peril. (Paras 187, 151 and 188)

Bowman v. *Secular Society Ltd* , 1917 AC 406 : (1916-17) All ER Rep 1, *relied on*

The right to freedom of speech and expression cannot rise above the national interest and the interest of society which is but another name for the interest of general public. It is true that Article 19(2) does not use the words "national interest", "interest of society" or "public interest" but the several grounds mentioned in clause (2) are ultimately referable to the interests of the nation and of the society. (Para 189)

FCC v *National Citizens Committee for Broadcasting*, 436 US 775 : 56 L Ed 2d 697 (1978), *relied on*

While delineating the parameters of the freedom of speech and expression one must bear in mind the dictum of Red Lion that it is necessary to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolisation of that market, whether it be by the Government itself or a private licensee. Speech concerning public affairs is more than self-expression; it is the essence of self-government. (Para 189)

Red Lion Broadcasting Co v. *FCC*, 395 US 367 · 23 L Ed 2d 371 (1969); *Associated Press* v. *United States*, 326 US 1 : 89 L Ed 2013 (1945); *New York Times Co.* v. *Sullivan*, 376 US 254 : 11 L Ed 2d 686 (1964); *Abrams* v. *United States*, 250 US 616 : 63 L Ed 1173 (1919); *Garrison* v. *Louisiana*, 379 US 64 : 13 L Ed 2d 125, 133 (1964); *Columbia Broadcasting System* v. *Democratic National Committee*, 412 US 94 · 36 L Ed 2d 772 (1973), *relied on*

(3)(*b*) The importance and significance of television in the modern world needs no emphasis. Most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The television is unique in the way in which it intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. It has a tremendous appeal and influence over millions of people. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far. Younger generation is particularly addicted to it. It is a powerful instrument, which can be used for greater good as also for doing immense harm to the society. It depends upon how it is used. With the advance of technology, the number of channels available has grown enormously. National borders have become meaningless. The reach of some of the major networks is international. It is no longer possible for any government to control or manipulate the news, views and information available to its people. No nation can remain a

Per Jeevan Reddy, J. *(contd.)*

fortress or an island in itself any longer. Without a doubt, this technological revolution is presenting new issues, complex in nature — with many hard questions and few easy answers. Broadcasting media by its very nature is different from press. Airwaves are public property. The fact that a large number of frequencies/channels are available does not make them anytheless public property. It is the obligation of the State under our constitutional system to ensure that they are used for public good. Now, what does this public good mean and signify in the context of the broadcasting medium? In a democracy, people govern themselves and they cannot govern themselves properly unless they are *aware* — aware of social, political, economic and other issues confronting them. To enable them to make a proper judgment on those issues, they must have the benefit of a range of opinions on those issues. Right to receive and impart information is implicit in free speech. This plurality of opinions, views and ideas is indispensable for enabling them to make an informed judgment on those issues to know what is their true interest, to make them responsible citizens, to safeguard their rights as also the interests of society and State. All the constitutional courts of leading democracies have recognised and reiterated this aspect. (Paras 192 and 193)

Castells v. *Spain*, 14 EHRR 445 (quoted in 1994 Public Law at p 524), *relied on*

(4)(*a*) (*i*) The freedom of the broadcaster means freedom from State or government control, in particular from the censorship by the Government. It implies freedom over the selection, content and scheduling of programmes. Broadcasting freedom is to be protected insofar as its exercise promotes the goals of free speech, i.e., an informed democracy and lively discussion of a variety of views The freedom of broadcaster cannot be understood as merely an immunity from government intervention but must be understood as a freedom to safeguard free speech right of all the people without being dominated either by the State or any commercial group. Complete disregard of interests of the public in the selection of programmes appears more like a property right than an attribute of freedom of speech. (Para 175)

Third Television case, 57 BVerfGE 295 (1981); *Fourth Television case*, 73 BVerfGE 118, *referred to*

(*ii*) Broadcasting freedom involves and includes the right of the viewers and listeners who retain their interest in free speech. It is on this basis that the European courts have taken the view that *restraints on freedom of broadcasters are justifiable on the very ground of free speech*. It has been held that freedom of expression includes the right to receive information and ideas as well as freedom to impart them. The free speech interests of viewers and listeners in exposure to a wide variety of material can best be safeguarded by the imposition of programme standards, limiting the freedom of radio and television companies. What is important according to this perspective is that the broadcasting institutions are free to discharge their responsibilities of providing the public with a balanced range of programmes and a variety of views. These free speech goals require positive legislative provision to prevent the domination of the broadcasting authorities by the Government or by private corporations and advertisers, and perhaps for securing impartiality. (Para 176)

The Fairness Doctrine evolved by FCC in the United States protected the interest of persons by providing a right of reply to personal attacks. It is indeed the interest of audience that justified the imposition of impartiality rules and positive programme standards upon the broadcasters. But difficulties have arisen in the matter of enforcing the listeners'/viewers' rights through courts. (Paras 177 and 178)

Red Lion Broadcasting Co v *FCC*, 395 US 367 : 23 L Ed 2d 371 (1969), *relied on*

(*iii*) The third facet of broadcasting freedom is the freedom of individuals and groups of individuals to have access to broadcasting media to express their views. The public is entitled to hear range of opinions held by different groups so that it can make sensible choices on political and social issues. The theoretical foundation for the claim for access to broadcasting is that freedom of speech means the freedom to communicate effectively to a mass audience which means through mass media. (Para 178)

LIC v *Professor Manubhai D. Shah*, (1992) 3 SCC 637; *Columbia Broadcasting System* v *Democratic National Committee*, 412 US 94 · 36 L Ed 2d 772 (1973), *relied on*

But there are, as held by the Italian Constitutional Court, practical objections to access rights. It may be very difficult to decide, for example, which group are to be given access and when and how often such programmes are shown. There is a danger some groups will be unduly privileged. (Para 180)

Columbia Broadcasting System v *Democratic National Committee*, 412 US 94 · 36 L Ed 2d 772 (1973), *considered*

(*iv*) In none of the European countries is there an unregulated right to establish private radio/television station. It is governed by law. Even in United States, it requires a licence from FCC. (Para 181)

Regulation on the basis of limited number of frequencies being available may not now be justified in view of the advances in technology. Yet the fact remains that airwaves are public property that they are to be utilised to the greatest public good; that they cannot be allowed to be monopolised or hijacked by a few privileged persons or groups; that granting licence to everyone who asks for it would reduce the right to nothing and that such a licensing system would end up in creation of oligopolies, as experienced in Italy. Similar has been the experience in the United States where control of the media came to be restricted only in a few hands leading to the 'market place of ideas' being a monopoly controlled by the owners of the market. (Para 185)

(*b*) For the purpose of ensuring the free speech rights of the citizens guaranteed by Article 19(1)(*a*), it is not *necessary* to have private broadcasting stations. Allowing private broadcasting would be to open the door for powerful economic, commercial and political interests, which may not prove beneficial to free speech right of the citizens — and certainly so, if strict programme controls and other controls are not prescribed. The analogy with press is wholly inapt. (Para 194)

Above all, airwaves constitute public property. While, the freedom guaranteed by Article 19(1)(*a*) does include the right to receive and impart information, no one can claim the fundamental right to do so by using or employing public property. Only where the statute permits him to use the public property, then only — and subject to such conditions and restrictions as the law may impose — he can use the public property, viz., airwaves. In other words, Article 19(1)(*a*) does not enable a citizen to impart his information, views and opinions by using the airwaves. He can do so without using the airwaves Airwaves, being public property must be utilised to advance public good. Public good lies in ensuring plurality of opinions, views and ideas and that would scarcely be served by private broadcasters, who would be and who are bound to be actuated by profit motive. There is a far greater likelihood of these private broadcasters indulging in misinformation, disinformation and manipulation of news and views than the government controlled media, which is at least subject to public and parliamentary scrutiny. The experience in Italy, where the Constitutional Court allowed private broadcasting at the local level while denying it at the national level should serve as a lesson; this limited opening has

Per Jeevan Reddy, J. *(contd.)*

given rise to giant media oligopolies. Even with the best of programme controls it may prove counter-productive at the present juncture of our development; the implementation machinery in our country leaves much to be desired; a reality which cannot be ignored. It is true that even if private broadcasting is not allowed from Indian soil, such stations may spring up on the periphery of or outside our territory, catering exclusively to the Indian public. (Para 194)

But that cannot be a ground for enlarging the scope of Article 19(1)(*a*). It may be a factor in favour of allowing private broadcasting — or it may not be. It may also be that Parliament decides to increase the number of channels under Doordarshan, diversifying them into various fields, commercial, educational, sports and so on. Or Parliament may decide to permit private broadcasting, but if it does so permit, it should not only keep in mind the experience of the countries where such a course has been permitted but also the conditions in this country and the compulsions of technological developments and the realities of situation resulting from technological developments. The Court is not concerned with the matters of policy which are for Parliament to consider. (Para 39)

The question whether to permit private broadcasting or not is a matter of policy for Parliament to decide. If it decides to permit it, it is for Parliament to decide, subject to what conditions and restrictions should it be permitted. The fact remains that private broadcasting, even if allowed, should not be left to market forces, in the interest of ensuring that a wide variety of voices enjoy access to it. (Para 200)

The considerations emphasised by Constitutional Courts of United States and major West European countries — furnish valid grounds against reading into Article 19(1)(*a*) a right to establish private broadcasting stations, whether permanent or temporary, stationary or mobile. Same holding holds good for earth stations and other telecasting equipment. In other words while public broadcasting is implicit in Article 19(1)(*a*) private broadcasting is not. We must reiterate that the press whose freedom is implicit in Article 19(1)(*a*) stands on a different footing. The petitioners — or the potential applicants for private broadcasting licences — cannot invoke the analogy of the press. To repeat, airwaves are public property and better remain in public hands in the interest of the very freedom of speech and expression of the citizens of this country. (Paras 185, 194 and 150)

Columbia Broadcasting System v *Democratic National Committee*, 412 US 94 : 36 L Ed 2d 772 (1973), *Red Lion Broadcasting Co* v *FCC*, 395 US 367 : 23 L Ed 2d 371 (1969), *Miami Herald Publishing Co* v *Tornillo*, 418 US 241 : 41 L Ed 2d 730 (1974); *New York Times* v. *United States)*, 403 US 713 : 29 L Ed 2d 822 (1971); *United States* v *Nixon*, 418 US 683 . 41 L Ed 2d 1039 (1974), *referred to*

Informationsverein Lentia v. *Austria*, 15 Human Rights Law Journal 31 (judgment dated 24-11-1993), *distinguished*

In conclusion :

(*a*) Game of cricket, like any other sports event, provides entertainment. Providing entertainment is implied in freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution subject to this rider that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing societal interests. The petitioners (CAB and BCCI) therefore have a right to organise cricket matches in India, whether with or without the participation of foreign teams [Para 201(1)(*a*)]

(*b*) Airwaves constitute public property and must be utilised for advancing public good. No individual has a right to utilise them at his choice and pleasure

and for purposes of his choice including profit. The right of free speech guaranteed by Article 19(1)(*a*) does not include the *right* to use airwaves, which are public property. The airwaves can be used by a citizen for the purpose of broadcasting only when allowed to do so by a statute and in accordance with such statute. Airwaves being public property, it is the duty of the State to see that airwaves are so utilised as to advance the free speech right of the citizens which is served by ensuring plurality and diversity of views, opinions and ideas. This is imperative in every democracy where freedom of speech is assured. The free speech right guaranteed to every citizen of this country does not encompass the right to use these airwaves at his choosing. Conceding such a right would be detrimental to the free speech rights of the body of citizens inasmuch as only the privileged few — powerful economic, commercial and political interests — would come to dominate the media. By manipulating the news, views and information, by indulging in misinformation and disinformation, to suit their commercial or other interests, they would be harming — and not serving — the principle of plurality and diversity of views, news, ideas and opinions. This has been the experience of Italy where a limited right, i.e., at the local level but not at the national level was recognised. It is also not possible to imply or infer a right from the guarantee of free speech which only a few can enjoy. [Para 201(1)(*b*)]

(*c*) Broadcasting media is inherently different from press or other means of communication/information. The analogy of press is misleading and inappropriate. This is also the view expressed by several constitutional courts including that of the United States of America. [Para 201(1)(*c*)]

(*d*) I must clarify what I say; it is that the right claimed by the petitioners (CAB and BCCI) — which in effect is no different in principle from a right to establish and operate a private TV station — does not flow from Article 19(1)(*a*); that such a right is not implicit in it. The question whether such right should be given to the citizens of this country is a matter of policy for Parliament. Having regard to the revolution in information technology and the developments all around, Parliament may, or may not, decide to confer such right. If it wishes to confer such a right, it can only be by way of an Act made by Parliament. The Act made should be consistent with the right of free speech of the citizens and must have to contain strict programme and other controls, as has been provided, for example, in the Broadcasting Act, 1991 in the United Kingdom. This is the implicit command of Article 19(1)(*a*) and is essential to preserve and promote plurality and diversity of views, news, opinions and ideas. [Para 201(1)(*d*)]

(*e*) There is an inseparable interconnection between freedom of speech and the stability of the society, i.e., stability of a nation-State. They contribute to each other. Ours is a nascent republic. We are yet to achieve the goal of a stable society. This country cannot also afford to read into Article 19(1)(*a*) an unrestricted right to licensing (right of broadcasting) as claimed by the petitioners herein. [Para 201(1)(*e*)]

(*f*) In the case before us, both the petitioners have sold their right to telecast the matches to a foreign agency. They have parted with the right. The right to telecast the matches, including the right to import, install and operate the requisite equipment, is thus really sought by the foreign agencies and not by the petitioners. Hence, the question of violation of their right under Article 19(1)(*a*) resulting from refusal of licence/permission to such foreign agencies does not arise. [Para 201(1)(*f*)]

E. Constitution of India — Arts. 19(1)(a) & 19(2) — Broadcasting/ telecasting as a medium of speech and expression — Whether the Govt. or its agencies, like Doordarshan, have a monopoly of creating terrestrial signals and of telecasting them or refusing to telecast them — Whether they can claim to be the host broadcaster for all events whether produced or organised by it or by anybody else in the country — Whether they can insist upon the organiser or the agency for telecasting engaged by him, to take the signals only from the Govt. or govt. agency and telecast it only with its permission or jointly with it — Whether, in fact, Doordarshan had not sought to monopolise the situation — Whether, in fact, there are a limited number of frequencies justifying social control through a central authority — What if no demand is made on the frequencies generated or owned and controlled by the Government or government agencies — Whether such monopolisation by Govt. in the sphere of Art. 19(1)(a) rights is permissible under Art. 19(2) — In this context what is paramount : the rights of the viewers and listeners or of the broadcaster — Monopoly in the field by broadcasting/telecasting, by the Government or government organisation or by any private individual, institution or organisation, held, is not constitutionally permissible — Situation in India — Need for an independent autonomous broadcasting authority of representative character to control all aspects of the operation of the electronic media — Restrictions imposed under the Telegraph Act, 1885 and the Cinematograph Act, 1952 and Rules must conform to Art. 19(2) — Inadequacy of Telegraph Act, 1885 to deal with the present situation — Govt. monopoly in print media, same considerations if apply

Held :

Per Sawant and Mohan, JJ.

Broadcasting is a means of communication and, therefore, a medium of speech and expression. Hence in a democratic polity, neither any private individual, institution or organisation nor any Government or government organisation can claim exclusive right over it. Our Constitution also forbids monopoly either in the print or electronic media. The monopoly permitted by our Constitution is only in respect of carrying on a trade, business, industry or service under Article 19(6) to subserve the interests of the general public. (Para 47)

The claim for monopoly by Government is to utilise the public resources in the form of the limited frequencies available for the benefit of the society at large. It is justified by the Government to prevent the concentration of the frequencies in the hands of the rich few who can monopolise the dissemination of views and information to suit their interests and thus in fact to control and manipulate public opinion in effect smothering the right to freedom of speech and expression and freedom of information of others. (Para 47)

This claim may lose all its *raison d'être* if either any section of the society is unreasonably denied an access to broadcasting or the governmental agency claims exclusive right to prepare and relay programmes. The ground is further not available when those claiming an access either do not make a demand on the limited frequencies controlled by the Government or claim the frequency which is not utilised and is available for transmission. The Government sometimes claims monopoly also on the ground that having regard to all pervasive presence and impact of the electronic media, it may be utilised for purposes not permitted by law and the damage done by private broadcasters may be irreparable. There is much to be said in favour of this view and it is for this reason that the regulatory provisions including those for granting licences to private broadcasting where it is permitted,

are enacted On the other hand, if the Government is vested with an unbridled discretion to grant or refuse to grant the licence or access to the media, the reason for creating monopoly will lose its validity. For then it is the Government which will be enabled to effectively suppress the freedom of speech and expression instead of protecting it and utilising the licensing power strictly for the purposes for which it is conferred. (Para 47)

It is for this reason that in most of the democratic countries an independent autonomous broadcasting authority is created to control all aspects of the operation of the electronic media. Such authority is representative of all sections of the society and is free from control of the political and administrative executive of the State. (Para 47)

In this country, unlike in the United States and some European countries, there has been a monopoly of broadcasting/telecasting in the Government. The Indian Telegraph Act, 1885 creates this monopoly and vests the power of regulating and licensing broadcasting in the Government. Further, the Cinematograph Act, 1952 and the Rules made thereunder empower the Government to pre-censor films. However, the power given to the Government to licence and to pre-censor under the respective legislations has to be read in the context of Article 19(2) of the Constitution which sets the parameters of reasonable restrictions which can be placed on the right to freedom of speech and expression. The power to pre-censor films and to grant licences for access to telecasting, has to be exercised in conformity with the provisions of Article 19(2). (Para 48)

As regards the rights of viewers and listeners it has been aptly stated in *Red Lion Broadcasting case* : "But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of the broadcasters, which is paramount." (Para 39)

Red Lion Broadcasting Co. v. *FCC*, 395 US 367 : 23 L Ed 2d 371 (1969), *relied on*

Viewing the matter from the aspect of right of viewers, there can be no dispute with the proposition that the freedom of speech has to be viewed also as a right of the viewers which has paramount importance, and the said view has significance in a country like ours. To safeguard the rights of the viewers in this country, it is necessary to regulate and restrict the right to access to telecasting. This right of the viewers is also relevant in another context earlier. True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1-1/2 per cent of the population has an access to the print media which is not subject to pre-censorship. When, therefore, the electronic media is controlled by one central agency or few private agencies of the rich, there is a need to have a central agency representing all sections of the society. Hence to have a representative central agency to ensure the viewers' right to be informed adequately and truthfully is a part of the right of the viewers under Article 19(1)(*a*). [We are, however, unable to appreciate this contention in the present context since the viewers' rights are not at all affected by the BCCI/CAB, by claiming a right to telecast the cricket matches. On the other hand, the facts on

Per Sawant and Mohan, JJ. *(contd.)*

record show that their rights would very much be trampled if the cricket matches are not telecast through Doordarshan, which has the monopoly of the national telecasting network.] (Para 82)

In conclusion :

The Central Government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves. [Para 122(*iii*)]

Per Jeevan Reddy, J.*†

The obligation of the State to ensure the right of freedom of speech and expression to all its citizens creates an obligation upon it to ensure that the broadcasting media is not monopolised, dominated or hijacked by privileged, rich and powerful interests. Such monopolisation or domination cannot but be prejudicial to the freedom of speech and expression of the citizens in general (Para 191)

From the standpoint of Article 19(1)(*a*), what is paramount is the right of the listeners and viewers and not the right of the broadcaster — whether the broadcaster is the State, public corporation or a private individual or body. A monopoly over broadcasting, whether by Government or by anybody else, is inconsistent with the free speech right of the citizens. State control really means governmental control, which in turn means, control of the political party or parties in power for the time being. Such control is bound to colour the views, information and opinions conveyed by the media. The free speech right of the citizens is better served in keeping the broadcasting media under the control of public. Control by public means control by an independent public corporation or corporations, as the case may be, formed under a statute. Broadcasting provides an essential service in a democratic society and could legitimately be reserved for a public institution, provided certain conditions are met. The corporation(s) must be constituted and composed in such a manner as to ensure its independence from Government and its impartiality on public issues. When presenting or discussing a public issue, it must be ensured that all aspects of it are presented in a balanced manner, without appearing to espouse any one point of view. This will also enhance the credibility of the media to a very large extent; a controlled media cannot command that level of credibility. (Para 194)

It has been held by this Court in *LIC* v. *Manubhai Shah* that the freedom of speech and expression guaranteed to the citizens of this country "includes the right to propagate one's views through print media or through any other communication channel, e.g., the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution". To the same effect is the holding in *Odyssey Communications*. Once this is so, it follows that no monopoly of this media can be conceived for the simple reason that Article 19(2) does not permit State monopoly unlike clause (6) of Article 19 vis-à-vis the right guaranteed by Article 19(1)(*g*). (Para 198)

LIC v *Professor Manubhai D. Shah*, 1992) 3 SCC 637; *Odyssey Communications (P) Ltd.* v *Lokvidayan Sanghatana*, (1988) 3 SCC 410 : 1988 Supp (1) SCR 486; *National Broadcasting Co* v. *US*, 319 US 190 . 87 L Ed 1344 (1943); *Red Lion Broadcasting Co* v *FCC*, 395 US 367 23 L Ed 2d 371 (1969); *FCC* v. *National Citizens Committee for Broadcasting*, 436 US 775 : 56 L Ed 2d 697 (1978), *relied on*

† *See* footnote * on p 168

All the constitutional courts of Europe whose opinions have been set out hereinbefore [paras 160 to 172] have taken the uniform view that in the interest of ensuring plurality of opinions, views, ideas and ideologies, the broadcasting media cannot be allowed to be under the monopoly of any one — be it the monopoly of Government or of an individual, body or organisation. Government control in effect means the control of the political party or parties in power for the time being. Such control is bound to colour and in some cases, may even distort the news, views and opinions expressed through the media. It is not conducive to free expression of contending viewpoints and opinions which is essential for the growth of a healthy democracy. In India, AIR and Doordarshan enjoy a monopoly in the matter of broadcasting and telecasting. They cannot think of any other agency doing the same job. (Paras 199, 128 and 159)

Third Television case, 57 BVerfGE 295; *Fourth Television case*, 73 BVerfGE 118, *relied on*

In conclusion :

The Government monopoly of broadcasting media in this country is the result of historical and other factors. This is true of every other country, to start with. Until recently, the broadcasting media has been in the hands of public/statutory corporations in most of the West European countries. Private broadcasting is comparatively a recent phenomenon. The experience in Italy of allowing private broadcasting at local level (while prohibiting it at national level) has left much to be desired. It has given rise to powerful media empires which development is certainly not conducive to free speech right of the citizens. [Para 201(2)]

Broadcasting media is affected by the free speech right of the citizens guaranteed by Article 19(1)(*a*). Hence monopoly of this medium (broadcasting media), whether by Government or by an individual, body or organisation is unacceptable. Clause (2) of Article 19 does not permit a monopoly in the matter of freedom of speech and expression as is permitted by clause (6) of Article 19 vis-à-vis the right guaranteed by Article 19(1)(*g*). [Para 201(3)(*a*)]

The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly — whether the monopoly is of the State or any other individual, group or organisation. As a matter of fact, private broadcasting stations may perhaps be more prejudicial to free speech right of the citizens than the government controlled media. *The broadcasting media should be under the control of the public as distinct from Government.* This is the command implicit in Article 19(1)(*a*). It should be operated by a public statutory corporation or corporations, as the case may be, whose constitution and composition must be such as to ensure its/their impartiality in political, economic and social matters and on all other public issues. It/they must be required by law to present news, views and opinions in a balanced way ensuring pluralism and diversity of opinions and views. It/they must provide equal access to all the citizens and groups to avail of the medium. [Para 201(3)(*b*)]

The Indian Telegraph Act, 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. The Act was intended for an altogether different purpose when it was enacted. This is the result of the law in this country not keeping pace with the technological advances in the

Per Jeevan Reddy, J. (contd.)

field of information and communications. While all the leading democratic countries have enacted laws specifically governing the broadcasting media, the law in this country has stood still, rooted in the Telegraph Act of 1885. Except Section 4(1) and the definition of telegraph, no other provision of the Act is shown to have any relevance to broadcasting media. It is, therefore, imperative that Parliament makes a law placing the broadcasting media in the hands of a public/statutory corporate or the corporations, as the case may be. This is necessary to safeguard the interests of public and the interests of law as also to avoid uncertainty, confusion and consequent litigation. [Paras 201(4) and 200]

[**Ed.**: In this context *see also* sub-para (1) of para 201 of the conclusion of Jeevan Reddy, J., also cited earlier in this headnote.]

F. **Constitution of India — Art. 19(1)(a) & (2) — Telecasting — Right of organisers of cricket match to telecast it in India through Doordarshan and/or through foreign satellite — Prohibition if can be imposed on the organisers from creating the terrestrial signals and be denied the facility of merely uplinking the terrestrial signals to the satellite owned by another agency, national or foreign — Position/situation when exercise of the telecasting right does not make any demand on any of the frequencies owned, commanded or controlled by the Government or its agencies like VSNL or Doordarshan — Whether, therefore, the permission to uplink to a foreign satellite the signals as generated by the organisers with their own cameras and earth station, or its agencies, can be denied by VSNL on grounds except those of Art. 19(2) — Conditions that can be imposed by the govt. department such as Ministry of Information and Broadcasting (MIB) on (a) creating of terrestrial signals of the event, and (b) granting facilities of uplinking to a satellite not owned or controlled by the Govt. or its agencies — If on facts MIB/DD had stipulated unreasonable conditions for taking up the telecasting contract with Cricket Association of Bengal (CAB) for Hero Cup Tournament, 1993 — Regulation by Central Government of radio and TV waves involving use of electromagnetic waves of frequencies lower than 3000 giga-cycles per second propagated without artificial guide, whether constitutional — Whether in seeking permissions and licences in favour of a foreign broadcaster indirectly meant giving freedom under Art. 19(1)(a) to non-citizens — Should not the rights of the viewer be given primacy over the rights of the organisers**

G. **Telegraph Act, 1885 — Ss. 4(1) and 3(1) — Question pertaining to frequencies of 3000 or more giga-cycles per second propagated with or without artificial guide and pertaining to frequencies below that propagated with artificial guide, left open**

H. **Telegraph Act, 1885 — S. 4(1) proviso — Telecasting — Right of citizen to secure a licence to operate a telegraph for a limited time for a limited and specified non-commercial purpose, namely, telecast certain number of cricket matches — Earning of revenue only incidental though necessary — Respondent CAB a sporting organisation and not a business or commercial organisation — Matches organised for the benefit of the sport, the sportsmen, present and prospective, and the viewers — Restrictions that the Central Govt. can impose under S. 4(1) proviso on such non-wireless telegraphing should be covered by Art. 19(2) — On facts, in the present case none of the purposes mentioned in Art. 19(2) justify the non-sanction of all the licences, permissions and facilities for the telecast by MIB/DD — The orders of the High Court were eminently in the interests of the viewers (per majority)**

Per Sawant and Mohan, JJ.

It cannot be disputed that the BCCI is a non-profit-making organisation which controls officially organised game of cricket in India. Similarly, Cricket Association of Bengal (CAB) is also non-profit-making organisation which controls officially organised game of cricket in the State of West Bengal. The CAB is one of the Founder Members of BCCI. Office-bearers and Members of the Working Committees of both BCCI and CAB are all citizens of India. The primary object of both the organisations, amongst others, is to promote the game of cricket, to foster the spirit of sportsmanship and the ideals of cricket, and to impart education through the media of cricket, and for achieving the said objects, to organise and stage tournaments and matches either with the members of International Cricket Council (ICC) or other organisations. Moreover, to arrange any international cricket tournament or series, it is necessary and a condition-precedent, to pay to the participating member-countries or teams, a minimum guaranteed amount in foreign exchange and to bear the expenses incurred for travelling, boarding, lodging and other daily expenses of the participating cricketers and the accompanying visiting officials concerned. A huge amount of expenses has also to be incurred for organising the matches. In addition, both BCCI and CAB annually incur large amount of expenses for giving subsidies and grants to its members to maintain, develop and upgrade the infrastructure, to coach and train players and umpires and to pay to them when the series and matches are played. (Paras 51 and 52)

It is a perverse view to contend that to engage a foreign agency for the purpose is to make it a device for a non-citizen to assert his rights under Article 19(1)(*a*). It cannot be denied that the right to freedom of speech and expression under Article 19(1)(*a*) includes the right to disseminate information by the best possible method through an agency of one's choice so long as the engagement of such agency is not in contravention of Article 19(2) of the Constitution and does not amount to improper or unwarranted use of the frequencies. Hence the choice of BCCI/CAB of a foreign agency to telecast the matches cannot be objected to. There is no suggestion in the present case that the engagement of the foreign agency by the BCCI/CAB is violative of the provisions of Article 19(2). In fact the BCCI/CAB is asserting its right under Article 19(1)(*a*). While asserting the said right, it is incidentally going to earn some revenue. In the circumstances, it has the right to choose the best method to earn the maximum revenue possible. In fact, it can be accused of negligence and may be attributed improper motives, if it fails to explore the most profitable avenue of telecasting the event, when in any case, in achieving the object of promoting and popularizing the sport, it has to endeavour to telecast the cricket matches. The record shows that all applications were made and purported to have been made to the various agencies on behalf of CAB for the necessary licences and permissions. All other Ministries and Departments understood them as such and granted the necessary permissions and licences. Hence, by granting such permission, the Government was not in fact granting permission to the foreign agency to exercise its right under Article 19(1)(*a*). If, further, that was the only objection in granting permission, a positive approach on the part of the MIB could have made it clear in the permission granted by it was being given to CAB. (Para 81)

It will not be a proper reading of the contentions raised by BCCI/CAB in their pleadings both before the High Court and the Supreme Court to argue that since in the present case, Doordarshan has not refused to telecast the event, its monopoly to telecast cannot be challenged and in fact no such contention was raised by the BCCI/CAB. Undisputed facts on record show that Doordarshan claimed exclusive right to create host broadcasting signal and to telecast it on the terms and

Per Sawant and Mohan, JJ. *(contd.)*

conditions stipulated by it or not at all. MIB even refused to grant uplinking facilities when the terrestrial signals were being created by the CAB with their own apparatus, i.e., the apparatus of the agency which they had engaged and when the use of any of the frequencies owned, controlled or commanded by DD or the Government, was not involved. Since BCCI/CAB were the organisers of the events, they had every right to create terrestrial signals of their event and to sell it to whomsoever they thought best so long as such creation of the signals and the sale thereof was not violative of any law made under Article 19(2) and was not an abuse of the frequencies which are a public property. Neither DD nor any other agency could impose their terms for creating signals or for telecasting them unless it was sought through their frequencies. When Doordarshan refused to telecast cricket matches except on their terms, the BCCI/CAB turned to another agency, in the present case a foreign agency, for creating the terrestrial signals and telecasting it through the frequencies belonging to that agency. When Doordarshan refused to telecast the matches, the rights of the viewers to view the matches were in jeopardy. Only the viewers in this country who could receive foreign frequencies on their TV sets, could have viewed the said matches. Hence it is not correct to say that Doordarshan had not refused to telecast the events. To insist on telecasting events only on one's unreasonable terms and conditions and not otherwise when one has the monopoly of telecasting, is nothing but refusal to telecast the same. Doordarshan could not do it except for reasons of non-availability of frequencies or for grounds available under Article 19(2) of the Constitution or for considerations of public interest involved in the use of the frequencies as public property. The fact that Doordarshan was prepared to telecast the events only on its terms shows that the frequency was available. Hence, scarcity of frequencies or public interests cannot be pressed as grounds for refusing to telecast or denying access to BCCI/CAB to telecasting. Nor can Doordarshan plead encroachment on the right of viewers as a ground since the telecasting of events on the terms of Doordarshan cannot alone be said to safeguard the right of viewers in such a case and in fact it was not so. (Para 83)

In the present case, it was not and cannot be the case of the MIB that the telecasting of the cricket matches was not for the benefit of the society at large or not in the public interest and, therefore, not a proper use of the public property. It was not the case of the MIB that it was in violation of the provisions of Article 19(2). There was nothing to be pre-censored on the grounds mentioned in Article 19(2). As regards the limitation of resources, since Doordarshan was prepared to telecast the cricket matches, but only on its terms it could not plead that there was no frequency available for telecasting. Doordarshan could also not have ignored the rights of the viewers. The CAB/BCCI being the organisers of the event had a right to sell the telecasting rights of its event to any agency. Assuming that Doordarshan had no frequency to spare for telecasting the matches, the CAB could certainly enter into a contract with any agency including a foreign agency to telecast the said matches through that agency's frequency for the viewers in this country (who could have access to those frequencies) as well as for the viewers abroad. The orders passed by the High Court in effect gave a right to Doordarshan to be the host broadcaster for telecasting in this country and for the TWI, for telecasting for the viewers outside this country as well as those viewers in this country who have an access to the TWI frequency. The order was eminently in the interests of the viewers whatever its merits on the other aspects of the matter. (Para 120)

The circumstances in which the High Court passed the orders and the factual and legal considerations which weighed with it in passing them speak for themselves. However, since the cricket matches have already been telecast, the question of the legality or otherwise of the orders has become academic and it is not necessary to pronounce our formal verdict on the same. Hence we refrain from doing so. (Para 121)

In conclusion :

Since the matches have been telecast pursuant to the impugned order of the High Court, it is not necessary to decide the correctness of the said order. [Para 122(*iv*)]

The High Court will now apportion between the CAB and Doordarshan the revenues generated by the advertisements on TV during the telecasting of both the series of the cricket matches, viz., the Hero Cup, and the International Cricket Matches played in India from October to December 1994, after hearing the parties on the subject. [Para 122(*v*)]

Per Jeevan Reddy, J.[*‡]

According to the petitioners' own case, they have sold the telecasting rights with respect to their matches to a foreign agency with the understanding that such foreign agency shall bring in its own equipment and personnel and telecast the matches from the Indian territory. Once they have sold their rights, the foreign agency is not their agent but an independent party. It is a principal by itself. The foreign agency cannot claim or enforce the right guaranteed by Article 19(1)(*a*). Petitioners cannot also claim because they have already sold the rights. In other words, the right to telecast is no longer with them but with the foreign firm which has purchased the telecasting rights. For this reason too, the petitioners' claim must be held to be unacceptable. (Para 196)

In conclusion :

What CAB and BCCI are seeking is a licence to telecast their matches through an agency of their choice — a foreign agency in both the cases — and through telecasting equipment brought in by such foreign agency from outside the country. In the case of Hero Cup matches organised by CAB, they wanted uplinking facility to INTELSAT through the government agency VSNL also. In the case of later international matches organised by BCCI they did not ask for this facility for the reason that their foreign agent has arranged direct uplinking with the Russian satellite Gorizon. In both cases, they wanted the permission to import the telecasting equipment along with the personnel to operate it by moving it to places all over the country wherever the matches were to be played. They claimed this licence, or permission, as it may be called, as a matter of right said to be flowing from Article 19(1)(*a*) of the Constitution. They say that the authorities are bound to grant such licence/permission, without any conditions; all that they are entitled to do, it is submitted, is to collect technical fees wherever their services are availed, like the services of VSNL in the case of Hero Cup matches. This plea is in principle no different from the right to establish and operate private telecasting stations. In principle, there is no difference between a permanent TV station and a temporary one; similarly there is no distinction in principle between a stationary TV facility and a mobile one; so also is there no distinction between a regular TV facility and a TV facility for a given event or series of events. If the right claimed by the petitioners (CAB and BCCI) is held to be constitutionally sanctioned one, then

‡ *See* footnote * *supra* p. 168

Per Jeevan Reddy, J. *(contd.)*

each and every citizen of this country must also be entitled to claim similar right in respect of his event or events, as the case may be. I am of the opinion that no such right flows from Article 19(1)(*a*). [Para 201(1)(*a*)]

Now the question arises, what is the position till the Central Government or Parliament takes steps as contemplated in para 4 (namely, place the broadcasting media in the hands of a public/statutory corporation) of the summary, i.e., if any sporting event or other event is to be telecast from the Indian soil? The obvious answer flowing from the judgment (and paras 1 and 4 of this summary) is that the organiser of such event has to approach the nodal ministry as specified in the decision of the Meeting of the Committee of Secretaries held on 12-11-1993. There is no reason to doubt that such a request would be considered by the nodal ministry and AIR and Doordarshan on its merits, keeping in view the public interest. In case of any difference of opinion or dispute regarding the monetary terms on which such telecast is to be made, matter can always be referred to an arbitrator or a panel of arbitrators. In case, the nodal ministry or AIR or Doordarshan find such broadcast/telecast not feasible, then they may consider the grant of permission to the organisers to engage an agency of their own for the purpose. Of course, it would be equally open to the nodal ministry (Government of India) to permit such foreign agency in addition to AIR/Doordarshan, if they are of the opinion that such a course is called for in the circumstances. [Para 201(6)]

I. **Telegraph Act, 1885 — S. 4(1) proviso — Licence for telecasting if can be implied — Court whether can pass directions so as to foreclose the exercise of discretion by the licensing authority — On facts, question rendered academic — Opinion however expressed (per Jeevan Reddy, J.) that Court cannot pass an order, as in the present case, forestalling or restricting the exercise of discretion by the licensing authority (Para 148)**

J. **Telegraph Act, 1885 — S. 4(1) proviso — Telecasting of Hero Cup Tournament, 1993 — Protracted negotiations with Doordarshan not materialising whereupon contract entered into with foreign agency — On facts, the allegation of conduct of Doordarshan being mala fide, arbitrary and authoritarian held, unacceptable (Paras 108 and 148)**

Per Jeevan Reddy, J.

The CAB did not ever apply for a licence under the first proviso to Section 4 of the Telegraph Act nor did its agents ever make such an application. The permissions, clearances or exemption obtained by it from the several departments (mentioned in judgment) are no substitute for a licence under Section 4(1) proviso. In the absence of such a licence, the CAB had no right in law to have its matches telecast by an agency of its choice. The legality or validity of the orders passed by Shri N. Vithal, Secretary to the Government of India, Telecommunications Department need not be gone into since it has become academic. In the facts and circumstances of the case, the charge of mala fides or of arbitrary and authoritarian conduct attributed to Doordarshan and Ministry of Information and Broadcasting is not acceptable. No opinion need be expressed on the allegations made in the Interlocutory Application filed by BCCI in these matters. Its intervention was confined to legal questions only. [Para 201(5)]

K. **Constitution of India — Art. 19(1)(a) & (2) — Freedom of speech and expression — American decisions, in principle, make no difference to the content of the right under the Constitution of India (Para 22)**

Chronological list of cases where cited *Para(s)*

(1994) 2 SCC 434, *Printers (Mysore) Ltd.* v. *Asstt. CTO* 19

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The Judgments of the Court were delivered by

SAWANT, J. (*for himself and Mohan, J.*)— Leave granted.

2. It will be convenient to answer the questions of law that arise in the present case, before we advert to the factual controversy between the parties. The questions of law are:

(1) Has an organiser or producer of any event a right to get the event telecast through an agency of his choice whether national or foreign?

(2) Has such organiser a choice of the agency of telecasting, particularly when the exercise of his right, does not make demand on any of the frequencies owned, commanded or controlled by the Government or the government agencies like the Videsh Sanchar Nigam Limited (VSNL) or Doordarshan (DD)?

(3) Can such an organiser be prevented from creating the terrestrial signal and denied the facility of merely uplinking the terrestrial signal to the satellite owned by another agency whether foreign or national?

(4) What, if any, are the conditions which can be imposed by the Government Department which in the present case is the Ministry of Information and Broadcasting (MIB) for (*a*) creating terrestrial signal of the event, and (*b*) granting facilities of uplinking to a satellite not owned or controlled by the Government or its agencies?

3. On answers to these questions depend the answers to the incidental questions such as (*i*) whether the Government or the government agencies like DD in the present case, have a monopoly of creating terrestrial signals and of telecasting them or refusing to telecast them, (*ii*) whether the Government or government agencies like DD can claim to be the host broadcaster for all events whether produced or organised by it or by anybody else in the country and can insist upon the organiser or the agency for telecasting engaged by him, to take the signal only from the Government or government agency and telecast it only with its permission or jointly with it.

4. To appreciate the thrust of the above questions and the answers to them, it is necessary first to have a proper understanding of what 'telecasting' means and what its legal dimensions and consequences are. Telecasting is a system of communication either audio or visual or both. We are concerned in the present case with audio-visual telecommunication. The first stage in telecasting is to generate the audio-visual signals of the events or of the information which is sought to be communicated. When the event to be telecast takes place on the earth, necessarily the signal is generated on the earth by the requisite electronic mechanism such as the audio-visual recorder. This stage may be described as the recording stage. The events may be spontaneous, accidental, natural or organised. The spontaneous, accidental and natural events are by their nature uncontrollable. But the organised events can be controlled by the law of the land. In our country, since the

organisation of an event is an aspect of the fundamental right to freedom of speech and expression protected by Article 19(1)(*a*), the law can be made to control the organisation of such events only for the purposes of imposing reasonable restrictions in the interest of the sovereignty and integrity of the country, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence as laid down under Article 19(2) of the Constitution. Although, therefore, it is not possible to make law for prohibiting the recording of spontaneous, accidental or natural events, it is possible for the reasons mentioned in Article 19(2), to restrict their telecasting. As regards the organised events, a law can be made for restricting or prohibiting the organisation of the event itself, and also for telecasting it, on the same grounds as are mentioned in Article 19(2). There cannot, however, be restrictions on producing and recording the event on grounds not permitted by Article 19(2). It, therefore, follows that the organisation or production of an event and its recording cannot be prevented except by law permitted by Article 19(2). For the same reasons, the publication or communication of the recorded event through the mode of cassettes cannot be restricted or prevented except under such law. All those who have got the apparatus of video cassette recorder (VCR) and the television screen can, therefore, view and listen to such recorded event (hereinafter referred to, for the sake of convenience, as 'viewers'). In this process, there is no demand on any frequency or channel since there is no live telecast of the event. The only additional restriction on telecasting or live telecasting of such event will be the lack of availability of the frequency or channel.

5. Since in the present case, what is involved is the right to live telecast the event, viz., the cricket matches organised by the Cricket Association of Bengal, it is necessary to understand the various issues involved in live telecasting. It may be made clear at the outset, that there may as well be a file telecast (i.e. telecasting of the events which are already recorded by the cassette). The issues involved in file telecasting will also be more or less the same and therefore, that subject is not dealt with separately. Telecasting live or file necessarily involves the use of a frequency or a channel.

6. The telecasting is of three types, — (*a*) terrestrial, (*b*) cable and (*c*) satellite. In the first case, the signal is generated by the camera stationed at the spot of the event and the signal is then sent to the earthly telecasting station such as the TV centre which in turn relays it through its own frequencies to all the viewers who have TV screens/sets. In the second case, viz., cable telecasting, the cable operator receives the signals from the satellite by means of the parabolic dish antenna and relays them to all those TV screens which are linked to his cable. He also relays the recorded file programmes or cassettes through the cable to the cable-linked viewers. In this case, there is no restriction on his receiving the signals from any satellite to which his antenna is adjusted. There is no demand made by him on any frequency or channel owned or controlled by the national Government or

governmental agencies. The cable operator can show any event occurring in any part of the country or the world live through the frequencies if his dish antenna can receive the same. The only limitation from which the cable TV suffers is that the programmes relayed by it can be received only by those viewers who are linked to the dish antenna concerned. The last type, viz., satellite TV operation involves the use of a frequency generated, owned or controlled by the national Government or the governmental agencies, or those generated, owned and controlled by other agencies. It is necessary to bear in mind the distinction between the frequencies generated, owned and controlled by the Government or governmental agency and those generated and owned by the other agencies. This is so because generally, as in the present case, one of the contentions against the right to access to telecasting is that there are a limited number of frequencies and hence there is the need to utilise the limited resources for the benefit of all sections of the society and to promote all social interests by giving them priority as determined by some central authority. It follows, therefore, that where the resources are unlimited or the right to telecast need not suffer for want of a frequency, objection on the said ground would be misplaced. It may be stated here that in the present case, the contention of the MIB and DD against the right to telecast claimed by the Cricket Association of Bengal (CAB)/Board of Control for Cricket in India (BCCI) was raised only on the ground of the limitation of frequencies, ignoring the fact that the CAB/BCCI had not made demand on any of the frequencies generated or owned by the MIB/DD. It desired to telecast the cricket matches organised by it through a frequency not owned or controlled by the Government but owned by some other agency. The only permission that the CAB/BCCI sought was to uplink to the foreign satellite the signals created by its own cameras and the earth station or the cameras and the earth station of its agency to a foreign satellite. This permission was sought by the CAB/BCCI from VSNL which is the government agency controlling the frequencies. The permission again cannot be refused except under law made in pursuance of the provisions of Article 19(2) of the Constitution. Hence, as stated above, one of the important questions to be answered in the present case is whether the permission to uplink to the foreign satellite, the signal created by the CAB/BCCI either by itself or through its agency can be refused except on the ground stated in the law made under Article 19(2).

7. This takes us to the content of the fundamental right to the freedom of speech and expression guaranteed by Article 19(1)(*a*) and the implications of the restrictions permitted to be imposed on the said right, by Article 19(2). We will first deal with the decisions of this Court where the dimensions of the right are delineated.

8. In *Romesh Thappar* v. *State of Madras*[1] the facts were that the Provincial Government in exercise of its powers under Section 9(1-A) of Madras Maintenance of Public Order Act, 1949, by an order, imposed a ban

1 1950 SCR 594 AIR 1950 SC 124

upon the entry and circulation of the petitioner's journal '*Cross Roads*'. The said order stated that it was being passed for the purpose of securing the public safety and the maintenance of public order. The petitioner approached this Court under Article 32 of the Constitution claiming that the order contravened the petitioner's fundamental right to freedom of speech and expression. He also challenged the validity of Section 9(1-A) of the impugned Act. The majority of the Court held that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. In support of this view, the Court referred to two decisions of the US Supreme Court, viz., (*i*) *Jackson, ex p*[2], and (*ii*) *Lovell* v. *City of Griffin*[3] and quoted with approval the following passage therefrom:

> "Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value."

Section 9(1-A) of the impugned Act authorised the Provincial Government "for the purpose of securing the public safety or the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale or distribution in the Province of Madras or any part thereof or any document or class of documents". The question that the Court had to answer was whether the impugned Act insofar as it contained the aforesaid provision was a law relating to a matter which undermined the security of, or tended to overthrow the State. The Court held that "public order" is an expression of wide connotation and signifies that state of tranquillity which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established. The Act was passed by the Provincial Legislature under Section 100 of the Government of India Act, 1935 read with Entry 1 of List II of the Seventh Schedule to that Act. That entry, among others, comprised "public order" which was different from "public safety" on which subject the Provincial Legislature was not competent to make a law. The Court distinguished between "public order" and "public safety" and held that public safety was a part of the wider concept of public order and if it was intended to signify any matter distinguished from and outside the content of the expression "public order", it would not have been competent for the Madras Legislature to enact the provision so far as it related to public safety. "Public safety" ordinarily means security of the public or their freedom from danger. In that sense, anything which tends to prevent danger to public health may also be regarded as securing public safety. The meaning of the expression must, however, vary according to the context. The Court then rejected the argument that the securing of the public safety or maintenance of public order would include the security of the State which was covered by Article

2 24 L Ed 877 96 US 727 (1877)
3 303 US 444 82 L Ed 949 (1938)

19(2) and held that where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative actions affecting such right, it is not possible to uphold it even insofar as it may be applied within the constitutional limits as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it may be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

9. The above view taken by this Court was reiterated in *Brij Bhushan* v. *State of Delhi*[4] where Section 7(1)(*c*) of the East Punjab Public Safety Act, 1949 as extended to the Province of Delhi, providing that the Provincial Government or any authority authorised by it in this behalf, if satisfied that such action was necessary for preventing or combating any activity prejudicial to the public safety or the maintenance of public order, may pass an order that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny, was held as unconstitutional and void. The majority held that the said provision was violative of Article 19(1)(*a*) since it was not a law relating to a matter which undermined the security of, or tended to overthrow the State within the meaning of the then saving provision contained in Article 19(2). The Court further unanimously held that the imposition of pre-censorship of a journal was a restriction on the liberty of the press which was an essential part of the right to freedom of speech and expression declared by Article 19(1)(*a*).

10. In *Hamdard Dawakhana (Wakf), Lal Kuan* v. *Union of India*[5] the Court held that the object of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was the prevention of self-medication and self-treatment by prohibiting instruments which may be used to advocate the same or which tended to spread the evil. Its object was not merely the stopping of advertisements offending against morality and decency. The Court further held that advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It is only when an advertisement is concerned with the expression or propagation of ideas that it can be said to relate to freedom of speech but it cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of the freedom of speech guaranteed by the Constitution. The provisions of the Act which prohibited advertisements commending the efficacy, value and importance in the treatment of particular diseases of certain drugs and medicines did not fall under Article 19(1)(*a*) of the Constitution. The scope

4 1950 SCR 605 AIR 1950 SC 129
5 (1960) 2 SCR 671 AIR 1960 SC 554

and object of the Act, its true nature and character was not interference with the right of freedom of speech but it dealt with trade and business. The provisions of the Act were in the interest of the general public and placed reasonable restrictions on the trade and business of the petitioner and were saved by Article 19(6). The Court further held that the first part of Section 8 of the impugned Act which empowered any person authorised by the State Government to seize and detain any document, article or thing which such person had reason to believe, contained any advertisement contravening the provisions of the Act imposed an unreasonable restriction on the fundamental rights of the petitioner and was unconstitutional. According to the Court, the said operation of Section 8 went far beyond the purposes for which the Act was enacted and failed to provide proper safeguards in regard to the exercise of the powers of seizure and detention as had been provided by the legislature in other statutes. However, if this operation was excised from the section the remaining portion would be unintelligible and could not be upheld.

11. In *Sakal Papers (P) Ltd.* v. *Union of India*[6] what fell for consideration was the Newspaper (Price and Page) Act, 1956 which empowered the Central Government to regulate the prices of newspapers in relation to their pages and size and also to regulate the allocation of space for advertising matters and the Central Government order made under the said Act, viz., the Daily Newspaper (Price and Page) Order, 1960 which fixed the maximum number of pages that might be published by the newspaper according to the price charged and prescribing the nature of supplements that could be issued. The Court held that the Act and the order were void being violative of Article 19(1)(*a*) of the Constitution. They were also not saved by Article 19(2). The Court asserted that the freedom of speech and expression guaranteed by Article 19(1)(*a*) included the freedom of press. For propagating his ideas a citizen had the right to publish them, to disseminate them and to circulate them, either by word of mouth or by writing. The right extended not merely to the matter which he was entitled to circulate but also to the volume of circulation. Although the impugned Act and the order placed restraints on the volume of circulation, their very object was directed against circulation. Thus both interfered with the freedom of speech and expression. The Court held that Article 19(2) did not permit the State to abridge the said right in the interest of general public. The Court also held that the State could not make a law which directly restricted one guaranteed freedom for securing the better enjoyment of another freedom. Freedom of speech could not be restricted for the purpose of regulating the commercial aspect of the activities of newspapers. In this connection, the following observations of the Court are relevant: (SCR pp. 866-68)

> "Its object thus is to regulate something which, as already stated, is directly related to the circulation of a newspaper. Since circulation of a

6 (1962) 3 SCR 842 AIR 1962 SC 305

newspaper is a part of the right of freedom of speech the Act must be regarded as one directed against the freedom of speech. It has selected the fact or thing which is an essential and basic attribute of the conception of the freedom of speech, viz., the right to circulate one's views to all whom one can reach or care to reach for the imposition of a restriction. It seeks to achieve its object of enabling what are termed the smaller newspapers to secure larger circulation by provisions which without disguise are aimed at restricting the circulation of what are termed the larger papers with better financial strength. The impugned law far from being one, which merely interferes with the right of freedom of speech incidentally, does so directly though it seeks to achieve the end by purporting to regulate the business aspect of a newspaper. Such a course is not permissible and the courts must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. No doubt, the law in question was made upon the recommendation of the Press Commission but since its object is to affect directly the right of circulation of newspapers which would necessarily undermine their power to influence public opinion it cannot but be regarded as a dangerous weapon which is capable of being used against democracy itself.

* * *

The legitimacy of the result intended to be achieved does not necessarily imply that every means to achieve it is permissible; for even if the end is desirable and permissible, the means employed must not transgress the limits laid down by the Constitution, if they directly impinge on any of the fundamental rights guaranteed by the Constitution. It is no answer when the constitutionality of the measure is challenged that apart from the fundamental right infringed the provision is otherwise legal.

Finally it was said that one of its objects is to give some kind of protection to small or newly started newspapers and, therefore, the Act is good. Such an object may be desirable but for attaining it the State cannot make inroads on the right of other newspapers which Article 19(1)(*a*) guarantees to them. There may be other ways of helping them and it is for the State to search for them but the one they have chosen falls foul of the Constitution.

To repeat, the only restrictions which may be imposed on the rights of an individual under Article 19(1)(*a*) are those which clause (2) of Article 19 permits and no other."

12. In *Bennett Coleman & Co.* v. *Union of India*[7] the majority of the Constitution Bench held that newspapers should be left free to determine their pages, their circulation and their new edition within their quota which has been fixed fairly. It is an abridgement of freedom of expression to prevent a common ownership unit from starting a new edition or a new newspaper. A common ownership unit should be free to start a new edition out of their allotted quota and it would be logical to say that such a unit can use its allotted quota for changing its page structure and circulation of different editions of same paper. The compulsory reduction to ten pages offends Article 19(1)(*a*) and infringes the freedom of speech and expression. Fixation of page-limit will not only deprive the petitioners of their economic viability, but will also restrict the freedom of expression by reason of the compulsive reduction of page level entailing reduction of circulation and including the area of coverage for news and views. Loss of advertisements may not only entail the closing down, but will also affect the circulation and thereby impinge on freedom of speech and expression. The freedom of press entitles newspapers to achieve any volume of circulation. It was further held that the machinery of import control cannot be utilised to curb or control circulation or growth or freedom of newspapers. The newsprint control policy was in effect a newspaper control policy and a newspaper control policy is ultra vires the Import Control Act and the Import Control Order. The majority further held that by the freedom of press is meant the right of citizens to speak and publish and express their views. The freedom of the press embodies the right of the people to read and it is not antithetical to the right of the people to speak and express. The freedom of speech and expression is not only in the volume of circulation but also in the volume of news and views. The press has the right of free publication and their circulation without any obvious restraint on publication. If the law were to single out press for laying down prohibitive burdens on it that would restrict circulation, penalise freedom of choice as to personnel, prevent newspapers from being started and compel the press to Government aid. This would violate Article 19(1)(*a*) and would fall outside the protection afforded by Article 19(2). The First Amendment to the American Constitution contains no exception like our Article 19(2). Therefore, American decisions have evolved their own exceptions. The American decisions establish that a Government regulation is justified in America as an important essential Government interest which is unrelated to the suppression of free expression. The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. The object of the law or executive action is irrelevant when it is established that the petitioner's fundamental right is infringed.

7 (1972) 2 SCC 788

13. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[8] the Court held that the expression "freedom of the press" has not been used in Article 19, but it is comprehended within Article 19(1)(*a*). This expression means a freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. There cannot be any interference with that freedom in the name of public interest. The purpose of the press is to advance the public interest by publishing facts and opinions without which democratic electorate cannot make responsible judgments. Freedom of the press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate. The freedom of expression has four broad social purposes to serve: (*i*) it helps an individual to attain self-fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) it strengthens the capacity of an individual in participating in decision-making, and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of the society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive generous support from all those who believe in the participation of people in the administration. It is on account of this special interest which society has in the freedom of speech and expression that the approach of the Government should be more cautious while levying taxes on matters concerning newspaper industry than while levying taxes on other matters. The courts are there always to strike down curtailment of freedom of press by unconstitutional means. The delicate task of determining when it crosses from the area of profession, occupation, trade, business or industry into the area of freedom of expression and interferes with that freedom is entrusted to the courts. In deciding the reasonableness of restrictions imposed on any fundamental right the court should take into consideration the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the disproportion of the imposition and the prevailing conditions including the social values whose needs are sought to be satisfied by means of the restrictions. The imposition of a tax like the customs duty on newsprint is an imposition of tax on knowledge and would virtually amount to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself of the world around him. The pattern of the law imposing customs duty and the manner in which it is operated, to a certain extent, exposes the citizens who are liable to pay the customs duties to the vagaries of executive discretion.

14. In *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana*[9] it was held that the right of citizens to exhibit films on Doordarshan subject to

8 (1985) 1 SCC 641 1985 SCC (Tax) 121
9 (1988) 3 SCC 410 1988 Supp (1) SCR 486

the terms and conditions to be imposed by Doordarshan is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(*a*) which can be curtailed only under circumstances set out under Article 19(2). The right is similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisement hoardings, etc. subject to the terms and conditions of the owners of the media. The freedom of expression is a preferred right which is always very zealously guarded by the Supreme Court. However, on the question whether a citizen has a fundamental right to establish a private broadcasting station or TV centre, the Court reserved its opinion for decision in an appropriate case. The matter had come up before this Court against an interim injunction order issued by the High Court as a result of which 12th and 13th episodes of the film "*Honi-Anhoni*" could not be telecast on the scheduled dates. The Court held that it was not the case of the writ petitioners before the High Court that the exhibition of the said serial was in contravention of any specific law or direction issued by the Government. They had also not alleged that Doordarshan had shown any undue favour to the appellant and the sponsoring institutions resulting in any financial loss to the public exchequer. The objection to the exhibition of the film had been raised by them on the basis that it was likely to spread false or blind beliefs among the members of the public. They had not asserted any right conferred on them by any statute or acquired by them under a contract which entitled them to secure an order of temporary injunction. The appellant before this Court had denied that the exhibition of the serial was likely to affect prejudicially the well-being of the people. The Union of India and Doordarshan had pleaded that the serial was being telecast after following the prescribed procedure and taking necessary precautions. The writ petitioners had not produced any material apart from their own statements to show that the exhibition of the serial was prima facie prejudicial to the community. This Court held that the High Court had overlooked that the issue of an order of interim injunction would infringe upon the fundamental right of the producer of a serial. In the absence of any prima facie evidence of gross prejudice that was likely to be caused to the public generally by the exhibition of the serial, it was not just and proper to issue an order of temporary injunction.

15. In *S. Rangarajan* v. *P. Jagjivan Ram*[10] it was held that the freedom of speech under Article 19(1)(*a*) means the right to express one's opinion by word of mouth, writing, printing, picture or in any other manner. It would thus include the freedom of communication and their right to propagate or publish opinion. The communication of ideas could be made through any medium — newspaper, magazine or movie. But this right is subject to reasonable restrictions in the larger interests of the community and the country set out in Article 19(2). These restrictions are intended to strike a proper balance between the liberty guaranteed and the social interests

10 (1989) 2 SCC 574

specified in Article 19(2). This is the difference between the First Amendment to the US Constitution and Article 19 of our Constitution. The decisions bearing on the First Amendment are, therefore, not useful to us except for the broad principle and purpose of the guarantee. The Court, in this connection referred to the US decisions in *Mutual Film Co.* v. *Industrial Commission of Ohio*[11], *Joseph Burstyn* v. *Lewis A. Wilson*[12] and *Schenck* v. *US*[13]. The Court further held that there should be a compromise between the interest of freedom of expression and social interests. The Court cannot simply balance the two interests as if they are of equal weight. The Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. It should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg". Though a movie enjoys the guarantee under Article 19(1)(*a*), there is one significant difference between a movie and other modes of communication. Movie motivates thought and action and assures a high degree of attention and retention. In view of the scientific improvements in photography and production, the present movie is a powerful means of communication. It has a unique capacity to disturb and arouse feelings. It has much potential for evil as it has for good. With these qualities and since it caters for mass audience who are generally not selective about what they watch, a movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market-place just as does the newspaper or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary. But the First Amendment to the US Constitution does not permit any prior restraint, since the guarantee of free speech is in unqualified terms. Censorship is permitted mainly on the ground of social interests specified under Article 19(2) with emphasis on maintenance of values and standards of society. Therefore, censorship with prior restraint must necessarily be reasonable that could be saved by the well-accepted principles of judicial review. The standard to be applied by the Board or courts for judging the film should be that of an ordinary man of common sense and prudence and not that of an out-of-the-ordinary or hypersensitive man. The Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation. The path of right conduct shown by the great sages and thinkers of India and the concept of 'Dharma' (righteousness in every respect) which are the bedrock of our civilisation should not be allowed to be shaken by unethical standards. But this does not mean that the censors should have an orthodox or conservative outlook. Far from it, they

11 236 US 247 : 59 L Ed 561 (1915)
12 343 US 495 : 96 L Ed 1098 (1952)
13 249 US 47 : 63 L Ed 470 (1919)

must be responsive to social change and they must go with the current climate. However, the censors may display more sensitivity to movies which will have a markedly deleterious effect to lower the moral standards of those who see it.

16. However, the producer may project his own message which others may not approve of. But he has a right to "think out" and put the counter-appeals to reason. It is a part of a democratic give-and-take to which one could complain. The State cannot prevent open discussion and open expression, however hateful to its policies. Everyone has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means. Democracy is a government by the people via open discussion. The democratic form of government itself demands from its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government.

17. Dealing with the film in question, the Court further observed that the film in the present case suggests that the existing method of reservation on the basis of caste is bad and reservation on the basis of economic backwardness is better. The film also deprecates exploitation of people on caste consideration. This is the range and rigour of the film. There is no warrant for the view that the expression in the film by criticism of reservation policy or praising the colonial rule will affect the security of the State or sovereignty and integrity of India. There is no utterance in the film threatening to overthrow the government by unlawful or unconstitutional means or for secession; nor is there any suggestion for impairing the integration of the country. Two Revising Committees have approved the film. The members thereof come from different walks of life with variegated experiences. They represent the cross-section of the community. They have judged the film in the light of the objectives of the Act and the guidelines provided for the purpose. There is nothing wrong or contrary to Constitution in approving the film for public exhibition. The producer or as a matter of fact, any other person has a right to draw the attention of the government and people that the existing method of reservation in educational institutions overlooks merit. Whether this view is right or wrong is another matter altogether and at any rate, the court is not concerned with its correctness or usefulness to the people. The court is only concerned whether such a view could be advocated in a film. To say that one should not be permitted to advocate that view goes against the first principle of our democracy. If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. Freedom of expression

which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1)(*a*) can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of government policies and operations is not a ground for restricting expression.

18. The views taken by this Court in the aforesaid decisions have thereafter been repeated and reproduced in the subsequent decisions.

19. In *Printers (Mysore) Ltd.* v. *Asstt. CTO*[14] it has been reiterated that the special treatment given to the newspapers has a philosophy and historical background. Freedom of press has been placed on a higher footing than other enterprises. Though freedom of press is not expressly guaranteed as a fundamental right, it is implicit in the freedom of speech and expression. Freedom of press has always been a cherished right in all democratic countries. Therefore, it has rightly been described as the Fourth Estate. The democratic credentials of a State are judged today by the extent of freedom the press enjoys in that State. This decision quotes from the opinion of Douglas, J. in *Terminiello* v. *Chicago*[15] that "acceptance by Government of a dissident press is a measure of the maturity of the nation".

20. In *LIC* v. *Professor Manubhai D. Shah*[16] the respondent-Executive Trustee of the Consumer Education and Research Centre (CERC), Ahmedabad after making research into the working of the Life Insurance Corporation (LIC), published a study paper portraying the discriminatory practice adopted by the LIC by charging unduly high premia from those taking out life insurance policies and thus denies access to insurance coverage to a vast majority of people who cannot afford to pay the high premium. A member of the LIC wrote a counter-article and published it in the daily newspaper "The Hindu". The respondent replied to the same in the said newspaper. The member of LIC then published his counter-reply in LIC's house magazine. The respondent requested the LIC to publish his rejoinder also in the said magazine. That request was turned down. On these facts, the respondent filed a writ petition before the High Court challenging the action of the LIC, among other things, on the ground that his fundamental right under Article 19(1)(*a*) of the Constitution was violated by LIC by refusing to publish his reply. The High Court held that under the pretext and guise of publishing a house magazine, the LIC cannot violate the fundamental rights of the petitioner. This Court endorsing the view taken by the High Court held that the LIC is a 'State' within the meaning of Article 12. The LIC Act requires it to function in the best interest of the community. The community is, therefore, entitled to know whether or not this requirement of the statute is being satisfied in the functioning of the LIC. The respondent's efforts in preparing the study paper was to bring to the

14 (1994) 2 SCC 434
15 93 L Ed 1131 337 US 1 (1949)
16 (1992) 3 SCC 637

notice of the community that the LIC had strayed from its path by pointing out that its premium rates were unduly high when they could be low if the LIC avoided the wasteful indulgence. The endeavour was to enlighten the community of the drawbacks and shortcomings of the LIC and to pinpoint the area where improvement was needed and was possible. By denying to the policy-holders, the information contained in the rejoinder prepared by the respondent, the LIC cannot be said to be acting in the best interest of the community. There was nothing offensive in the rejoinder which fell within the restriction clauses of Article 19(2). Nor was it prejudicial to the members of the community or based on imaginary or concocted material. On the basis of the fairness doctrine the LIC was under an obligation to publish the rejoinder. The respondent's fundamental right to speech and expression clearly entitled him to insist that his views on the subject should reach those who read the magazine so that they have complete picture before them instead of a one-sided or distorted picture. The Court also pointed out that the attitude of the LIC in refusing to publish the rejoinder in their magazine financed from public funds can be described as both unfair and unreasonable — unfair because fairness demanded that both viewpoints be placed before the readers and unreasonable because there was no justification for refusing publication. The monopolistic State instrumentality which survives on public funds cannot act in an arbitrary manner on the specious plea that the magazine is an in-house one and it is a matter of its exclusive privilege to print or refuse to print the rejoinder. By refusing to print and publish the rejoinder, the LIC had violated respondent's fundamental right. The court must be careful to see that it does not even unwittingly aid the effort to defeat the parties' right. Every free citizen has an undoubted right to lay what sentiments he pleases before the public. Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. This Court has always placed a broad interpretation on the value and content of Article 19(1)(*a*), making it subject only to the restrictions permissible under Article 19(2). Efforts by intolerant authorities to curb or suffocate this freedom have always been firmly repelled, more so when public authorities have betrayed autocratic tendencies. The Court then went on to observe: (SCC headnote)

> "The words 'freedom of speech and expression' must be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media, i.e., periodicals, magazines or journals or through any other communication channel e.g. the radio and the television. The right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him. The print media, the radio and the tiny screen play the role of public educators, so vital to growth of a healthy democracy. These communication channels are great

purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on vital issues of national importance. Modern communication mediums advance public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. Therefore, in any set-up, more so in a democratic set-up like ours, dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2). This freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest.

* * *

A constitutional provision is never static, it is ever-evolving and ever-changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach. The Constitution-makers employed a broad phraseology while drafting the fundamental rights so that they may be able to cater to the needs of a changing society. Therefore, constitutional provisions must receive a broad interpretation and the scope and ambit of such provisions, in particular the fundamental rights, should not be cut down by too astute or too restricted an approach, unless the context otherwise requires."

21. The facts in the other case which were disposed of simultaneously by the same judgment were that Doordarshan refused to telecast a documentary film on the Bhopal Gas Disaster titled "*Beyond Genocide*" produced by the respondent-Cinemart Foundation on the grounds that (*i*) the film was outdated, (*ii*) it had lost its relevance, (*iii*) it lacked moderation and restraint, (*iv*) it was not fair and balanced, (*v*) political parties were raising various issues concerning the tragedy, (*vi*) claims for compensation by the victims were *sub judice*, (*vii*) the film was likely to create commotion in the already charged atmosphere, and (*viii*) the film criticised the action of the State Government and it was not permissible under the guidelines. The respondent filed a writ petition in the High Court on the ground of violation of his fundamental right under Article 19(1)(*a*) and for a mandamus to Doordarshan to telecast the film. The High Court held that the respondent's right under Article 19(1)(*a*) obliged Doordarshan to telecast the film and directed Doordarshan to telecast the film at a time and date convenient to it keeping in view the public interest and on such terms and conditions as it would like to impose in accordance with the law. In the appeal against the said decision filed in this Court, the Court held that once it has recognised that the film-maker has the fundamental right under Article 19(1)(*a*) to exhibit the film, the onus lies on the party which claims that it was entitled to refuse enforcement of this right by virtue of law made under Article 19(2) to show that the film did not conform to requirements of that law. Doordarshan being a State-controlled agency funded by public funds could

not have denied access to screen except on valid grounds. The freedom conferred on a citizen by Article 19(1)(*a*) includes the freedom to communicate one's ideas or thoughts through a newspaper, a magazine or a movie. Traditionally, prior restraints, regardless of their form, are frowned upon as threats to freedom of expression since they contain within themselves forces which if released have the potential of imposing arbitrary and at times direct conflict with the right of another citizen. Censorship by prior restraint, therefore, seems justified for the protection of the society from the ill-effects that a motion picture may produce if unrestricted exhibition is allowed. Censorship is thus permitted to protect social interests enumerated in Article 19(2) and Section 5-B of the Cinematograph Act. For this reason, need for prior restraint has been recognised and our laws have assigned a specific role to the censors, as such is the need in a rapidly changing societal structure. But since permissible restrictions, albeit reasonable, are all the same restrictions, they are bound to be viewed as anathema, in that, they are in the nature of curbs or limitations on the exercise of the right and are, therefore, bound to be viewed with suspicion, thereby throwing a heavy burden on the authorities that seek to impose them to show that the restrictions are reasonable and permissible in law. Such censorship must be reasonable and must answer the test of Article 14.

22. In this connection, it will be interesting also to know the content of the right to freedom of speech and expression under the First Amendment to the American Constitution where the freedom of press is exclusively mentioned as a part of the said right unlike in Article 19(1)(*a*) of our Constitution. Further, the restrictions on the right are not spelt out as in our Constitution under Article 19(2). But the US Supreme Court has been reading some of them as implicit in the right. In principle, they make no difference to the content of the right to the freedom of speech and expression under our Constitution.

23. In *National Broadcasting Co.* v. *US*[17] it was held inter alia that the wisdom of regulations adopted by the Federal Communications Commission is not a matter for the courts, whose duty is at an end when they find that the action of the Commission was based upon findings supported by evidence and was made pursuant to authority granted by Congress.

24. In *Joseph Burstyn* v. *Lewis A. Wilson*[12] a licence granted for the exhibition of a motion picture was rescinded by the appropriate New York authorities on the ground that the picture was 'sacrilegious' within the meaning of a statute requiring the denial of a licence if a film was 'sacrilegious'. The statute was upheld by the State courts. The Supreme Court unanimously reversed the decision of the State courts. Disapproving a contrary theory expressed in *Mutual Film Co.* v. *Industrial Commission of Ohio*[11] six members of the Supreme Court in an opinion of Clerk, J. held that

17 319 US 190 . 87 L Ed 1344 (1943)

12 *Burstyn* v. *Wilson,* 343 US 495 · 96 L Ed 1098 (1952)

11 236 US 247 59 L Ed 561 (1915)

the basic principles of freedom of speech and press applied to motion pictures, even though their production, distribution, and exhibition is a large-scale business conducted for profit. The court recognised that motion pictures are not necessarily subject to the precise rules governing any other particular method of expression, but found it not necessary to decide whether a State may censor motion pictures under a clearly-drawn statute and limited its decision to the holding that the constitutional guarantee of free speech and press prevents a State from banning a film on the basis of a censor's conclusion that it is 'sacrilegious'. Reed, J. in a concurrent opinion emphasised that the question as to whether a State may establish a system for the licensing of motion pictures was not foreclosed by the court's opinion. Frankfurter, J. with Jackson and Burton, JJ. held that the term 'sacrilegious' as used in the statute was unconstitutionally vague.

25. In *Red Lion Broadcasting Co.* v. *FCC*[18] by which two cases were disposed of by common judgment, the facts were that in the first case, the Broadcasting Company carried as a part of "Christian Crusade" series, a 15-minute broadcast in which a third person's honesty and character were attacked. His demand for free reply time was refused by the broadcasting station. Federal Communications Commission (FCC) issued a declaratory order to the effect that the broadcasting station had failed to meet its obligation under the FCC's fairness doctrine. The Court upheld the FCC's directions.

26. In the second case, the FCC after the commencement of the litigation in the same case made the personal attack aspect of the fairness doctrine more precise and more readily enforceable. The Court upheld the FCC's rules overruling the view taken by the Court of Appeals that the rules were unconstitutional as abridging the freedom of speech and press.

27. The Court dealing with the two cases held:

> "Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound track, or any other individual does not embrace a right to snuff out the free speech of others.
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> Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.
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> * * *
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> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the

18 395 US 367 23 L Ed 2d 371 (1969)

right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. ... No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech'.

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized, which forbids FCC interference with 'the right of free speech by means of radio communication'.

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favour of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. ...

It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. ... It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC. ...

... As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

* * *

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'

* * *

... It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. ...

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."

Referring to the contention that although at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, the said condition no longer prevailed to invite continuing control, the Court held:

"Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilisation of the frequency spectrum, but uses for that spectrum have also grown apace. Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting mid-air collisions through radio warning devices. 'Land mobile services' such as police, ambulance, fire department, public utility and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum and there are,

apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the 'citizens' band' which is also increasingly congested. Among the various uses for radio frequency space, including marine, aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications. The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorised by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential. This does not mean, of course, that every possible wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperilled.

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those

unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional."

28. In *Columbia Broadcasting System* v. *Democratic National Committee*[19] in separate decisions rejecting the contentions that the general policy of certain radio and television broadcast licensees of not selling any editorial advertising time to individuals or groups wishing to speak out on public issues violated the Federal Communications Act of 1934 and the First Amendment, such contentions having been asserted in actions instituted by a national organisation of businessmen opposed to United States' involvement in Vietnam and by the Democratic National Committee, the US Court of Appeals for the District of Columbia Circuit reversed the Commission. However, the US Supreme Court reversed the Court of Appeals. Burger, C.J. expressing the views of the six members of the Court held:

> "... (1) the First Amendment issues involved in the case at bar had to be evaluated within the framework of the statutory and regulatory scheme that had developed over the years, affording great weight to the decisions of Congress and the experience of the Federal Communications Commission, and (2) under the Federal Communications Act and the Commission's "fairness doctrine", broadcast licensees had broad journalistic discretion in the area of discussion of public issues; and it was also held, expressing the views of five members of the court (Part IV of the opinion), that (3) neither the public interest standards of the Federal Communications Act nor the First Amendment, assuming that there was governmental action for First Amendment purposes, required broadcasters to accept editorial advertisements, notwithstanding that they accepted commercial advertisements, and (4) the Commission was justified in concluding that the public interest would not be served by a system affording a right of access to broadcasting facilities for paid editorial advertisements, since such a system would be heavily weighted in favour of the financially affluent, would jeopardize effective operation of the Commission's "fairness doctrine", and would increase government involvement in broadcasting by requiring the Commission's daily supervision of broadcasters' activities. ... A broadcaster's refusal to accept any editorial advertisements was not governmental action for purposes of the First Amendment, since private broadcasters, even though licensed and regulated to some extent by the Government, were not instrumentalities or 'partners' of the Government for First Amendment purposes, and since the Commission, in declining to reject the broadcasters' policies against accepting editorial advertisements, had not fostered or required such policy."

29. It may be mentioned here that unlike in this country, in United States, the private individuals and institutions are given licences to have their

19 412 US 94 36 L Ed 2d 772 (1973)

own broadcasting stations and hence the right of the private broadcasters against the right of others who did not own the broadcasting stations but asserted their right of free speech and expression were pitted against each other in this case and the decision has mainly turned upon the said balancing of rights of both under the First Amendment. It was in substance held that any direction to the private broadcasters by the Government to sell advertising time to speak out on public issues violated the protection given by the First Amendment to the private broadcasters against government control.

30. In *FCC* v. *WNCN Listeners Guild*[20] a number of citizen groups interested in fostering and preserving particular entertainment formats petitioned for review of the Policy Statement of Federal Communications Commission (FCC) in the US Court of Appeals for the District of Columbia Circuit. The Court held that the Policy Statement was contrary to the Communications Act of 1934. The US Supreme Court reversed the decision of the Court of Appeals by majority, holding, inter alia, that the Policy Statement was not inconsistent with the Communications Act since the FCC provided a rational explanation for its conclusion that reliance on the market was the best method of promoting diversity in entertainment formats and that the FCC's judgment regarding how the public interest is best served was entitled to substantial judicial deference and its implementation of the public interest standard, when based on a rational weighing of competing policies was not to be set aside. Marshall and Brennan, JJ., however, held that in certain limited circumstances, the FCC may be obliged to hold a hearing to consider whether a proposed change in a licensee's entertainment programme format is in the public interest and that the FCC's Policy Statement should be vacated since it did not contain a safety valve procedure that allowed the FCC the flexibility to consider applications for exemptions based on special circumstances and since it failed to provide a rational explanation for distinguishing between entertainment and non-entertainment programming for purposes of requiring Commission review of format changes.

31. In *City of Los Angeles & Department of Water and Power* v. *Preferred Communications, Inc.*[21] a cable television company asked a public utility and the City of Los Angeles's water and power department for permission to lease space on their utility poles in order to provide cable television service to part of the city. The respondent-Company was told that it must first obtain franchise from the appellant-City which refused to grant one on grounds that the Company had failed to participate in an auction that was to award a single franchise in the area. The respondent sued claiming violation of his right under the free speech clause of the First Amendment. It was alleged in the complaint that there was sufficient physical capacity and the economic demand in the area at issue to accommodate more than one

20 450 US 582 67 L Ed 2d 521
21 476 US 488 90 L Ed 2d 480 (1986)

cable company and that the city's auction process allowed it to discriminate among applicants. As against this, the applicant argued that lack of space on public utility structures, the limited economic demand and the practical and aesthetic disruptive effects on the public right of way justified its decision. The District Court dismissed the complaint. On appeal, the US Court of Appeals reversed and remanded for further proceedings. The US Supreme Court affirmed the Court of Appeals. Rehnquist, J. expressing the unanimous decision of the Court held:

> "... (1) that the cable television company's complaint should not have been dismissed, since the activities in which it allegedly sought to engage plainly implicated First Amendment interests where they included the communication of messages on a wide variety of topics and in a wide variety of formats, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, but (2) that it was not desirable to express any more detailed views on the proper resolution of the First Amendment question without a more thoroughly developed record of proceedings in which the parties would have an opportunity to prove those disputed factual assertions upon which they relied."

32. The position of law on the freedom of speech and press has been explained in 16 Am Jur 2d 343 as under:

> "The liberty of the press was initially a right to publish without a license that which formerly could be published only with one, and although this freedom from previous restraint upon publication could not be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the First Amendment. It is well established that liberty of the press historically considered and taken up by the Federal Constitution, means principally, although not exclusively, immunity from previous restraints or censorships. Stated differently, the rule is that an essential element of the liberty of the press is its freedom from all censorships over what shall be published and exemption from control, in advance, as to what shall appear in print....
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> The freedom of speech and press embraces the right to distribute literature and necessarily protects the right to receive literature which is distributed. It is said that liberty in circulating is as essential to the freedom as liberty of publishing, since publication without circulation would be of little value.
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> The right or privilege of free speech and publication, guaranteed by the Constitutions of the United States and of the several States, has its limitations and is not an absolute right, although limitations are recognised only in exceptional cases.
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> The question of when the right of free speech or press becomes wrong by excess is difficult to determine. Legitimate attempts to protect

the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct are not presumptively bad because they interfere with and in some of their manifestations restrain the exercise of the First Amendment rights. The issue in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils which the Federal or State Legislatures have a right to prevent; it is a question of proximity and degree.

* * *

The freedoms of speech and press are not limited to particular media of expression. Verbal expression is, of course, protected, but the right to express one's views in an orderly fashion extends to the communication of ideas by handbills and literature as well as by the spoken word. Picketing carried on in a non-labor context, when free from coercion, intimidation, and violence, is constitutionally guaranteed as a right of free speech."

33. In *Civil Liberties & Human Rights* authored by David Feldman, the justification for and limits of freedom of expression are stated in the following words:

"The liberty to express one's self freely is important for a number of reasons. Firstly, self-expression is a significant instrument of freedom of conscience and self-fulfilment. Second justification concerns epistemology. Freedom of expression enables people to contribute to debates about social and moral values. The best way to find the best or truest theory or model of anything is to permit the widest possible range of ideas to circulate. Thirdly, the freedom of expression allows political discourse which is necessary in any country which aspires to democracy. And lastly, it facilitates artistic scholarly endeavours of all sorts."

34. The obvious connection between press freedom and freedom of speech is that the press is a medium for broadcasting information and opinion. Firstly, media freedom as a tool of self-expression is a significant instrument of personal autonomy. Secondly, as a channel of communication, it helps to allow the political discourse in a democracy. Thirdly, it helps to provide one of the essential conditions in scholarships making possible the exchange and evaluation of theories, explanations and discoveries, and lastly, it helps to promulgate a society's cultural values and facilitates the debate about them, advancing the development and survival of civilisation.

35. Referring to the reasons for regulating the broadcasting media, the learned author has stated that, first, the Government realises the potential of channels of mass communication for contributing to democracy or undermining it. They hoped to foster a public service ethos in broadcasting so that it would be a medium for educating and improving the population. Secondly, in order to do this it was necessary to keep the media of mass communications from having programme policy dictated entirely by market

forces. A strong public sector and regulation of the independent sector when one started to operate, were called for. Thirdly, when commercial broadcasters appeared on the scene, and a regulatory scheme was being developed for them, it was thought to be important to preserve a diversity of ideas by preventing oligopolistic concentrations of power in the hands of a few, usually rich and conservative media magnates and to ensure that licences were granted only to people who could be expected not to abuse the privilege. The need to preserve propriety has been a motivating factor in the regulation of commercial broadcasting over much of the world. Fourthly, Government hoped to ensure that civilised standards were maintained to uphold social values. Fifthly, wavelengths for broadcasting were limited. This purely technical consideration sharply distinguishes broadcasting from newspapers and justifies a higher level of regulation. In theory, if not in practice, there is nothing to prevent any number of newspapers being published simultaneously. The only controlling mechanism needed is that of market forces. This is not true of broadcasting. Some control over the allocation of wavelengths is needed in order to ensure that there are sufficient for all legitimate broadcasters. Lastly, another legitimate object of national regulation is to protect the intellectual property rights of programme-makers and broadcasters. It is permissible on this ground for an organisation to prevent people from getting access to programmes without paying proper licence fees. One way of preventing this is to encode programme transmissions and to restrict access to decoders to people who pay the fee.

36. The freedom to receive and to communicate information and ideas without interference is an important aspect of the freedom of free speech and expression. We may in this connection refer to Article 10 of the European Convention on Human Rights which states as follows:

> "10.1. 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, may be 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."

37. The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media.

38. Eric Barendt in his book titled *Broadcasting Law* (1993 Edn.) which presents a comparative study of the law in five legal systems, viz., Great Britain, France, Germany, Italy and United States of America has dealt with the subject succinctly. He has referred to a number of reasons which are generally put forward to justify broadcasting regulations and has dealt with each of them. The first reason advanced is that because the airwaves are a public resource, the Government or some agency on its behalf is entitled to license their use for broadcasting on the terms it sees fit. A similar argument can now be deployed in respect of cable broadcasting where an authority must give permission before roads can be dug up for laying cable. The learned author states that the case is unconvincing for it infers that it is right for the Government to regulate broadcasting from the fact that it has opportunity to do this. It would be perfectly possible for Government to allocate frequencies for cable franchises without programme conditions on the basis of a competitive tender and allow the resale by the purchaser. The argument, according to the author, therefore, does not work. It does not justify broadcasting regulations but almost explains how it is feasible. The author, however, does not accept the objection to this reason for regulation that thereby Government acts improperly by using their licensing power to purchase broadcasters' constitutional right to speech. According to the author, this argument is less persuasive as it assumes that broadcasters enjoy the same constitutional rights of free speech as individuals talking in a bar or leafletting in a high street. The author then deals with the second reason given for regulation of broadcasting, viz., scarcity of frequencies and points out that this argument referred to in *Red Lion Broadcasting case*[18] is less clear than appears at first sight, since it is not clear whether the scarcity of frequencies refers to the limited number allocated by the Government as available for broadcasting or to the actual numerical shortage of broadcasting stations. If it is the former, the scarcity is an artificial creation of the Government rather than a natural phenomenon since it reserves a number of frequencies for the use of the army, police and other public services. The Government is then not in a good position to argue for restrictions on broadcasters' freedom. The author then points out that as far as the actual scarcity of broadcasting stations is concerned, there has been an increase in the last 20 years in the broadcasting stations in the United States while there are fewer newspapers than there used to be. Similar developments have occurred in European countries in the same period, especially, since the advent of cable and satellite. Further the scarcity argument cannot be divorced from economic considerations. The shortage of frequencies and the high cost of starting up broadcasting channel explain their dearth in comparison with the number of newspapers and magazines in 1961. However, it is now probably as difficult to finance a new newspaper as it is a private television channel, if not more so. Lastly, the author points out that the scarcity argument is much less tenable than it used to be. Cable and

18 395 US 367 23 L Ed 2d 371 (1969)

satellite have significantly increased the number of available or potentially available channels so that there are more broadcasting outlets than there are national or local daily newspapers. Dealing with the third reason advocated for giving differential treatment to broadcasting, viz., the character of the broadcasting media, the author points out that it is said that television and radio, are more influential on public opinion than the press, or at least are widely thought to be so. The majority of the US Supreme Court in *FCC* v. *Pacifica Foundation*[22] said that they intrude into the home and are more pervasive and are more difficult to control than the print media. In particular, it is hard to prevent children from being exposed to broadcast while it is relatively easy to stop them looking at magazines and papers which in any case they will not be able to read or purchase. These grounds underpin the extension of legal control in Britain over violent and sexually explicit programmes through the establishment of Broadcasting Standard Council and the strengthening of the impartiality rules. In *Third Television case*[23] the German Constitutional Court dealing with a different version of this argument has held that regulation is necessary to guarantee pluralism and programme variety, whether or not there is a shortage of frequencies and other broadcasting outlets. The free market will not provide for broadcasting the same variety found in the range of press and magazine titles. Hence programme content should be regulated and the media monopolies should be cut down by the application of anti-trust laws. Thus both the US and the German arguments lay stress on the power of television and its unique capacity to influence the public. According to the learned author, the arguments are difficult to assess. Broadcasting does not intrude into the home unless listeners and viewers want it to be. From the point of view of constitutional principles it is not easy to justify imposition of greater limits on the medium on the ground that it is more influential than the written words. It cannot be right to subject more persuasive types of speech to greater restraints than those imposed on less effective varieties. The author, however, accepts the view of the majority of the US Supreme Court in *Pacifica case*[22] which regarded broadcasting, particularly television, as a uniquely pervasive presence in the lives of most people. More time is spent watching television than reading. The presence of sound and picture in any home makes it an exceptional potent medium. It may also be harder to stop children having access to "adult material" on television than to pornographic magazines. This may not apply to subscription channels, enjoyment of which is dependent on a special decoder. He also agrees that experience in the United States and more recently in Italy suggests that a free broadcasting market does not produce the same variety as the press and book publishing markets do. However, the author states that these three justifications for broadcasting regulation are inconclusive and it is doubtful whether the case is powerful enough to justify the radically different legal treatment of the press and broadcasting media. A separate question, according to the author,

22 57 L Ed 2d 1073 438 US 726 (1978)
23 57 BVerfGE 295, 322-3 (1981)

is whether it is appropriate to continue to treat radio in the same way as television since there is generally a large choice of local, if not national radio programmes and it is hard to believe that it exercises a dominating influence on the formation of public attitudes. The same question arises in respect of cable television. Although a licence has to be obtained from a licensing authority several franchises may be physically accommodated and a wide band cable system may be able to carry up to 30 or 40 or even more channels. The scarcity rationale, therefore, seems inapplicable to cable and further it is hard to believe that this mode of broadcasting exercises such a strong influence that stringent programme regulation is justifiable. Dealing with the last reason advocated by a leading American scholar, Lee Bollinger in his article "*Freedom of the Press and Public Access*" and his essay "*The Rationale of Public Regulation of the Media*" and in "*Democracy and the Mass Media*" [Cambridge (1990)] for the divergent treatment of the press and broadcasting media, the author points out that Bollinger accepts that there is no fundamental difference in the character of the two mass media, but argues that broadcasting being a still relatively new means of mass communication, it is understandable that society has wanted to regulate it just as it has treated the cinema with more caution than it has the theatre. This argument of Bollinger is based on the history of the two media. Bollinger's second argument is that society is entitled to remedy the deficiencies of an unregulated press with a regulated broadcasting system which may be preferable to attempting to regulate both sectors. According to Bollinger, regulation poses the danger of government control, a risk which is reduced if one branch of the media is left free. The author attacks this reason given by Bollinger and states that it is an unsatisfactory compromise. If the regulation of the press is always wrong and perhaps unconstitutional and if there is no significant difference between the two media, it follows that the latter should also be wholly unregulated. The author also points out that Bollinger's argument attempts to justify the unequal treatment of the liberties of the broadcasters and newspaper proprietors and editors when in all material respects, their position is identical.

39. The author then refers to the rights of viewers and listeners which is referred to in *Red Lion Broadcasting case*[18] by White, J. of the US Supreme Court in the following words:

> "But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of the broadcasters, which is paramount."

40. The author concludes by pointing out that the cases from a variety of jurisdictions show that the broadcasters' programme freedom when exercised within the constraints imposed by the regulatory authority, has priority over

18 395 US 367 23 L Ed 2d 371 (1969)

the rights claimed by viewers to see a particular programme or to retain a particular series in the schedule. On the other hand, the interests of viewers and listeners justify the imposition of programme standards which would not be countenanced for the press or publishing. It is recognised by the constitutional courts of European countries that viewers and listeners have interests, and they should be taken into account in the interpretation of broadcasting freedom. But the balancing of the rights of the broadcasters and viewers is done by regulatory authority. Courts are understandably reluctant to contemplate the interference with administrative discretion which would result from their recognition of individual rights.

41. Dealing with the right to access to broadcasting, the author points out that the theoretical argument in this connection is that freedom of speech means freedom to communicate effectively to a mass audience and nowadays that entails access to the mass media. The rights to access provide some compensation for the expropriation by the public monopoly of the freedom to broadcast. In the absence of a justification for that monopoly, there would be a right to broadcast in the same way that everyone has a right to say or write what he likes in his own home. This would justify the recognition of access to both public and private channels. The author states that these arguments are unacceptable. Freedom of speech does not entail any right to communicate effectively in the sense that a citizen can call upon the State to provide him with the most effective means for the purpose. He points out that no legal system provides its citizens with the means and opportunities to address the public in the way each considers most appropriate. Moreover, to grant everyone a right to use an access channel, even if available all the time, would be to give every adult a worthless right to use it for a second a year. Limited access rights, enjoyed only by important political and social groups may be more valuable. But even their recognition would involve some interference with the editorial freedom of channel controllers and programme schedulers and it may be more difficult as a consequence to achieve a balanced range of programmes. Further, a channel might find it hard to create any clear identity for itself, if it had to devote a substantial amount of time to relaying the programmes made by pressure groups. There are also practical objections to access rights. It may be very difficult to decide, for example, which groups are to be given access and when and how often such programmes are to be shown. There is a danger that some groups will be unduly privileged. These points weigh particularly heavily against the recognition of constitutional rights, for courts are not competent to formulate them with any precision. Dealing with the constitutional rights of access to the broadcasting media, the author concludes that individuals and groups do not have constitutional rights of access to the broadcasting media. Access rights can only be framed effectively by legislature or by specialist administrative agencies. It does not mean that statutory or other access rights do not have a constitutional dimension. The courts may lay down that some provisions should be made for access as a matter of constitutional policy. This, however, does not mean that there are individual constitutional rights to access.

42. In this connection, the author also points out that the development of cable poses new access problems. Operator of the cable may himself have rights of free speech which would be infringed by a requirement to honour access claims. The scarcity and economic arguments which are employed to justify broadcasting regulation and, therefore, access provision, may be less applicable in the context of cable.

43. We may now summarise the law on the freedom of speech and expression under Article 19(1)(*a*) as restricted by Article 19(2). The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.

44. This fundamental right can be limited only by reasonable restrictions under a law made for the purposes mentioned in Article 19(2) of the Constitution.

45. The burden is on the authority to justify the restrictions. Public order is not the same thing as public safety and hence no restrictions can be placed on the right to freedom of speech and expression on the ground that public safety is endangered. Unlike in the American Constitution, limitations on fundamental rights are specifically spelt out under Article 19(2) of our Constitution. Hence no restrictions can be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2).

46. What distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence. It has a greater impact on the minds of the viewers and is also more readily accessible to all including children at home. Unlike the print media, however, there is a built-in limitation on the use of electronic media because the airwaves are a public property and hence are owned or controlled by the Government or a central national authority or they are not available on account of the scarcity, costs and competition.

47. The next question to be answered in this connection is whether there can be a monopoly in broadcasting/telecasting. Broadcasting is a means of

communication and, therefore, a medium of speech and expression. Hence in a democratic polity, neither any private individual, institution or organisation nor any Government or government organisation can claim exclusive right over it. Our Constitution also forbids monopoly either in the print or electronic media. The monopoly permitted by our Constitution is only in respect of carrying on a trade, business, industry or service under Article 19(6) to subserve the interests of the general public. However, the monopoly in broadcasting and telecasting is often claimed by the Government to utilise the public resources in the form of the limited frequencies available for the benefit of the society at large. It is justified by the Government to prevent the concentration of the frequencies in the hands of the rich few who can monopolise the dissemination of views and information to suit their interests and thus in fact to control and manipulate public opinion in effect smothering the right to freedom of speech and expression and freedom of information of others. The claim to monopoly made on this ground may, however, lose all its *raison d'être* if either any section of the society is unreasonably denied an access to broadcasting or the governmental agency claims exclusive right to prepare and relay programmes. The ground is further not available when those claiming an access either do not make a demand on the limited frequencies controlled by the Government or claim the frequency which is not utilised and is available for transmission. The Government sometimes claims monopoly also on the ground that having regard to all pervasive presence and impact of the electronic media, it may be utilised for purposes not permitted by law and the damage done by private broadcasters may be irreparable. There is much to be said in favour of this view and it is for this reason that the regulatory provisions including those for granting licences to private broadcasting where it is permitted, are enacted. On the other hand, if the Government is vested with an unbridled discretion to grant or refuse to grant the licence or access to the media, the reason for creating monopoly will lose its validity. For then it is the Government which will be enabled to effectively suppress the freedom of speech and expression instead of protecting it and utilising the licensing power strictly for the purposes for which it is conferred. It is for this reason that in most of the democratic countries an independent autonomous broadcasting authority is created to control all aspects of the operation of the electronic media. Such authority is representative of all sections of the society and is free from control of the political and administrative executive of the State.

48. In this country, unlike in the United States and some European countries, there has been a monopoly of broadcasting/telecasting in the Government. The Indian Telegraph Act, 1885 (hereinafter referred to as the "Telegraph Act") creates this monopoly and vests the power of regulating and licensing broadcasting in the Government. Further, the Cinematograph Act, 1952 and the Rules made thereunder empower the Government to pre-censor films. However, the power given to the Government to licence and to pre-censor under the respective legislations has to be read in the context of

Article 19(2) of the Constitution which sets the parameters of reasonable restrictions which can be placed on the right to freedom of speech and expression. Needless to emphasise that the power to pre-censor films and to grant licences for access to telecasting, has to be exercised in conformity with the provisions of Article 19(2). It is in this context that we have to examine the provisions of Section 4(1) of the Telegraph Act and the action of the MIB/DD in refusing access to telecast the cricket matches in the present case.

49. The relevant Section 4 of the Telegraph Act reads as follows:

"4. (1) Within India the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India:

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working—

(*a*) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters, and

(*b*) of telegraphs other than wireless telegraph within any part of India.

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose."

Section 3(1) of the Act defines 'telegraph' as under:

"3. (1) 'telegraph' means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means;

Explanation.— 'Radio waves' or 'Hertzian waves' means electromagnetic waves of frequencies lower than 3000 giga-cycles per second propagated in space without artificial guide."

It is clear from a reading of the provisions of Sections 4(1) and 3(1) together that the Central Government has the exclusive privilege of establishing, maintaining and working appliances, instruments, material or apparatus used or capable of use for transmission or reception of signs, signals, images and

sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means. Since in the present case the controversy centres round the use of airwaves or Hertzian waves (hereinafter will be called as "electromagnetic waves"), as is made clear by Explanation to Section 3(1), the Central Government can have monopoly over the use of the electromagnetic waves only of frequencies lower than 3000 giga-cycles per second which are propagated in space with or without artificial guide. In other words, if the electromagnetic waves of frequencies of 3000 or more giga-cycles per second are propagated in space with or without artificial guide, or if the electromagnetic waves of frequencies of less than 3000 giga-cycles per second are propagated with an artificial guide, the Central Government cannot claim an exclusive right to use them or deny its user by others. Since no arguments were advanced on this subject after the closure of the arguments and pending the decision, we had directed the parties to give their written submissions on the point. The submissions sent by them disclosed a wide conflict which would have necessitated further oral arguments. Since we are of the view that the present matter can be decided without going into the controversy on the subject, we keep the point open for decision in an appropriate case. We will presume that in the present case the dispute is with regard to the use of electromagnetic waves of frequencies lower than 3000 giga-cycles per second which are propagated in space without artificial guide.

50. The first proviso to Section 4(1) states that the Central Government may grant licence on such conditions and in consideration of such payment as it thinks fit, to any person, to establish, maintain or work a telegraph within any part of India. We are not concerned here with the permission to establish or maintain a telegraph because in the present case the permission is sought only for operating a telegraph and that too for a limited time and for a limited and specified purpose. The purpose again is non-commercial. It is to relay the specific number of cricket matches. It is only incidentally that the CAB will earn some revenue by selling its right to relay the matches organised by it. The CAB is obviously not a business or a commercial organisation nor can it be said that it is organising matches for earning profits as a business proposition. As will be pointed out later, it is a sporting organisation devoted to the cause of cricket and has been organising cricket matches both of internal and international cricket teams for the benefit of the sport, the cricketers, the sportsmen present and prospective and of the viewers of the matches. The restrictions and conditions that the Central Government is authorised to place under Section 4(1) while permitting non-wireless telegraphing can, as stated earlier, only be those which are warranted by the purposes mentioned in Article 19(2) and none else. It is not and cannot be the case of the Government that by granting the permission in question, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or either of them will be in jeopardy or that the permission will lead to the

contempt of court, defamation or incitement to an offence. On the other hand, the arguments advanced are specious and with them we will deal a little later.

51. It is then necessary to understand the nature of the respondent organisation, namely, CAB. It cannot be disputed that the BCCI is a non-profit-making organisation which controls officially organised game of cricket in India. Similarly, Cricket Association of Bengal (CAB) is also non-profit-making organisation which controls officially organised game of cricket in the State of West Bengal. The CAB is one of the Founder Members of BCCI. Office-bearers and Members of the Working Committees of both BCCI and CAB are all citizens of India. The primary object of both the organisations, amongst others, is to promote the game of cricket, to foster the spirit of sportsmanship and the ideals of cricket, and to impart education through the media of cricket, and for achieving the said objects, to organise and stage tournaments and matches either with the members of International Cricket Council (ICC) or other organisations. According to CAB, BCCI is perhaps the only sports organisation in India which earns foreign exchange and is neither controlled by any governmental agency nor receives any financial assistance or grants, of whatsoever nature.

52. It cannot be disputed further that to arrange any international cricket tournament or series, it is necessary and a condition-precedent, to pay to the participating member-countries or teams, a minimum guaranteed amount in foreign exchange and to bear the expenses incurred for travelling, boarding, lodging and other daily expenses of the participating cricketers and the accompanying visiting officials concerned. A huge amount of expenses has also to be incurred for organising the matches. In addition, both BCCI and CAB annually incur large amount of expenses for giving subsidies and grants to its members to maintain, develop and upgrade the infrastructure, to coach and train players and umpires and to pay to them when the series and matches are played.

53. Against this background, we may now examine the questions of law raised by the parties. The contention of the Ministry of Information and Broadcasting (MIB) is that there is a difference between the implications of the right conferred under Article 19(1)(*a*) upon (*i*) the broadcaster i.e. the person operating the media, (*ii*) the person desiring access to the media to project his views including the organiser of an event, (*iii*) the viewer, and (*iv*) a person seeking uplinking of frequencies so as to telecast signals generated in India to other countries. The contention of CAB that denial of a licence to telecast through a media of its choice, based (according to MIB) upon the commercial interests, infringes viewers' right under Article 19(1)(*a*) is untenable. It is further contended that the commercial interests of the organiser are not protected by Article 19(1)(*a*). However, the contention of the CAB results indirectly in such protection being sought by resort to the following steps of reasoning : (*a*) the Board has a right to commercially exploit the event to the maximum, (*b*) the viewer has a right to access to the

event through the television. Hence the Board has the right to telecast through an appropriate channel and also the right to insist that a private agency, including a foreign agency, should be allowed all the sanctions and permissions as may be necessary therefor.

54. According to MIB the aforesaid contention is untenable because even if it is assumed that entertainment is a part of free speech, the analogy of the right of the press under Article 19(1)(*a*) vis-à-vis the right under Article 19(1)(*g*), cannot be extended to the right of sports associations. The basic premise underlying the recognition of the rights of the press under Article 19(1)(*a*) is that the economic strength is vitally necessary to ensure independence of the press, and thus even the 'business' elements of a newspaper have to some extent a "free speech" protection. In other words the commercial element of the press exists to subserve the basic object of the press, namely, free dissemination of news and views which enjoys the protection of free speech. However, free speech element in telecast of sports is incidental. According to the MIB, the primary object of the telecast by the CAB is to raise funds and hence the activities are essentially of trade. The fact that the profits are deployed for promotion of sports is immaterial for the purpose.

55. It is further urged that a broadcaster does not have a right as such to access to the airwaves without a licence either for the purposes of telecast or for the purposes of uplinking. Secondly, there is no general right to a licence to use airwaves which being a scarce resource, have to be used in a manner that the interests of the largest number are best served. The paramount interest is that of the viewers. The grant of a licence does not confer any special right inasmuch as the refusal of a licence does not result in the denial of a right to free speech. Lastly, the nature of the electronic media is such that it necessarily involves the marshalling of the resources for the largest public good. State monopoly created as a device to use the resource is not per se violative of the right of free speech as long as the paramount interests of the viewers are subserved and access to the media is governed by the fairness doctrine. According to the MIB, the width of the rights under Article 19(1)(*a*) has never been considered to be wider than that conferred by the First Amendment to the US Constitution. It is also urged that the licensing of frequencies and consequent regulation of telecast/broadcast would not be a matter covered by Article 19(2). The right to telecast/broadcast has certain inherent limitations imposed by nature, whereas Article 19(2) applies to restrictions imposed by the State. The object of licensing is not to cast restrictions on the expression of ideas, but to regulate and marshal scarce resources to ensure their optimum enjoyment by all including those who are not affluent enough to dominate the media.

56. It is next urged that the rights of an organiser to use airwaves as a medium to telecast and thereby propagate his views, are distinct from his right to commercially exploit the event. Although it is conceded that an organiser cannot be denied access on impermissible grounds, it is urged that he cannot further claim a right to use an agency of his choice as a part of his

right of free speech. In any event no person can claim to exercise his right under Article 19(1)(*a*) in a manner which makes it a device for a non-citizen to assert rights which are denied by the Constitution. According to MIB, it is the case of the BCCI that to promote its commercial interest, it is entitled to demand that the Government grants all the necessary licences and permissions to any foreign agency of its choice and a refusal to do so would violate Article 19(1)(*a*). According to MIB, this is an indirect method to seek protection of Article 19(1)(*a*) to the non-citizens.

57. It is then contended that a free-speech right of a viewer has been recognised as that having paramount importance by the US Supreme Court and this view is all the more significant in a country like ours. While accepting that the electronic media is undoubtedly the most powerful media of communication both from the perspective of its reach as well as its impact, transcending all barriers including that of illiteracy, it is contended that it is very cost-intensive. Unless, therefore, the rights of the viewers are given primacy, it will in practice result in the affluent having the sole right to air their views completely eroding the right of the viewers. The right of viewer can only be safeguarded by the regulatory agency by controlling the frequencies of broadcast as it is otherwise impossible for viewers to exercise their right to free speech qua the electronic media in any meaningful way.

58. Lastly, dealing with the contention raised on behalf of the CAB and BCCI that the monopoly conferred upon DD is violative of Article 19(1)(*a*), while objecting to the contention on the ground that the issue does not arise in the present proceedings and is not raised in the pleadings, it is submitted on behalf of MIB that the principal contentions of the CAB/BCCI are that they are entitled to market their right to telecast an event at the highest possible value it may command and if Doordarshan is unwilling to pay as much as the highest bidder, the CAB/BCCI has the right not only to market the event but to demand as of right, all the necessary licences and permissions for the agency including foreign agency which has purchased its rights. According to MIB these contentions do not raise any free-speech issues, but impinge purely on the right to trade. As far as Article 19(1)(*g*) is concerned, the validity of the monopoly in favour of the Government is beyond question. Secondly, in the present case, Doordarshan did not refuse to telecast the event per se. It is then submitted that the CAB/BCCI are not telecasters. They are only organisers of the events sought to be telecast and when the agency like DD which has access to the largest number of viewers agrees to telecast the events, their right as well as the viewers' right under Article 19(1)(*a*) is satisfied. No organiser, it is contended, can insist that his event be telecast on terms dictated by him and refusal to agree to his term constitutes breach of his right under Article 19(1)(*a*). If it is accepted that the Government has not only the right but the duty to regulate the distribution of frequencies, then the only way it can be done is by creating a monopoly. A mere creation of the monopoly agency to telecast does not per se violate Article 19(1)(*a*) as long as the access is not denied to the media either

absolutely or by imposition of terms which are unreasonable. Article 19(1)(*a*) proscribes monopoly in ideas and as long as this is not done, the mere fact that the access to the media is through the Government-controlled agency, is not per se violative of Article 19(1)(*a*). It is further urged that no material has been placed before the Court to show that the functioning of Doordarshan is such as to deny generally an access to the media and the control exercised by the Government is in substance over the content on the grounds other than those specified in Article 19(2) or a general permission to all those who seek frequencies to telecast would better subserve the principle underlying Article 19(1)(*a*) in the socio-economic scenario of this country and will not result in passing the control of the media from the Government to private agencies affluent enough to buy access.

59. As against these contentions of the MIB, it is urged on behalf of CAB and BCCI as follows: The right to organise a sports event inheres in the entity to which the right belongs and that entity in this case is the BCCI and its members which include the CAB. The right to produce an event includes the right to deal with such event in all manner and mode which the entity chooses. This includes the right to telecast or not to telecast the event, and by or through whom, and on what terms and conditions. No other entity, not even a department of the Government can coerce or influence this decision or obstruct the same except on reasonable grounds mentioned under Article 19(2) of the Constitution. In the event the entity chooses to televise its own events, the terms and conditions for televising such events are to be negotiated by it with any party with whom it wishes to negotiate. There is no law, bye-law, rule or regulation to regulate the conduct of the BCCI or CAB in this behalf. In the event, BCCI chooses to enter into an agreement with an agency having necessary expertise and infrastructure to produce signals, and transmit and televise the event of the quality that BCCI/CAB desires, the terms and conditions to be negotiated with such an entity, are the exclusive privilege of BCCI/CAB. No department of the Government and least of all, the MIB or DD is concerned with the same and can deny the BCCI or CAB the benefit of such right or claim, much less can the MIB or DD insist that such negotiation and finalisation only be done with it or not otherwise.

60. In the event the BCCI or CAB wishes to have the event televised outside India, what is required is that the required cameras and equipments in the field send signals to the earth station which in turn transmits the same to the appointed satellite. From the satellite, the picture is beamed back which can be viewed live by any person who has a TV set and has appropriate access to receive footprints within the beaming zone. In such case Doordarshan or the Ministry of Communications is not to provide any assistance either in the form of equipments or personnel or for that matter, in granting uplinking facility for televising the event.

61. It is further contended that the right to disseminate information is a part of the fundamental right to freedom of expression. BCCI/CAB have the fundamental right to televise the game of cricket organised and conducted by them for the benefit of public at large and in particular citizens of India who

are either interested in cricket or desire to be educated and/or entertained. The said right is subject only to the regulations and restrictions as provided by Article 19(2) of the Constitution.

62. At no other stage either DD or MIB stated that reasonable restrictions as enumerated in Article 19(2) are being sought to be imposed apart from the fact that such plea could not have been taken by them in the case of telecasting sports events like cricket matches. It is urged that the sole ground on which DD/MIB is seeking to obstruct and/or refuse the said fundamental right is that DD has the exclusive privilege and monopoly to broadcast such an event and that unless the event is produced, transmitted and telecast either by DD itself or in collaboration with it on its own terms and conditions and after taking signals from it on the terms and conditions it may impose, the event cannot be permitted to be produced, transmitted and telecast at all by anybody else.

63. It is also urged that there is no exclusive privilege or monopoly in relation to production, transmission or telecasting and such an exclusivity or monopoly, if claimed, is violative of Article 19(1)(*a*).

64. The BCCI and CAB have a right under Article 19(1)(*a*) to produce, transmit, telecast and broadcast their event directly or through its agent. The right to circulate information is a part of the right guaranteed under Article 19(1)(*a*). Even otherwise, the viewers and persons interested in sports by way of education, information, record and entertainment have a right to such information, knowledge and entertainment. The content of the right under Article 19(1)(*a*) reaches out to protect the information of the viewers also. In the present case, there is a right of the viewers and also the right of the producer to telecast the event and in view of these two rights, there is an obligation on the part of the Department of Telecommunication to allow the telecasting of the event.

65. It is then contended that the grant of a licence under Section 4 of the Act is a regulatory measure and does not entitle MIB either to deny a licence to BCCI/CAB for the purposes of production, transmission and telecasting sports events or to impose any condition unrelated to Article 19(2). If such denial or imposition is made, it would amount to a prohibition. Hence the MIB is obliged and duty-bound in law to grant licence against payment of fees related to and calculated on the basis of user of time only, as has been standardized and not otherwise. Any other method applied by MIB/DD would be violative of Article 19(1)(*a*). The grant of licence under Section 4 of the Act has thus to be harmoniously read with the right of the citizen under Article 19(1)(*a*). The Constitution does not visualize any monopoly in Article 19(1)(*a*). Hence DD cannot claim the same nor can the commercial interest of DD or claim of exclusivity by it of generation of signals be a ground for declining permission under Section 4 of the Act. Hence the following restrictions sought to be imposed fall outside the ambit of Article 19(2) and are unconstitutional. The restrictions are:

(*a*) That unless BCCI or CAB televises the matches in collaboration with DD, a licence shall not be granted.

(*b*) DD alone will be the host broadcaster of the signals and BCCI/CAB or its agency must take the signal from DD alone; and

(*c*) Unless the BCCI or CAB accepts the terms and conditions imposed by DD, the production of signal and transmission and telecast thereof shall not be permitted.

66. It is further contended that there is no monopoly in relation to what viewer must today view and the American decisions relied upon on behalf of MIB have no bearing on the present state of affairs. Satellite can beam directly on to television sets through dish antenna all programmes whose footprints are receivable in the country. Further, anyone can record a programme in India and then telecast it by sending the cassette out as is being done in the case of several private TV channels. Various foreign news organisations such as the BBC and the CNN record directly Indian events and then transmit their own signals after a while to be telecast by their organisations.

67. Further, the non-availability of channel is of no consequence in the present days of technological development. Any person intending to telecast/broadcast an event can do so directly even without routing the signals through the channels of DD or MIB. What is required to ensure is that the secured channels are not interfered with or overlapped. On account of the availability of innumerable satellites in the geo-stationary orbit of the Hemisphere, the signals can directly be uplinked through any of the available transponders of satellite whose footprints can be received back through appropriate electronic device. As a matter of fact, beaming zone of only 3 satellites parked 3000 kms above the surface of the earth can cover the entire Hemisphere. Moreover, due to technological developments, frequency is becoming thinner and thinner and as a result, availability of frequencies has increased enormously and at present there are millions of frequencies available. In order to ensure that none of the footprints of any satellite overlaps the footprint of other satellite, each and every satellite is parked at a different degree and angle. Hence, there is no resource crunch or inbuilt restriction on the availability of electronic media, as contended by MIB. In this connection it is also pointed out that there is a difference in the right spelt out by Article 19(1)(*a*) of our Constitution and that spelt out by the First Amendment of the American Constitution.

68. It is also contended that in no other country the right to televise or broadcast is in the exclusive domain of any particular body. In this connection, a reference is made to various instances in other countries where the host broadcaster has been other than the domestic network, which instances are not controverted. It is also urged that there is no policy of the Government of India as urged on behalf of the MIB that telecasting of sporting events would be within the exclusive domain and purview of DD/MIB who alone would market their rights to other authorities in whole

or in part. It is pointed out that the extract from the minutes of the meeting of the Committee of Secretaries held on 12-11-1993 relied upon by the MIB for the purpose is not a proof of such policy. The said minutes are "executive decision" of a few Secretaries of the various departments of the Government.

69. It is also urged that even public interest or interest of general public cannot be a ground for refusal or for the imposition of restrictions or for claiming exclusivity in any manner whatsoever. Such restriction, if imposed will be violative of Article 19(1)(*a*). To suggest that power to grant a licence shall not be exercised under any circumstances because of the policy of the Government, is arbitrary inasmuch as the power conferred is not being used for the purpose for which it has been conferred.

70. It is then contended that both BCCI and CAB are non-profit-making organisations and their sole object is to promote the game of cricket in this country and for that purpose not only proper and adequate infrastructures are required to be erected, built and maintained, but also huge expenses have to be incurred to improve the game which includes, amongst others, grant of subsidies and grants to the Member Associations, upgradation of infrastructure, training of cricketers from school level, payments to the cricketers, insurance and benevolent funds for the cricketers, training of umpires, payments to foreign participants, including guarantee money etc. The quantum of amount to be spent for all these purposes has increased during the course of time. These expenses are met from the amounts earned by the BCCI and CAB since they have no other continuous source of income. The earnings of BCCI and CAB are basically from arranging various tournaments, in-stadia advertisements and licence fee for permitting telecast and censorship. At least 70 per cent of the income earned through the advertisements and generated by the TV network while telecasting of the matches, is paid to the organiser apart from the minimum guaranteed money as is apparent from the various agreements entered by and between BCCI/CAB as well as by DD with other networks. DD in effect desires to snatch away the right of telecast for its own commercial interest through advertisement, and at the same time also demand money from the organisers as and by way of production fee.

71. Merely because an organisation may earn profit from an activity whose character is predominantly covered under Article 19(1)(*a*), it would not convert the activity into one involving Article 19(1)(*g*). The test of predominant character of the activity has to be applied. It has also to be ascertained as to who is the person who is utilising the activity. If a businessman were to put in an advertisement for simpliciter commercial activity, it may render the activity, the one covered by Article 19(1)(*g*). But even newspapers or a film telecast or sports event telecast will be protected by Article 19(1)(*a*) and will not become an activity under Article 19(1)(*g*) merely because it earns money from advertisements in the process. Similarly, if the cricket match is telecast and profit is earned by the licensing of telecasting right and receipts from advertisements, it will be an essential

element for utilisation and fulfilment of its object. The said object cannot be achieved without such revenue.

72. Rebutting the argument that the organisation of sports is an industry and, therefore, monopoly under Article 19(6) is permissible, it is pointed out that even if, in matters relating to business and profession, the State can create monopoly under Article 19(6), it can still not infringe Article 19(1)(*a*). While the State may monopolise the textile industry, it cannot prohibit the publication of books and articles on textiles.

73. It is also contended that the exercise of right claimed in the present case is by BCCI/CAB and its office-bearers who are citizens of India. Merely because foreign equipment and technical and personnel are used as collaborators to exercise the said right more effectively, it does not dilute the content of Article 19(1)(*a*) nor does it become an exercise of right by non-citizens. In this connection, it is emphasised that Doordarshan is also using Worldtel, a foreign agency. Most of the newspapers in India are printed on machines imported from abroad. A newspaper may also have a foreigner as its manager. However, that does not take away the right of the newspaper under Article 19(1)(*a*). They are only instances of technical collaboration. Apart from it, every citizen has a right to information as the same cannot be taken away on grounds urged by the MIB.

74. It will be apparent from the contentions advanced on behalf of MIB that their main thrust is that the right claimed by the BCCI/CAB is not the right of freedom of speech under Article 19(1)(*a*), but a commercial right or the right to trade under Article 19(1)(*g*). The contention is based mainly on two grounds, viz., there is no free-speech element in the telecast of sports and secondly, the primary object of the BCCI/CAB in seeking to telecast the cricket matches is not to educate and entertain the viewer but to make money.

75. It can hardly be denied that sport is an expression of self. In an athletic or individual event, the individual expresses himself through his individual feat. In a team event such as cricket, football, hockey etc., there is both individual and collective expression. It may be true that what is protected by Article 19(1)(*a*) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right. The degree of the element will depend upon the character of the telecaster who

claims the right. An organiser such as the BCCI or CAB in the present case which are indisputably devoted to the promotion of the game of cricket, cannot be placed in the same scale as the business organisations whose only intention is to make as large a profit as can be made by telecasting the game. Whereas it can be said that there is hardly any free-speech element in the right to telecast when it is asserted by the latter, it will be a warped and cussed view to take when the former claim the same right and contend that in claiming the right to telecast the cricket matches organised by them, they are asserting the right to make business out of it. The sporting organisations such as BCCI/CAB which are interested in promoting the sport or sports are under an obligation to organise the sports events and can legitimately be accused of failing in their duty to do so. The promotion of sports also includes its popularization through all legitimate means. For this purpose, they are duty-bound to select the best means and methods to reach the maximum number of listeners and viewers. Since at present, radio and TV are the most efficacious methods, thanks to the technological development, the sports organisations like BCCI/CAB will be neglecting their duty in not exploring the said media and in not employing the best means available to them to popularize the game. That while pursuing their objective of popularizing the sports by selecting the best available means of doing so, they incidentally earn some revenue, will not convert either them into commercial organisations or the right claimed by them to explore the said means, into a commercial right or interest. It must further be remembered that sporting organisations such as BCCI/CAB in the present case, have not been established only to organise the sports events or to broadcast or telecast them. The organisation of sporting events is only a part of their various objects, as pointed out earlier and even when they organise the events, they are primarily to educate the sportsmen, to promote and popularize the sports and also to inform and entertain the viewers. The organisation of such events involves huge costs. Whatever surplus is left after defraying all the expenses is ploughed back by them in the organisation itself. It will be taking a deliberately distorted view of the right claimed by such organisations to telecast the sporting event to call it an assertion of a commercial right. Yet the MIB has chosen to advance such contention which can only be described as most unfortunate. It is needless to state that we are, in the circumstances, unable to accept the ill-advised argument. It does no credit to the Ministry or to the Government as a whole to denigrate the sporting organisations such as BCCI/CAB by placing them on a par with business organisations sponsoring sporting events for profit and the access claimed by them to telecasting as assertion of commercial interest.

76. The second contention of MIB is based upon the propositions laid down by the US Supreme Court, viz., there are inherent limitations imposed on the right to telecast/broadcast as there is scarcity of resources, i.e., of frequencies and therefore the need to use them in the interest of the largest number. There is also a pervasive presence of electronic media such as TV. It

has a greater impact on the minds of the people of all ages and strata of the society necessitating the prerequisite of licensing of the programmes. It is also contended on that account that the licensing of frequencies and consequent regulation of telecasting/broadcasting would not be a matter governed by Article 19(2). Whereas Article 19(2) applies to restrictions imposed by the State, the inherent limitations on the right to telecast/broadcast are imposed by nature.

77. In the first instance, it must be remembered that all the decisions of the US Supreme Court relied upon in support of this contention, are on the right of the private broadcasters to establish their own broadcasting stations by claiming a share in or access to the airwaves or frequencies. In the United States, there is no Central Government-owned or controlled broadcasting centre. There is only a Federal Commission to regulate broadcasting stations which are all owned by private broadcasters. Secondly, the American Constitution does not explicitly state the restrictions on the right of freedom of speech and expression as our Constitution does. Hence, the decisions in question have done no more than impliedly reading such restrictions. The decisions of the US Supreme Court, therefore, in the context of the right claimed by the private broadcasters are irrelevant for our present purpose. In the present case what is claimed is a right to an access to telecasting specific events for a limited duration and during limited hours of the day. There is no demand for owning or controlling a frequency. Secondly, unlike in the cases in the US which came for consideration before the US Supreme Court, the right to share in the frequency is not claimed without a licence. Thirdly, the right to use a frequency for a limited duration is not claimed by a business organisation to make profit, and lastly — and this is an important aspect of the present case, to which no reply has been given by the MIB — there is no claim to any frequency owned and controlled by the Government. What is claimed is a permission to uplink the signal created by the organiser of the events to a foreign satellite.

78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article

19(1)(*a*) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like the FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media.

79. As stated earlier, we are not concerned in the present case with the right of the private broadcasters, but only with the limited right for telecasting particular cricket matches for particular hours of the day and for a particular period. It is not suggested that the said right is objectionable on any of the grounds mentioned in Article 19(2) or is against the proper use of the public resources. The only objection taken against the refusal to grant the said right is that of the limited resources. That objection is completely

misplaced in the present case since the claim is not made on any of the frequencies owned, controlled and utilised by Doordarshan. The right claimed is for uplinking the signal generated by the BCCI/CAB to a satellite owned by another agency. The objection, therefore, is devoid of any merit and untenable in law. It also displays a deliberate obdurate approach.

80. The third contention advanced on behalf of the MIB is only an extended aspect of the first contention. It is based on the same distorted interpretation of the right claimed. It proceeds on the footing that the BCCI/CAB is claiming a commercial right to exploit the sporting event when they assert that they have a right to telecast the event through an agency of their choice. It is even contended on behalf of the MIB that this amounts to a device for a non-citizen to assert rights under Article 19(1)(*a*) which are not available to him.

81. It is unnecessary to repeat what we have stated while dealing with the first contention earlier, with regard to the character of BCCI/CAB, the nature of and the purpose for which the right to access to telecast is claimed by them. As pointed out, it is not possible to hold that what the BCCI/CAB are in the present cast (*sic* case) claiming is a commercial right to exploit the event unless one takes a perverse view of the matter. The extent of perversity is apparent from the contention raised by them that to engage a foreign agency for the purpose is to make it a device for a non-citizen to assert his rights under Article 19(1)(*a*). It cannot be denied that the right to freedom of speech and expression under Article 19(1)(*a*) includes the right to disseminate information by the best possible method through an agency of one's choice so long as the engagement of such agency is not in contravention of Article 19(2) of the Constitution and does not amount to improper or unwarranted use of the frequencies. Hence the choice of BCCI/CAB of a foreign agency to telecast the matches cannot be objected to. There is no suggestion in the present case that the engagement of the foreign agency by the BCCI/CAB is violative of the provisions of Article 19(2). On the other hand, the case of MIB, as pointed out earlier, is that the BCCI/CAB want to engage the foreign agency to maximise its revenue and hence they are not exercising their right under Article 19(1)(*a*) but their commercial right under Article 19(1)(*g*). We have pointed out that that argument is not factually correct and what in fact the BCCI/CAB is asserting is a right under Article 19(1)(*a*). While asserting the said right, it is incidentally going to earn some revenue. In the circumstances, it has the right to choose the best method to earn the maximum revenue possible. In fact, it can be accused of negligence and may be attributed improper motives, if it fails to explore the most profitable avenue of telecasting the event, when in any case, in achieving the object of promoting and popularizing the sport, it has to endeavour to telecast the cricket matches. The record shows that all applications were made and purported to have been made to the various agencies on behalf of CAB for the necessary licences and permissions. All other Ministries and Departments understood them as such and granted the necessary permissions and licences. Hence, by granting

such permission, the Government was not in fact granting permission to the foreign agency to exercise its right under Article 19(1)(*a*). If, further, that was the only objection in granting permission, a positive approach on the part of the MIB could have made it clear in the permission granted that it was being given to CAB. In fact, when all other Government Departments had no difficulty in construing the application to that effect and granting the necessary sanctions/permissions at their end, it is difficult to understand the position taken by the MIB in that behalf. One wishes that such a contention was not advanced.

82. The fourth contention is that, as held by the US Supreme Court, the freedom of speech has to be viewed also as a right of the viewers which has paramount importance, and the said view has significance in a country like ours. To safeguard the rights of the viewers in this country, it is necessary to regulate and restrict the right to access to telecasting. There cannot be any dispute with this proposition. We have in fact referred to this right of the viewers in another context earlier. True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1-1/2 per cent of the population has an access to the print media which is not subject to pre-censorship. When, therefore, the electronic media is controlled by one central agency or few private agencies of the rich, there is a need to have a central agency, as stated earlier, representing all sections of the society. Hence to have a representative central agency to ensure the viewers' right to be informed adequately and truthfully is a part of the right of the viewers under Article 19(1)(*a*). We are, however, unable to appreciate this contention in the present context since the viewers' rights are not at all affected by the BCCI/CAB, by claiming a right to telecast the cricket matches. On the other hand, the facts on record show that their rights would very much be trampled if the cricket matches are not telecast through Doordarshan, which has the monopoly of the national telecasting network. Although, there is no statistical data available (and this is not a deficiency felt only in this arena), it cannot be denied that a vast section of the people in this country is interested in viewing the cricket matches. The game of cricket is by far the most popular in all parts of the country. This is evident from the overflowing stadia at the venues wherever the matches are played and they are played all over the country. It will not be an exaggeration to say that at least one in three persons, if not more, is interested in viewing the cricket matches. Almost all television sets are switched on to view the matches.

Those who do not have a TV set of their own crowd around TV sets of others when the matches are on. This is not to mention the number of transistors and radios which are on during the match-hours. In the face of these revealing facts, it is difficult to understand why the present contention with regard to the viewers' right is raised in this case when the grant of access to BCCI/CAB to telecast cricket matches was in the interest of the viewers and would have also contributed to promote their rights as well.

83. The last argument on behalf of the MIB is that since in the present case, DD has not refused to telecast the event, its monopoly to telecast cannot be challenged and in fact no such contention was raised by the BCCI/CAB. We are afraid that this will not be a proper reading of the contentions raised by BCCI/CAB in their pleadings both before the High Court and this Court. Undisputed facts on record show that Doordarshan claimed exclusive right to create host broadcasting signal and to telecast it on the terms and conditions stipulated by it or not at all. MIB even refused to grant uplinking facilities when the terrestrial signal was being created by the CAB with their own apparatus, i.e., the apparatus of the agency which they had engaged and when the use of any of the frequencies owned, controlled or commanded by DD or the Government, was not involved. Since BCCI/CAB were the organisers of the events, they had every right to create terrestrial signals of their event and to sell it to whomsoever they thought best so long as such creation of the signals and the sale thereof was not violative of any law made under Article 19(2) and was not an abuse of the frequencies which are a public property. Neither DD nor any other agency could impose their terms for creating signals or for telecasting them unless it was sought through their frequencies. When Doordarshan refused to telecast cricket matches except on their terms, the BCCI/CAB turned to another agency, in the present case a foreign agency, for creating the terrestrial signal and telecasting it through the frequencies belonging to that agency. When Doordarshan refused to telecast the matches, the rights of the viewers to view the matches were in jeopardy. Only the viewers in this country who could receive foreign frequencies on their TV sets, could have viewed the said matches. Hence it is not correct to say that Doordarshan had not refused to telecast the events. To insist on telecasting events only on one's unreasonable terms and conditions and not otherwise when one has the monopoly of telecasting, is nothing but refusal to telecast the same. DD could not do it except for reasons of non-availability of frequencies or for grounds available under Article 19(2) of the Constitution or for considerations of public interest involved in the use of the frequencies as public property. The fact that Doordarshan was prepared to telecast the events only on its terms shows that the frequency was available. Hence, scarcity of frequencies or public interests cannot be pressed as grounds for refusing to telecast or denying access to BCCI/CAB to telecasting. Nor can Doordarshan plead encroachment on the right of viewers as a ground since the telecasting of events on the terms of Doordarshan cannot alone be said to safeguard the right of viewers in such a case and in fact it was not so.

84. Coming to the facts of the present case, which have given rise to the present proceedings, the version of MIB is as follows.

85. On 15-3-1993, the CAB wrote a letter to the Director General of Doordarshan that a six-Nation International Cricket Tournament will be held in November 1993 as a part of its Diamond Jubilee Celebrations and asked DD to send a detailed offer for any of the two alternatives, namely, (*i*) that DD would create "host broadcaster signal" and also undertake live telecast of all the matches in the tournament, or (*ii*) any other party may create the "host broadcaster signal" and DD would only purchase the rights to telecast in India. CAB in particular emphasised that in either case, the foreign TV rights would be with CAB. The CAB also asked DD to indicate the royalty amount that would be paid by DD. On 18-3-1993 the Controller of Programmes (Sports), DD, replied to the letter stating amongst other things that during the meeting and during the telephonic conversation, CAB's President Dalmia had agreed to send them in writing the amount that he expected as rights fee payable to CAB exclusively for India, without the Star TV getting it. On 19-3-1993 CAB informed DD that they would be agreeable to DD creating the "host broadcaster signal" and also granting DD exclusive right for India without the Star TV getting it and the CAB would charge DD US $ 8,00,000 (US Dollars eight lakhs only) for the same. The CAB, however, made it clear that they would reserve the right to sell/licence the right worldwide, excluding India and Star TV. The CAB also stated that DD would be under an obligation to provide a picture and commentary subject to payment of DD's technical fees. On 31-3-1993, DD sent its bid as "Host Broadcaster" for a sum of Rs 1 crore stating inter alia, that CAB should grant signals to it exclusively for India without the Star TV getting it. DD also stated that they would be in a position to create the "host broadcaster signal" and offer a live telecast of all the matches in the tournament. Thereafter, on 4-5-1993, DD by a fax message reminded the President of CAB about its offer of 31-3-1993. To that CAB replied on 12-5-1993 that as the Committee of CAB had decided to sell/allot worldwide TV rights to one party only, they would like to know whether DD would be interested in the deal and, if so, to send their offer for worldwide TV rights latest by 17-5-1993 on the following basis, namely, outright purchase of TV rights and sharing of rights fee. On 14-5-1993 DD by its fax addressed to CAB stated that it was committed to its earlier bid of Rs 1 crore, namely, exclusive TV right in India alone. DD also stated that as there was a speculation that Pakistan may not participate in the tournament, which may affect viewership and consequent commercial accruals, DD would have to rethink on the said bid also, in such an eventuality and requested CAB to reply to the said letter at the earliest.

86. On 14-6-1993, according to the MIB, without obtaining the required clearances from the Government for telecasting, the CAB entered into an agreement with the World Production Establishment (WPE) representing the interests of TWI (Trans World International), for telecasting all the matches. The said agreement provided for the grant of sole and exclusive right to

sell/license or otherwise exploit throughout the world "Exhibition Rights" in the tournament. CAB shall only retain radio rights for the territory of India. The CAB under the agreement was to receive not less than US $ 5,50,000 as guaranteed sum. If any income from the rights fee is received in excess of the guaranteed sum, it was to be retained wholly by WPE until it was eventually split into 70:30 per cent as per the agreement. If the rights fee/income received was less than guaranteed sum, WPE was to pay the difference to CAB. The WPE was to pay, where possible, television licence fee in advance of the start of the tournament.

87. On 18-6-1993, DD sent a fax to CAB stating therein that from the press reports, it had learnt that CAB had entered into an agreement with TWI for the TV coverage of the tournament and DD had decided not to telecast the matches of the tournament by paying TWI, and that DD was not prepared to enter into any negotiations with TWI to obtain the television rights for the event. On 30-6-1993, DD also informed similarly to International Management Group, Hong Kong.

88. On 2-9-1993, the Department of Youth Affairs and Sports, Ministry of Human Resource Development, addressed a letter to the CAB informing it that the Government had no objection to the proposed visit of the cricket teams of Pakistan, South Africa, Sri Lanka, West Indies and Zimbabwe to India for participation in the tournament. The Department further stated that no foreign national shall visit any restricted/protected/prohibited area of India without permission from the Ministry of Home Affairs. It was also clarified that the sanction of foreign exchange was subject to the condition that CAB would utilise only the minimum foreign exchange required for the purpose and shall deposit foreign exchange obtained by it by way of fee, sponsorship, advertisements, broadcasting rights, etc. through normal banking channels under intimation to the Reserve Bank of India. On 17-9-1993 on the application of CAB made on 7-9-1993 VSNL advised CAB to approach the respective Ministries and the Telecom Commission for approval (*a*) regarding import of earth station and transmission equipment, and (*b*) for frequency clearance from Telecom Commission. The satellite to be used for the transmission coverage, was also required to be specified. It was further stated that CAB should approach VSNL for uplinking signal to INTELSAT at Washington. The TWI was advised to apply to VSNL for necessary coordination channels and DD phone facility covering each location. On 9-10-1993 TWI wrote to VSNL seeking frequency clearance from the Ministry of Communications. The TWI informed VSNL that they will be covering the tournament and that they were formally applying for its permission to uplink their signal as per the list attached to the letter. They also sought frequency clearance for the walkie-talkie. On 13-10-1993, the Ministry of Home Affairs informed the CAB that the Ministry had "no objection" to the filming of the cricket matches at any of the places mentioned in the CAB's letter and that the "no objection" pertains to the filming of the matches on the cricket grounds only. The Ministry also gave

its "no objection" to the use of walkie-talkie sets in the playgrounds during the matches subject to the permission to be obtained from WPC.

89. On 18-10-1993, the CAB addressed a letter to DD for telecasting matches mentioning its earlier offer of rights for telecasting and pointed out that the offer of Rs 10 million made by DD vide its fax message dated 31-3-1993 and on the condition the CAB should not grant any right to Star TV was uneconomical, and considering the enormous organisational cost, they were looking for a minimum offer of Rs 20 million. The CAB also pointed out that the offers received by them from abroad including from TWI, were much higher than Rs 20 million and that the payment under the offers would be made in foreign exchange. The CAB also stated that they were given to understand that DD was not interested in increasing their offer and hence they entered into a contract with TWI for telecasting the matches. However, they were still keen that DD should come forward to telecast the matches since otherwise people in India would be deprived of viewing the same. Hence they had made TWI agree to co-production with DD and they also prayed DD for such co-production. The CAB's letter further stated that during a joint meeting the details were worked out including the supply of equipment list by the respective parties, and it was decided in principle to go for a joint production. The CAB stated that it was also agreed that DD would not claim exclusive right and CAB would be at liberty to sell the rights to Star TV. Thereafter CAB learnt from newspaper reports that DD had decided not to telecast the matches. Hence they had written a letter to DD dated 15-9-1993 to confirm the authenticity of such news, but they had not received any reply from DD. It was pointed that in the meanwhile they had been repeatedly approached by Star TV, Sky TV and other network to telecast matches to the Indian audience and some of them on an exclusive basis. But they had not taken a decision on their offers, since they did not want to deprive DD's viewers. It was further recorded that the CAB had also learnt recently that DD would be interested in acquiring the rights of telecast provided it was allowed to produce the matches directly and the matches produced by TWI were made available to it live, without payment of any technical fees. After recording this, the CAB made a fresh set of proposals, the gist of which was as follows:

1. TWI and Doordarshan would cover 9 (nine) matches each in the tournament independently, which are as follows:

Trans World International

November

08 South Africa v. Zimbabwe (Bangalore)
11 India v. South Africa (Delhi-Chandigarh)
13 W. Indies v. South Africa (Bombay, Brabourne)
16 Pakistan v. South Africa (Cuttack)
19 S. Africa v. Sri Lanka (Guwahati)

21 India v. Pakistan (Chandigarh)
23 First Semi-Final (Calcutta)
— Second Semi-Final (Calcutta)
— Final (Calcutta)

Doordarshan

November
07 India v. Sri Lanka (Kanpur)
09 W. Indies v. Sri Lanka (Bombay, Wankhede)
15 Sri Lanka v. Zimbabwe (Patna)
16 India v. W. Indies (Ahmedabad)
18 India v. Zimbabwe (Indore)
21 W. Indies v. Zimbabwe (Hyderabad)

2. TWI will do the coverage of these matches with their own equipment, crew and commentators. Similarly, Doordarshan will also have their own crew, equipment and commentators for the matches produced by them.
3. Doordarshan will be at liberty to use their own commentators for matches produced by TWI for telecast in India. Similarly, TWI may also use their own commentators if they televised matches produced by Doordarshan in other networks.
4. TWI will allow Doordarshan to pick up the signal and telecast live within India, free of charges. Similarly, Doordarshan will allow TWI to have the signal for live/recorded/highlights telecast abroad, free of charges.
5. Doordarshan will not pay access fees to CAB, but shall allow 4 minutes' advertising time per hour (i.e. 28 minutes in 7 hours). The CAB will be at liberty to sell such time slot to the advertisers and the proceeds so received will belong to CAB.
6. Contract will be entered upon by the CAB and Doordarshan directly for the above arrangements. TWI will give a written undertaking for the coverage break-up as mentioned in point 1.
7. Score Card and Graphics shall be arranged by CAB and the expenses for such production or income derived from sponsorship shall be on the account of CAB. Both TWI and Doordarshan will use such Score Cards and Graphics as arranged by CAB.

90. The CAB requested DD to communicate their final decision in the matter before 21-10-1993.

91. On 26-10-1993 VSNL sent a communication to INTELSAT at Washington seeking information of uplinking timings for TV transmission asked for by CAB/TWI. On 27-10-1993 the Telecommunications Department sent a letter to the Central Board of Excise and Customs on the question of temporarily importing electronic production equipment required for transmission of one-day matches of the tournament and conveying "no

objection" of the Ministry of Communications to the proposal, subject to the organisers coordinating with WPC (DoT) for frequency clearance, from the "Standing Advisory Committee on Frequency Allocation (SACFA)", for TV uplinking from different places and coordinating with VSNL, Bombay for hooking TV transponders.

92. On 27-10-1993 DD informed CAB with reference to its renewed offer of 18-10-1993 that the terms and conditions of the offer were not acceptable to it and that they have already intimated to them that DD will not take signals from TWI — a foreign organisation. They also made it clear that they had not agreed to any joint production with TWI. On 29-10-1993 CAB replied to DD that they were surprised at the outright rejection of the various alternative proposals they had submitted. They had pointed out that the only reason given for rejection was that DD will not take signals from TWI, which was a foreign organisation. Since they had also suggested production of live matches by DD the question of taking signals from TWI did not arise. CAB further stated that purely in deference to DD's sensitivity about taking signals from TWI, CAB would be quite happy to allow DD to produce its own picture of matches and DD may like to buy rights and licences from CAB at a price which will be mutually agreed upon and that these rights would be on non-exclusive basis on Indian territory. On 30-10-1993 DD sent a message to CAB stating that DD will not pay access fee to CAB to telecast the matches. However, for DD to telecast the matches live, CAB has to pay technical charges/production fee at Rs 5 lakhs per match. In that case DD will have exclusive rights for the signals generated and the parties interested to take the signals will have to negotiate directly with DD. On 31-10-1993 DD sent a fax message to CAB to the same effect.

93. On 1-11-1993 VSNL deputed its engineers/staff to be at the venues where the matches were being played to coordinate with TWI for TV coverage. On 2-11-1993 TWI paid US $ 29,640 and £ 121,400 to VSNL as fees for INTELSAT charges. On the same day, the Finance Ministry permitted the equipment of TWI to be imported on certain conditions by waiving the customs and additional duties of customs. On 4-11-1993 CAB addressed a letter to DD referring to DD's fax message of 31-10-1993 asking for certain clarification on the offer made by DD. In this letter, CAB stated that since DD had asked for fees for production and telecast of matches, it was presumed that all revenue generated from the matches or entire time slot for advertisements, would belong to CAB and that they shall have the right to charge access fees including other charges from parties abroad and DD would telecast those matches for which CAB will pay the charges. The choice of the matches to be telecast by DD would be determined by CAB. On 5-11-1993, DD rejected the terms.

94. On 8-11-1993 CAB filed a writ petition in the Calcutta High Court praying, among others, that the respondents should be directed to provide telecast and broadcast of all the matches and also provide all arrangements and facilities for telecasting and broadcasting of the matches by the agency

appointed by the CAB, viz., TWI. Interim reliefs were also sought in the said petition. On the same day, the High Court directed the learned advocate of the Union of India to obtain instructions in the matter and in the meanwhile, passed the interim orders making it clear that they would not prevent DD from telecasting any match without affecting the existing arrangements between CAB and TWI. The writ petition was posted for further hearing on 9-11-1993 on which day, the learned Single Judge confirmed the interim orders passed on 8-11-1993 and respondents were restrained from interfering with the frequency lines given to Respondent 10 (TWI). On 10-11-1993 VSNL advised INTELSAT at Washington seeking cancellation of its request for booking. On 11-11-1993 the learned Judge partly allowed the writ by directing All India Radio to broadcast matches. On 12-11-1993 in the appeal filed by the Union of India against the aforesaid orders of the Division (*sic* Single) Bench, the High Court passed interim order to the following effect:

(*a*) that CAB would pay DD a sum of Rs 5 lakhs per match and the revenue collected by DD on account of sponsorship will be kept in separate account.

(*b*) that DD would be the host broadcaster.

(*c*) that Ministry of Telecommunication would consider the question of issuing a licence to TWI under the Telegraph Act and decide the same within three days.

95. On 12-11-1993 the Film Facilities Officer of the MIB informed the Customs Department at New Delhi, Bombay and Calcutta airports, that as TWI had not obtained required clearances from the Government for the coverage of the tournament, they should not be permitted to remove exposed film outside India till it was cleared by the Government. On the same day, DD asked the CAB for providing various facilities at each match venue as this was a prerequisite for creating host broadcaster signal in India. CAB sent a reply on the same day and called upon DD to telecast matches within India pursuant to the High Court's order. On the same day again the Collector of Customs, Bombay called upon CAB to pay customs duty on the equipment as there was a breach in the terms of the exemption order.

96. On the same day, i.e. 12-11-1993, again the Committee of Secretaries decided that the telecast of all sporting events would be within the exclusive purview of DD/MIB. It was also decided that for the purposes of obtaining necessary clearances for telecasting different types of events for the country, a Single Window Service would be followed where the Administrative Ministry concerned would be the 'Nodal' Ministry to which the application will be submitted and it would thereafter be the function of the 'Nodal' Ministry to obtain permissions from the Ministry/Agencies concerned.

97. On 14-11-1993 the High Court in clarification of its order of 12-11-1993 directed, among others, as follows:

(*a*) In case the signal is required to be generated by TWI separately, such necessary permission should be given by DD and/or other competent authorities.

(*b*) The differences with regard to the placement of cameras, etc., if any, between cricket authority and DD should be mutually worked out, and if this cannot be done, the dispute should be decided by the Head of the Police in the place where the match was being played.

(*c*) The equipment of TWI which had been seized by the Customs Authority should be released upon undertaking that the same would not be used for any other purpose; and

(*d*) The VSNL should take proper steps for uplinking, and should not take any steps to defeat the orders of the Court. The TWI should comply with all financial commitments to VSNL.

98. On 15-11-1993 the CAB and another filed the present Writ Petition No. 836 of 1993. On 15-11-1993 this Court passed an order directing the Secretary, Ministry of Communications to hold a meeting on the same day by 4.30 p.m. and communicate his decision by 7.30 p.m. The Customs Authorities were directed to release the equipment. On the same day at night another order was passed partly staying the orders of the Chairman, Telecommunications and Secretary, DoT. TWI was permitted to generate its own signals and Customs Authorities were directed to release the goods forthwith.

99. DD filed contempt petition in the High Court on the same day against CAB and another, for non-compliance with the orders of the High Court. DD also filed the present special leave petitions in this Court on the same day.

100. What emerges from the above correspondence is as follows. The CAB as early as on 15-3-1993 had offered to DD two alternatives, viz., either DD would create host broadcaster signal and undertake live telecast of all the matches in the tournament or any other party may create the host broadcaster signal and DD would purchase from the said party the rights to telecast the said signals in India. The CAB made it clear that in either case, the foreign TV rights would remain with it. The CAB also asked DD to indicate the royalty that it will be willing to pay in either case. To that, on 18-3-1993 DD rejoined by asking in turn the amount of royalty that the CAB expected if the rights were given to it exclusively for India without the Star TV getting it. On 19-3-1993 the CAB informed DD that they would charge US $ 8 lakhs for giving DD the right to create the host broadcaster signal and also for granting it exclusive right for India without the Star TV getting it. It was, however, emphasised that the CAB would reserve the right to sell/license the right of broadcasting worldwide excluding India and the Star TV. The CAB also stated that DD would be under an obligation to provide a picture and commentary subject to payment of DD's technical fees. On

31-3-1993 DD sent its bid as host broadcaster for a sum of Rs 1 crore (i.e. about US $ 3.33 lakhs at the then exchange rate). Obviously, this was less than 50 per cent of the royalty which was demanded by the CAB. The CAB was, therefore, justified in looking for other alternatives and that is what they did before DD by a fax message of 4-5-1993 reminded the CAB about DD's offer of Rs 1 crore (i.e. US $ 3.33 lakhs). To that message, the CAB replied on 12-5-1993 that it had decided to sell/allot worldwide TV rights to only one party and, therefore, they would like to know whether DD would be interested in the said deal and if so, to send their offer for worldwide TV rights latest by 17-5-1993. To this, on 14-5-1993 DD by fax, replied that it was interested only in exclusive TV rights for India alone without the Star TV getting it and that it stood by its earlier offer of Rs 1 crore (i.e. US $ 3.33 lakhs). DD went further and stated that as there was a speculation that Pakistan might not participate in the tournament which eventuality was likely to affect viewership and commercial accruals, it will have to rethink on that bid also meaning thereby that even the offer of Rs 1 crore may be reduced.

101. According to the MIB, the CAB, thereafter, entered into an agreement with World Production Establishment representing the interests of TWI for telecasting all the matches without obtaining clearance from the Government for telecasting, and granted TWI sole and exclusive right to sell or otherwise exploit all exhibition rights of the tournament. Under the agreement with TWI, the CAB was to receive US $ 5.50 lakhs as guaranteed sum and in addition, if any rights fee income was received in excess of the guaranteed sum, it was to be split in the ratio of 70 : 30 between the parties, i.e., 70 per cent to the CAB and 30 per cent to TWI. Learning of this, DD informed the CAB that it had decided not to telecast the matches of the tournament by paying TWI TV rights fee and that it was not prepared to enter into any negotiations with TWI for the purpose.

102. Again on 18-10-1993 CAB addressed a letter to DD for telecasting the matches mentioning its earlier offer of rights for telecasting and pointed out that the offer of Rs 1 crore made by DD on the condition that the CAB should not grant any right to Star TV was uneconomical. CAB also pointed out that considering the enormous organisational costs involved, they were looking for a minimum offer of Rs 20 million. In this connection, they pointed out that the offers received by them from abroad including from TWI were much higher than Rs 20 million and under those offers, the payment was also to be received in foreign exchange. The CAB further stated in that letter that they were given to understand that DD was not interested in increasing their offer and hence they entered into a contract with TWI for telecasting the matches. Yet, they were keen that DD should telecast the matches since otherwise people in India would be deprived of viewing the same. They had, therefore, made the TWI agree for co-production with DD. They, therefore, requested DD to agree to such co-production. The CAB also stated in the said letter that in fact in a joint meeting, details of such

arrangement were worked out including the supply of equipment list by the respective parties and it was decided in principle to go in for joint production. In the meeting, it was further agreed that DD would not claim exclusive rights and the CAB would be at liberty to sell the rights to Star TV. However, since subsequently they had learnt from newspaper reports that DD had decided not to telecast the matches, by their letter of 15-9-1993 they had asked DD to confirm the authenticity of the news items. DD, however, had not responded to the said letter. In the meanwhile, many other networks had repeatedly approached them for telecasting matches to the Indian audience and some of them on exclusive basis. But they had still kept the matter pending since they did not want to deprive the viewers of DD of the matches. They further added that they had also learnt that DD would be interested in acquiring rights of telecast provided it was allowed to produce some matches directly and the matches produced by TWI are made available to it live without payment of any technical fee. The CAB, therefore, in the circumstances, suggested a fresh set of proposals for DD's consideration and requested response before 21-10-1993. On 27-10-1993 DD responded to the said letter in the negative and stated that the offer made was not acceptable to it and they had already communicated to that effect earlier, stating that they will not take any signals from TWI. DD further denied that they had agreed to any joint production with TWI. The CAB by its letter of 29-10-1993 pointed out, in response to this letter, that since they had also suggested production of live matches by DD, question of taking signals from TWI did not arise, and in deference to DD's sensitivity about taking signals from TWI, CAB would be quite happy to allow DD to produce its own picture of matches and DD may buy rights and licences from it at a price which will be mutually agreed upon.

103. Thus, the controversy between the parties was with regard to the terms for the telecasting of the matches. It must be noted in this connection that DD had never stated to the CAB that it had no frequency to spare for telecasting the matches. On the other hand, if the CAB had accepted the terms of DD, DD was ready to telecast the matches. Therefore, the argument based on resource crunch as advanced on behalf of the MIB/DD, is meaningless in the present case.

104. All that we have to examine in the present case is whether the MIB/DD had stipulated unreasonable conditions for telecasting the matches. It is apparent from the above correspondence between the parties that CAB wanted a minimum of US $ 8 lakhs, i.e., Rs 2.40 crores. However, DD insisted that it would be the host broadcaster and will have exclusive telecasting rights for India and for these rights, it will pay only Rs 1 crore, i.e., US $ 3.33 lakhs. It had also threatened to reduce the said offer of Rs 1 crore because Pakistan was not likely to participate in the tournament. When it was pointed out by the CAB that this offer was uneconomical taking into consideration the enormous costs involved and that they were looking for a

minimum of Rs 2 crores and had received higher offers from other parties under which the payments will also be made in foreign exchange, DD stuck to its earlier offer and refused to raise it. In the meanwhile, the CAB received an offer of US $ 5.50 lakhs, i.e., Rs 1.65 crores from TWI as guaranteed sum plus a share to the extent of 70 per cent in the rights income fee. The CAB being the sole organiser of the event had every right to explore the maximum revenue possible and there was nothing wrong or improper in their negotiating with TWI the terms and conditions of the deal. However, the only response of DD to these arrangements which were being worked out between the CAB and TWI was that it would not telecast the matches of the tournament by paying TWI the fees for purchasing the rights from that organisation. Even then the CAB did not shut its doors on DD, and by its letter of 18-10-1993 informed DD that it was keen that DD should telecast the matches so that people in India are not deprived of viewing the matches. They also informed DD that it was with this purpose that they had made TWI agree for co-production with DD and had made a fresh set of proposals. However, these proposals were on materially different terms. To this, DD replied by its letters of 27-10-1993 that the terms and conditions of the offer were not acceptable to it. The CAB by its letter of 29-10-1993 again offered to DD that if their only objection was to taking signals from TWI, since they had suggested production of live matches by DD in their fresh proposals, there was no question of taking signals from TWI and they should reconsider the proposals. To this, the only reply of DD was that they will not pay any access fee to CAB to telecast the matches and if DD were to telecast the matches, the CAB will have to pay technical/production fee at the rate of Rs 5 lakhs per match, and in that case DD will have exclusive rights for the signals generated, and the parties interested will have to take the signals from DD after negotiating directly with it. In other words, DD took the stand that not only it will not pay any charges to the CAB for the rights of telecasting the matches, but it is CAB which will have to pay the charges, and that DD will be the sole producer of signals and others will have to buy the signals from it.

105. Thus the correspondence between the parties shows that each of the parties was trying to score over the other by taking advantage of its position. The blame for the collapse of the negotiations has to be shared by both. The difference, if any, was only in the degree of unreasonableness. If anything, this episode once again emphasises the need to rescue the electronic media from the Government monopoly and bureaucratic control and to have an independent authority to manage and control it.

106. Coming now to the change in the stand of the other departments of the Government for granting facilities to the agency engaged by the CAB, the facts make a revealing reading. The actions of the various Departments of the Government, referred to earlier, show firstly, that the Ministries of Human Resource Development, of Home Affairs, of Finance, of Communications and the VSNL had no objection whatsoever to the

arrangements which the CAB had entered into with TWI, the foreign agency, for covering the cricket matches. In fact, they granted all the necessary permissions and facilities to the CAB/TWI in all respects subject to certain conditions with which neither the CAB nor TWI had any quarrel. Secondly, these various departments had accepted TWI as the agency of CAB for the purposes of the said coverage and they had no objection to the TWI covering the matches on the ground that it was a foreign agency. This was the situation till the writ petition was filed by the CAB in the Calcutta High Court on 8-11-1993. It is necessary to remember in this connection that the decision of DD to intimate CAB that it will not pay even access fee to the CAB to telecast the tournament and that it was for the CAB to pay the technical/production fee of Rs 5 lakhs per match with DD having exclusive right for the signals generated, and others will have to buy it after negotiating directly with DD, was taken on 30/31-10-1993. It is in that context that further developments which are relevant for our purpose and which took place during the pendency of the Court proceedings, have to be viewed. It is only on 12-11-1993 that the Committee of Secretaries came out with the concept of the nodal ministry. By itself, the decision to form the nodal ministry to coordinate the activities of all the ministries and departments concerned is unexceptional. But the time of taking the decision and its background was not without its significance. However, there is no adequate material on record to establish a nexus between the MIB/DD and the aforesaid actions of the other authorities.

107. The nexus in question was sought to be established by the CAB by pointing out to the letter addressed by the Deputy Secretary in MIB with the approval of the Secretary of that Ministry to Department of Youth Affairs and Sports of the Ministry of Human Resource Development. It in terms refers to the meeting of the Committee of Secretaries on 12-11-1993 and states that according to the so-called "extant policy" of the Government, as endorsed by the Committee of Secretaries, the telecasting of sporting events is within the exclusive purview of DD/MIB. Accordingly, the MIB opposes the grant of any permission to M/s WPE or its agency TWI or any Indian company to cover the matches for general reception in India through uplinking facility except in collaboration with DD with only the latter being the sole agency entrusted with the task of generating TV signals from the venue of the matches. It further states that the MIB opposes (*i*) import of any satellite earth station for the coverage of the series, (*ii*) the grant of any ad hoc exemption for the import of equipment by WPE or TWI without their first producing the approval of the competent authority permitting its use within India, in terms of the provisions of Indian Telegraph Act, 1885 and the Wireless Telegraph Act, 1933 in the absence of which possession of such equipment within India constitutes an offence, (*iii*) M/s WPE or TWI being permitted to undertake shooting of the cricket matches at different places and grant of visa or RAP to its personnel for visiting India, and (*iv*) the grant of

any permission to any aircraft leased by M/s WPE/TWI for landing at any international or national airport.

108. It was urged that the question of the absence of permission/licence of the requisite authorities under the Indian Telegraph Act and the Wireless Telegraph Act was never raised or made a ground for denial of the right to the BCCI/CAB to telecast the matches or to uplink the signal through TWI till after CAB had approached the Calcutta High Court on 8-11-1993. It was contended that the MIB woke up suddenly to the relevant provisions of the statute after the Court proceedings. We are, however, not satisfied that these events conclusively establish that the other departments acted at the behest of DD/MIB.

109. The circumstances in which the High Court came to pass its interim order dated 12-11-1993 may now be noticed. The MIB and DD's appeals are directed against the said order and writ petition is filed by the CAB for direction to Respondents 1 to 9, which include, among others, Union of India.

110. In the writ petition filed by the CAB before the High Court on 8-11-1993 the learned Single Judge on the same day passed an order of interim injunction commanding the respondents to provide all adequate facilities and cooperation to the petitioner and/or their appointed agency for free and uninterrupted telecasting and broadcasting of the cricket matches in question to be played between 10 and 20-11-1993 and restrained the respondents from tampering with, removing, seizing or dealing with any equipment relating to transmission, telecasting or broadcasting of the said matches, belonging to the CAB and their appointed agency, in any manner whatsoever. On the next day, i.e., 9-11-1993 the said interim order was made final. On 11-11-1993 on the application of the CAB complaining that the equipment brought by their agency, viz., TWI (Respondent 10 to the petition) were seized by the Bombay Customs Authorities under the direction issued by the Ministry of Communications and the MIB, another order was passed by the learned Judge directing all Government Authorities including Customs Authorities to act in terms of the interim orders passed earlier on 8/9-11-1993. While passing this order in the presence of the learned counsel for the respondents who pleaded ignorance about the seizure of the equipment by the Customs Authorities, the learned Single Judge observed, among other things, as follows:

> "It is submitted by the learned counsel on behalf of the respondent that since Doordarshan has been denied telecasting of the tournament by Respondent 6, Akashvani has also decided to stop broadcasting and in support of his contention has produced a letter dated 10-11-1993 issued by the Station Director, Calcutta, for Director General, All India Radio to Shri S.K. Kundu, Central Government's Advocate whereupon it appears that it was admitted, that All India Radio had planned to provide running commentary of the matches of the above tournament organised

by the Cricket Association of Bengal, but as Doordarshan was denied the facility of nominating the Host Broadcaster's Signal and it consequently decided not to cover those matches, All India Radio also had decided to drop the coverage of those matches since the principles on which Doordarshan based its decision, viz., the protection of inherent interest of the National Broadcasters to generate the signal of sports, applied equally to the All India Radio.

I fail to understand the logic behind the said letter and the stand taken by the All India Radio in the matter which appears to me wholly illogical and ridiculous. Doordarshan might have some dispute with the... regarding the right to be the Host Broadcaster's Signal including financial questions, but the All India Radio, which itself volunteered to broadcast the matches themselves, and when, admittedly, no financial transaction is involved between the All India Radio and Respondent 6, denial of the All India Radio to broadcast the said matches only on the ground that since Doordarshan was denied by Respondent 6 to be the Host Broadcaster's Signal, the All India Radio stopped broadcasting the matches following the same principle, appears to be absolutely whimsical and capricious.

* * *

Such denial by the All India Radio certainly is an act done against the public interest and thus cannot be supported and/or upheld to deprive the general people of India of such small satisfaction....

* * *

Accordingly, I find the action of the All India Radio in stopping the broadcasting of aforesaid tournament is wholly illegal, arbitrary and mala fide. ...

This writ application accordingly succeeds and is allowed to the extent as stated above, and let a writ in the nature of mandamus to the extent indicated above be issued."

111. The Union of India preferred an appeal against the said decision and in the appeal moved an application for staying the operation of the orders passed by the learned Single Judge on 8/9-11-1993. Dealing with the said application, the Division Bench in its order dated 12-11-1993 observed, among other things, as follows:

"Mr R.N. Das, learned counsel appearing for and on behalf of the Union of India and others including the Director General of Doordarshan, appearing with Mr B. Bhattacharya and Mr Prodosh Mallick submitted inter alia, that Doordarshan authority is very much inclined and keen to telecast the Hero Cup matches in which several parties from abroad are participating including India. But it was pointed out that the difficulties have been created by Cricket Association of Bengal in entering into an agreement with Trans World International (UK) Inc. World Production Respondent 10 of the writ petition wherein

the Cricket Association of Bengal has given exclusive rights to telecast to that authority. It was submitted by Mr Das that under Section 4 of the Indian Telegraph Act, 1885 the Central Government have the exclusive privilege of establishing, maintaining and working telegraph and that it was further submitted that the expression telegraph includes telecasts through Doordarshan. It was further provided that proviso to Section 4(1) of the said Act provides that the Central Government may grant a licence on such conditions and in consideration of such payments as it thinks fit to any person to establish, maintain or work a telegraph within any part of India. Relying upon the provisions it was submitted that neither the CAB nor the TWI Respondent 10 of the writ application have obtained any licence for the purpose of telecasting the matches direct from India."

112. The Court then referred to the correspondence between the CAB and DD between 31-3-1993 and 31-10-1993 and the letters of no objection issued to the CAB by the Ministry of Communications and the VSNL and to the acceptance by the VSNL of the payments from TWI as per the demand of the VSNL itself for granting facilities of uplinking the signal and recorded its prima facie finding that DD was agreeable to telecast matches live for India on a consideration of Rs 5 lakhs per match which was accepted under protest and without prejudice by the CAB and the only dispute was with regard to the revenue to be earned through advertisements during the period of the matches. The Court said that it was not adjudicating on as to what and in what manner the revenue through advertisements would be created and distributed between the parties. It left the said points to be decided on merits in the appeal pending before it and proceeded to observe as follows:

"... but at present having regard to the interest of millions of Indian viewers who are anxiously expecting to see such live telecast, we record as Doordarshan is inclined to telecast the matches for the Indian viewers on receipt of Rs 5 lakh per match and to enjoy the exclusive right of signalling within the country being host broadcaster, we direct the CAB to pay immediately a sum of Rs 5 lakhs per match for this purpose and the collection of revenue on account of sponsorship or otherwise in respect of 28 minutes which is available for commercial purpose be realised by Doordarshan on condition that such amount shall be kept in a separate account and shall not deal with and dispose of the said amount until further orders and we make it clear regarding the entitlement and the manner in which the said sum will be treated would abide by the result of the appeal or the writ application. Accordingly, it is made clear that Doordarshan shall on these conditions start immediately telecasting the live matches of the Hero Cup for the subsequent matches from the next match in India. Mr Das, learned counsel appearing on behalf of the appellant submits that they were in a position technically or otherwise to telecast immediately. With regard to the right of TWI to telecast the matches outside India is concerned, we also record that on time of hearing the counsel appearing on behalf of the appellant showed an order

in three lines that the authority concerned has summarily and without giving any reason and/or any hearing whatsoever directed VSNL not to allow the TWI to transmit or to telecast from India in respect of the Hero Cup matches but it was submitted by the learned counsel appearing for the appellant that they are very much keen to consider the matter in proper perspective in accordance with laws, having regard to the national impact on this question. It appears that on the basis of the representation made by VSNL, TWI came into the picture and subsequently TWI entered into an agreement with the CAB. At this stage, we are not called upon to decide the validity or otherwise of such an agreement entered into by the parties. As a matter of fact, we are referring this without prejudice to the rights and contentions of the parties. It further appears that the Government of India through the Department of Communication stated that the said department had no objection with regard to the permission to the CAB for temporarily importing electronic product equipments required for transmitting one-day matches of the Hero Cup as a part of Diamond Jubilee Celebration to be started from 7-11-1993 to 27-11-1993, the Ministry has no objection to proposal 'subject to the organisers coordinating with WPC (DoT) for frequency clearance from the Standing Advisory Committee on Frequency Allocation (SACFA) for TV uplinking from different places and coordinating with VSNL, Bombay for booking of TV transponders etc. It appears that the said no-objection certificate has created a legitimate expectation, particularly in view of the fact that the money demanded by VSNL in this behalf was duly paid by TWI and all arrangements have been made by TWI for performing the job. As we find that no formal permission is required under the proviso to Section 4(1) of Indian Telegraph Act (*sic*) is there in favour of the party, having regard to the facts stated above and having regard to national and international impact on this question and having regard to the fact that any decision taken will have tremendous impact on the international sports, we direct Appellant 5 who is Respondent 6 in the writ application, the Secretary, Ministry of Telecommunication, Sanchar Bhavan, New Delhi, Government of India to consider the facts and circumstances of the case clearly suggesting that there had already been an implied grant of permission, shall grant a provisional permission or licence without prejudice to the rights and contentions of the parties in this appeal and the writ application and subject to the condition that Respondent 6 in the writ application will be at liberty to impose such reasonable terms and conditions consistent with the provision to Section 4(1) of the Indian Telegraph Act, having regard to the peculiar facts and circumstances of the case. If TWI comply with such terms and conditions that may be imposed without prejudice to their rights and contentions in the interest of sports and subject to the decision in this appeal or the writ application shall be entitled to telecast for international viewers outside India.... The Secretary, Ministry of Telecommunication,

Sanchar Bhavan, New Delhi, Government of India, is directed to decide this question as directed by us within three days from today and all the parties will be entitled to be heard, if necessary. We must put in on record our anxiety that the matter should be taken in the spirit of sports not on the spirit of prestige or personal interest and should approach the problem dispassionately rising above all its narrow interest and personal ego.... In order to comply with this order any order of detention of the equipments of TWI should not be given effect to."

113. The Court also made it clear that in order to comply with its order, any order of detention of the equipments of TWI should not be given effect to. Notwithstanding this order or probably in ignorance of it, the Collector of Customs, Bombay wrote to the CAB that it had given an undertaking to fulfil all the conditions of the ad hoc order dated 2-11-1993 under which exemption was given to it for importing the equipments. However, it had not fulfilled the conditions laid down at (*i*) and (*iii*) of para 2 of the said ad hoc exemption order and, therefore, it should pay an amount of Rs 3,29,07,711 as customs duty on the equipment imported by TWI. They also threatened that if no such duty was paid, the goods would be confiscated. In view of the said show-cause notice, the CAB moved the Division Bench on 14-11-1993. The lawyer of TWI also wrote a letter in the meanwhile on 13-11-1993 to the Customs Authorities at Bombay stating therein that as TWI had sent a letter enclosing a copy of the order of the Division Bench passed on 12-11-1993 directing them not to give effect to the detention of the equipments and complaining that in spite of it they had not released the goods and, therefore, they had committed a contempt of the court. This grievance of CAB and TWI along with the complaint of DD for not permitting them to place their cameras at the requisite places, were heard by the Division Bench on 14-11-1993 when the match was already being played in Bombay. The Bench observed that the Court was given to understand that none of the parties was inclined to go higher up against its earlier order and that what was required was certain clarification of that order in the changed circumstances. The learned counsel for the CAB stated that they were not going to oppose DD placing their cameras but the dispute had arisen as to the signalling to be made for the telecast. According to the learned counsel for the Union of India, there could be only one signalling from the field and DD should be treated as host broadcaster and the TWI should take the signals from it. This was opposed by the learned counsel for the CAB who contended that DD had been given exclusive right as host broadcaster so far as the telecasting of matches in India was concerned. The telecasting of matches abroad was to be done by TWI. The Division Bench held that DD will have the exclusive right of signalling for the purposes of telecasting within the country, and they were to be treated as host broadcasters so far as telecasting within India was concerned. As far as TWI is concerned, if it was authorised and permitted in terms of their earlier order, it would be entitled to telecast outside the country and to send their signals accordingly. They also stated that in case

the signalling was required to be made by the TWI separately the necessary permission should be given by DD or other competent authorities. They resolved the dispute with regard to the placement of cameras by directing that DD will have first priority and if there was any dispute on that account it would be resolved by the local Head of the Police Administration at the venue concerned. They also directed the Customs Authorities, Bombay to release the equipments imported for the purposes of TWI with the condition that the said equipments will be used only for transmission of the matches and they shall not deal with or dispose of the said equipments or remove it outside the country without the permission of the Court. In particular, they also directed the VSNL to take proper steps for uplinking and not to take any step to defeat the purpose.

114. Against the said order of the Division Bench, the present appeals are preferred by the Ministry of Information and Broadcasting and others whereas the writ petition is filed by the CAB for restraining the respondents [which include, among others, Union of India (Respondent 1), Secretary, Ministry of Information and Broadcasting (Respondent 2), Director General, Doordarshan (Respondent 3), Secretary, Ministry of Communications (Respondent 5), Director, Department of Telecommunications (Respondent 6) and Videsh Sanchar Nigam Limited (Respondent 9)] from preventing, obstructing and interfering with or creating any hurdles in the implementation of agreement dated 14-6-1993 between the petitioner-CAB and Respondent 10, i.e., TWI.

115. The matter was heard by this Court on 15-11-1993. It appears from the record that although the High Court had directed the Secretary, Ministry of Communications to decide the question of granting of licence under Section 4(1) of the Telegraph Act within 3 days from 12-11-1993 by its order of the same day, the Secretary had fixed the meeting for consideration of the application only on 16-11-1993. That itself was a breach of the High Court's order. This Court, therefore, directed the Secretary to hear the matter at 4.30 p.m. on 15-11-1993 and communicate its decision to TWI or its counsel or to the CAB or its counsel immediately thereafter but before 7.30 p.m. on the same day. This Court also directed the Customs Authorities to release the equipment forthwith which they had not done in spite of the High Court's order. The TWI and CAB were, however, restrained from using the said equipment till the licence was issued by the Secretary, Department of Telecommunication.

116. Pursuant to the direction given by this Court, the Secretary by his order of 15-11-1993 after referring to the judgment of the High Court and its implication and after taking into consideration the arguments of the respective parties, held as follows:

> "In this connection, we have to take into account an important point brought to our notice by the Director General, Doordarshan. It is true that Section 4 of the Indian Telegraph Act of 1885 enables the

Government to give licences to agencies other than Doordarshan or the Government Departments to telecast. In fact, such a permission had been given in January 1993 when the cricket matches were telecast by the same TWI. However, subsequently, I am given to understand that the Government policy in the Ministry of I & B has been that the uplinking directly by private parties/foreign agencies from India for the purpose of broadcasting should not be permitted.

It is true that in a cricket match we are not considering security aspects. But, the point to be considered is whether uplinking given in a particular case will have its consequences on other such claims which may not be directly linked to sports and which will have serious implications. Within the Government, as per Allocation of Business Rules, it is the Ministry of I & B which has the responsibility for formulation and implementation of the policies relating to broadcasting/telecasting.

As was made clear earlier, in this case, we are considering two aspects. One is the generation of signals and the second is their communication. The Department of Telecommunication comes in the picture so far as the communication aspect is concerned.

Taking into account the facts mentioned above, *the only reasonable conclusion I reach is that permission may be given to TWI for telecast overseas through the VSNL, while Doordarshan will be telecasting within the country. The TWI will have to get the signals from Doordarshan for uplinking through the VSNL by making mutual arrangements. So far as VSNL is concerned, there should be no difficulty in transmitting the signals through INTELSAT as already agreed upon.*

In my view, the above decision takes into account the needs of the millions of viewers both within the country and abroad who are keen to watch the game and at the same time ensures that there is no conflict with the broad Government policy in the Ministry of I & B which is entrusted with the task of broadcasting. It also takes into account the overall aspects and the reasonable expectation created within the TWI by the series of clearances given by the different authorities of the Government of India."

117. This order which was passed around 7.30 p.m. was challenged by the CAB, and being an urgent matter, was heard by the Court late at night on the same day. The Court stayed the order of the Secretary to the extent that it imposed a condition that the TWI will have to get the signals from DD for uplinking through the VSNL by making mutual arrangements. The Court directed that the TWI can generate its own signals by focussing its cameras only on the ground where the matches were being played, as directed by the Ministry of Home Affairs and that they will take care not to focus their cameras anywhere else.

118. For telecasting the triangular series and the West Indies tour to India in 1994 season, the same disputes arose between the parties. By their letter

of 25-8-1994 the BCCI requested the Director, Sports, of the Ministry of Human Resource Development, Department of Youth Affairs and Sports to grant permission to it or TWI/ESPN to telecast the triangular series and matches to be played between India and West Indies. By their letter of 30-8-1994 written to the Secretary, Department of Sports, the MIB opposed the grant of uplinking facilities to any foreign agency. On 14-9-1994 Ishan Television India Ltd. (with a tie-up with ESPN which had contract with BCCI), applied to the VSNL for uplinking facilities for telecasting of the said matches. The VSNL thereafter wrote to the MIB for their "no objection" and the MIB opposed the grant of "no-objection" certificate and objected to VSNL writing to the MIB directly for the purpose. The MIB also stated that their view in the matter was very clear that satellite uplinking from Indian soil would be within the exclusive competence of the MIB/DoT/DOS and that the telecast of sporting events would be the exclusive privilege of DD. By their letter of 26-9-1994, the 'nodal' Ministry, i.e., Ministry of Human Resource Development (Department of Youth Affairs and Sports) addressed to all the ministries and departments including the MIB called for the remarks on the letter of the BCCI addressed to the nodal Ministry. The MIB again wrote to the Sports Department of the nodal Ministry, opposing grant of Single Window Service to the BCCI. On 3-10-1994, the VSNL returned the advance which it had received from Ishan TV for uplinking facilities. On 7-10-1994 this Court passed the following order:

> "Pending the final disposal of the matters by this interim order confined to telecast the international cricket matches to be played in India from October 1994 to December 1994, we direct Respondents 1 and 6 to 9 in Writ Petition No. 836 of 1993 to grant forthwith necessary permission/sanctions and uplinking facilities for production, transmission and telecasting of the said matches.
>
> We also direct Respondents 2, 3 and 4 in Writ Petition No. 836 of 1993 and all other Government Agencies not to obstruct/restrict in any manner whatsoever production, transmission and telecasting of the said matches for the said period by the petitioner-applicant only on the ground where the cricket matches would be played and the signals are generated under the direct supervision of the VSNL personnel.
>
> So far as the production, transmission and telecasting of these matches in India is concerned, Doordarshan shall have the exclusive right in all respects for the purpose, and the petitioner-applicant shall not prevent Doordarshan from doing so, and in particular shall afford all facilities for Doordarshan to do so.
>
> So far as the placement of cameras are concerned both petitioner-applicant as well as Doordarshan shall have equal rights. This shall be ensured by Shri Sunil Gavaskar in consultation with such technical experts as he may deem necessary to consult. He is requested to do so. As far as the remuneration for Shri Sunil Gavaskar and the technical

expert is concerned, both Doordarshan as well as the petitioner-applicant will share the remuneration equally which will be fixed by this Court.

As regards the revenue generated by the advertisement by Doordarshan is concerned, Doordarshan will deposit the said amount in a separate account and preferably in a nationalised bank. Doordarshan will have the exclusive right to advertisement. All the IAs are disposed of accordingly."

119. Since certain disputes arose between the parties, on 18-10-1994 this Court had to pass the following order:

"The BCCI will ensure that all Cricket Associations and staging centres shall extend every facility to the personnel authorised by Doordarshan to enter into the cricket ground for production, transmission and telecasting of the matches without any let or hindrance.

The BCCI will also ensure that all Cricket Associations staging the matches will make available every facility and render such assistance as may be necessary and sought by Doordarshan for effective telecasting of the matches at the respective grounds and stadia.

The BCCI shall not permit the ESPN to enter into any contract either with ATN or any other agency for telecasting in any manner all over India, whether through the satellite footprints or otherwise, cricket matches which are being telecast in India by Doordarshan. If the ESPN has entered into any such contract either with ATN or any other agency, that contract should be cancelled forthwith.

Since this Court is seized of the present matter, no court should entertain any writ petition, suit or application which is connected in any manner with the discharge of obligation imposed on the respective parties to the present proceedings. If any such writ petition, suit or application is already entertained, the Courts should not proceed with the same till further orders of this Court.

The BCCI and Doordarshan will mutually solve the problem of the Control Room and Storage Room facilities needed by Doordarshan, preferably in one meeting in Bombay on 20-10-1994."

120. The law on the subject discussed earlier makes it clear that the fundamental right to freedom of speech and expression includes the right to communicate effectively and to as large a population not only in this country but also abroad, as is feasible. There are no geographical barriers on communication. Hence every citizen has a right to use the best means available for the purpose. At present, electronic media, viz., TV and radio, is the most effective means of communication. The restrictions which the electronic media suffers in addition to those suffered by the print media, are that (*i*) the airwaves are a public property and they have to be used for the benefit of the society at large, (*ii*) the frequencies are limited, and (*iii*) media is subject to pre-censorship. The other limitation, viz., the reasonable restrictions imposed by law made for the purposes mentioned in Article

19(2) are common to all the media. In the present case, it was not and cannot be the case of the MIB that the telecasting of the cricket matches was not for the benefit of the society at large or not in the public interest and, therefore, not a proper use of the public property. It was not the case of the MIB that it was in violation of the provisions of Article 19(2). There was nothing to be pre-censored on the grounds mentioned in Article 19(2). As regards the limitation of resources, since DD was prepared to telecast the cricket matches, but only on its terms it could not plead that there was no frequency available for telecasting. DD could also not have ignored the rights of the viewers which the High Court was at pains to emphasise while passing its orders and to which we have also made a reference. The CAB/BCCI being the organisers of the event had a right to sell the telecasting rights of its event to any agency. Assuming that DD had no frequency to spare for telecasting the matches, the CAB could certainly enter into a contract with any agency including a foreign agency to telecast the said matches through that agency's frequency for the viewers in this country (who could have access to those frequencies) as well as for the viewers abroad. The orders passed by the High Court in effect gave a right to DD to be the host broadcaster for telecasting in this country and for the TWI, for telecasting for the viewers outside this country as well as those viewers in this country who have an access to the TWI frequency. The order was eminently in the interests of the viewers whatever its merits on the other aspects of the matter.

121. The orders passed by the High Court have to be viewed against the backdrop of the events and the position of law discussed above. The circumstances in which the High Court passed the orders and the factual and legal considerations which weighed with it in passing them speak for themselves. However, since the cricket matches have already been telecast, the question of the legality or otherwise of the orders has become academic and it is not necessary to pronounce our formal verdict on the same. Hence we refrain from doing so.

122. We, therefore, hold as follows:

(*i*) The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an inbuilt restriction on its use as in the case of any other public property.

(*ii*) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves, involved in the exercise of the right and can

be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution.

(*iii*) The Central Government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves.

(*iv*) Since the matches have been telecast pursuant to the impugned order of the High Court, it is not necessary to decide the correctness of the said order.

(*v*) The High Court will now apportion between the CAB and DD the revenues generated by the advertisements on TV during the telecasting of both the series of the cricket matches, viz., the Hero Cup, and the International Cricket Matches played in India from October to December 1994, after hearing the parties on the subject.

123. The civil appeals are disposed of accordingly.

124. In view of the disposal of the civil appeals, the writ petition filed by the Cricket Association of Bengal also stands disposed of accordingly.

B.P. JEEVAN REDDY, J. (*concurring*)— Leave granted in special leave petitions.

126. While I agree broadly with the conclusions arrived at by my learned Brother Sawant, J. in para 122 of his judgment, I propose to record my views and conclusions on the issues arising in these matters in view of their far-reaching importance.

127. Cricket is an interesting game. radio, and more particularly the television has made it the most popular game in India. It has acquired tremendous mass appeal. Television has brought the game into the hearths and homes of millions of citizens across the country, enhancing its appeal several-fold. Men, women and children who had no interest in the game earlier have now become its ardent fans — all because of its broadcast by radio and television. This has also attracted the attention of business and commerce. They see an excellent opportunity of advertising their products and wares. They are prepared to pay huge amounts therefor. The cricket clubs which conduct these cricket matches have come to see an enormous opportunity of making money through these matches. Previously, their income depended mainly upon the ticket money. Now, it probably does not count at all. The real income comes from the advertisements both in-stadia as well as the spot advertisements over radio and television. The value of in-stadia advertisement has increased enormously on account of its constant exposure on television during the progress of the game. Lured by these huge revenues, organisers of these events now propose to sell the broadcasting

rights — used compendiously to denote both radio and television rights — of these events to the highest bidder, be he a foreign agency or a local one. They find that Doordarshan is not in a position to or willing to pay as much as the foreign agencies are. Accordingly, they have sold these rights to foreign agencies. But — and here lies the rub — broadcasting the event, particularly telecasting, requires import, installation and operation of certain equipment by these foreign agencies for which the law (Indian Telegraph Act) requires a prior permission — licence — to be granted by Government of India. Earlier, they wanted uplinking facility too through Videsh Sanchar Nigam Ltd., a Government of India-owned company. Now they suggest, it may not be necessary. They say, they can uplink directly from their earth station installed, or parked, as the case may be, near the playing field to their designated communication satellite which will beam it back to earth. The revolution in communications/information technology is throwing up new issues for the courts to decide and this is one of them.

128. Doordarshan says that all these years it has been telecasting the cricket events in India and has helped popularize it. So also is the plea of All India Radio (AIR). They are government agencies — Departments of Government. AIR and Doordarshan enjoy a monopoly in this country in the matter of broadcasting and telecasting. They cannot think of any other agency doing the same job. They are not prepared to reconcile themselves to any other agency, more particularly, a foreign agency being invited to broadcast/telecast these events and they themselves being asked to negotiate and purchase these rights from such foreign agencies. They say, they alone should be allowed to telecast and broadcast these events; that they alone must act as the "host broadcaster", which means they alone shall generate the host broadcasting signal, which the interested foreign agencies can purchase from them. They are, of course, not prepared to pay as much amounts as the foreign agencies. They are seeking to keep away the foreign agencies with the help of the legal provisions in force in this country. If they are successful in that, it is obvious, they may — they can — dictate terms to the organisers of these events. If they cannot, the organisers will be in a position to dictate their terms. But here again, there is another practical, technological, problem. The foreign agencies do beam their programmes over Indian territory too, but for receiving these programmes you require — period — a dish antenna, which costs quite a bit. Our TV sets cannot receive these programmes through the ordinary antenna. Doordarshan alone has the facility of telecasting programmes which can be received through ordinary antennae. Millions in this country, who are deeply interested in the game, cannot afford these dish antennae but they want to watch the game and that can be provided only by Doordarshan. And this is its relevance. Doordarshan says, if the organisers choose to sell their telecasting rights to a foreign agency, they would have nothing to do with the event. They would not telecast it themselves. If the foreign agencies can telecast them, well and

good — they can do so in the manner they can, but Doordarshan would not touch the event even with a long bargepole. But, Doordarshan complains, they are being compelled by the courts to telecast these events in public interest; such orders have been passed in writ petitions filed by individuals or groups of individuals purporting to represent public interest; Doordarshan is thus made to lose at both ends — and the organisers are laughing all the way; telecasting an event requires good amount of preparation; advertisements have got to be collected well in time; it cannot be done at the last minute; without advertisements, telecasting an event results in substantial loss to public exchequer — it says. These are the problems which have given rise to these appeals and writ petitions. They raise inter alia grave constitutional questions touching the freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. The interpretation of Section 4(1) of the Indian Telegraph Act, the right to establish private broadcasting and telecasting facilities/stations — in short, the whole gamut of the law on broadcasting and telecasting has become involved in the issues arising herein.

FACTUAL CONSPECTUS

129. Cricket Association of Bengal (CAB) organised an international cricket tournament under the name and style of "Hero Cup Tournament" to commemorate and celebrate its diamond jubilee celebrations. Apart from India, national teams of West Indies, South Africa, Sri Lanka and Zimbabwe agreed to participate though the national team of Pakistan withdrew therefrom having agreed to participate in the first instance. The "Hero Cup Tournament" comprised several one-day matches and its attraction was not confined to India but to all the cricket-loving countries which, in effect, means all the Commonwealth countries. The tournament was to be held during the month of November 1993. Until 1993, Doordarshan was acting as the host broadcaster in respect of all the cricket matches played in India. It generated the "host broadcaster signal", which signal could be assigned or sold to foreign television organisations for being broadcast in their countries. However, an exception was made by the Government of India — for reasons we do not know — in respect of an earlier tournament; a foreign agency was permitted to telecast the matches in addition to Doordarshan. This exception appears to have set a precedent. On 15-3-1993 the Cricket Association of Bengal wrote to Doordarshan asking it to send their detailed offer which could be any one of the two alternatives mentioned in the letter. The two alternatives mentioned were: "(*a*) that you (Doordarshan) would create 'host broadcaster signal' and also undertake live telecast of all the matches in the tournament, or (*b*) that any other party may create the 'host broadcaster signal' and you would only purchase the rights to telecast in India." Doordarshan was requested to clearly spell out in their offer the royalty amount they were willing to pay. It was further made clear that "in either case it may also please to note that foreign TV rights will be retained by this association". The letter also suggested the manner in which and by which

date the royalty amount was to be paid to it. The offer from Doordarshan was requested to be sent by 31-3-1993. On 18-3-1993 Doordarshan wrote to CAB asking it to send in writing the amount it expects as rights' fee payable to it for granting exclusive telecasting rights "without the Star TV getting it". On 19-3-1993, CAB wrote to Doordarshan stating that "we are agreeable to your creating the host broadcaster signal and also granting you exclusive rights for India without the Star TV getting it. And we would charge you US $ 800,000 (US Dollars Eight Hundred Thousand only) for the same. We will, however, reserve the right to sell/license rights worldwide, excluding India and Star TV. You would be under an obligation to provide the picture and commentary, subject to the payment of your technical fees". On 31-3-1993 Doordarshan replied back stating that the exclusive rights for India without Star TV getting it may be granted to Doordarshan at a cost of rupees one crore. Evidently, because no response was forthwith coming from CAB, Doordarshan sent a reminder on 4-5-1993. On 12-5-1993, CAB wrote to Doordarshan. By this letter, CAB informed Doordarshan that they have now decided "to sell/allot worldwide TV rights for the tournament to one party only, instead of awarding separate area-wise and company-wise contracts". In view of this revised decision, the CAB called upon Doordarshan to let them know whether Doordarshan is in the deal and if so to submit its detailed offer for worldwide TV rights by 17-5-1993. Doordarshan was given an option either to purchase TV rights outright or to purchase TV rights on the basis of sharing of rights' fee. Even before receiving this letter of CAB dated 12-5-1993, Doordarshan addressed a letter to CAB on 14-5-1993 stating that while Doordarshan is still committed to its bid of rupees one crore, there is speculation that Pakistan may not participate in the tournament which would adversely affect the viewership and commercials. In such an eventuality, Doordarshan said, it will have to rethink its bid.

130. On 18-6-1993 Doordarshan sent a fax message to CAB referring to the press reports that CAB has entered into an agreement with Trans World Image (TWI) for the TV coverage of the said tournament and that, therefore, Doordarshan has decided not to telecast the tournament matches organised by paying TWI. It stated that Doordarshan is not prepared to enter into any negotiation with TWI to obtain TV rights for the event.

131. Months passed by and then on 18-10-1993, CAB wrote a detailed letter to Doordarshan. In this letter, CAB stated that though they were expecting an offer of rupees two crores, Doordarshan was offering only a sum of rupees one crore and that they have received offers from agencies abroad including TWI which were much higher than rupees two crores and that too in foreign exchange. Since Doordarshan was not interested in increasing its offer, the letter stated, CAB entered into a contract with TWI for the telecast of matches. Even so, the letter stated, the CAB is still keen that Doordarshan comes forward to telecast the matches since it does not wish to deprive 800 million people of this country and that accordingly they

have made TWI agree for co-production with Doordarshan. It was also stated that Doordarshan should not claim exclusive rights and the CAB would be at liberty to sell the rights to Star TV. The letter further stated that Doordarshan has not been responding to their letters and that meanwhile several foreign TV organisations and networks have been approaching them to telecast their matches to the Indian audience. The letter also referred to their information received from some other sources that Doordarshan is interested in acquiring the rights of telecast provided it is allowed to produce some matches directly and that matches produced by TWI are made available to Doordarshan without payment of technical fees. The letter indicated the matches which Doordarshan would be allowed to telecast directly and the matches which TWI was to telecast directly. This offer was, however, subject to certain conditions which inter alia included the condition that Doordarshan will not pay access fee to CAB but shall allow four minutes' advertising time per hour (i.e. a total of twenty-eight minutes in seven hours) and that CAB will be at liberty to sell such time slots to advertisers and receive the proceeds therefor by itself.

132. On 27-10-1993 Doordarshan replied that they are not interested in the offer made by CAB in its letter dated 18-10-1993. They stated that they have never agreed to any joint production with TWI. On 29-10-1993, CAB again wrote to Doordarshan expressing their regret at the decision of Doordarshan conveyed in their letter dated 27-9-1993 and stated, "...purely in deference to your sensitivity about taking a signal from TWI, CAB would be quite happy to allow you production of your own picture of matches; you may like to buy rights and licence from CAB, at a price to be mutually agreed upon. We would also like to clarify that these rights will be on non-exclusive basis for Indian territory". Doordarshan's response was requested at the earliest. On 30-10-1993, Doordarshan confirmed its message sent that day expressing their refusal to pay any access fee to CAB and stating further that if Doordarshan has to telecast the matches live, CAB has to pay technical charges/production fee at the rate of rupees five lakhs per match and that Doordarshan shall have exclusive rights for the signals generated. There was a further exchange of letters, which it is unnecessary to refer.

133. While the above correspondence was going on between CAB and Doordarshan, the CAB applied for and obtained the following permissions from certain departments. They are:

(*a*) On 2-9-1993, the Government of India, Ministry of Human Resource Development (Department of Youth Affairs and Sports) wrote to CAB stating that Government has no objection to the proposed visit of the cricket teams of the participating countries in November 1993. The Government also expressed its no-objection to provide the conversion facility for guarantee money and prize money for foreign players subject to a particular ceiling.

(*b*) Videsh Sanchar Nigam Limited (VSNL) indicated its charges for providing uplinking facility to INTELSAT and accepted the said charges when paid by the CAB/TWI.

(*c*) On 13-10-1993 the Government of India, Ministry of Home Affairs wrote to CAB expressing its no-objection to the filming of cricket matches and to the use of walkie-talkie sets in the playground during the matches. It also expressed its no-objection in principle to the production and technical staff of TWI visiting India.

(*d*) On 20-10-1993, the Department of Telecommunications addressed a letter to the Central Board of Excise and Customs expressing its no-objection to temporary import of electrical production equipment required for transmission of the said matches between 7-11-1993 and 27-11-1993 subject to the organisers coordinating with wireless planning committee for frequency clearance and also with VSNL.

(*e*) On 2-11-1993, the Ministry of Finance (Department of Revenue) addressed a letter to Collector of Customs, Sahar Airport, Bombay intimating him of the grant of exemption from duty for the temporary import of electrical equipment by TWI, valued at Rs 4.45 crores subject to certain conditions.

134. Inasmuch as no agreement could be arrived at between CAB and Doordarshan, the Department of Telecommunications addressed a letter to VSNL on 3-11-1993 (on the eve of the commencement of the matches) to the following effect:

"Refer to your letter No. 18-IP(TWI)/93-TG dated 13-10-1993 and discussion of Shri V. Babuji with WA on 2-11-1993 regarding uplink facility for telecasting by TWI of CAB Jubilee cricket matches. You are hereby advised that uplink facilities for this purpose should *NOT* repeat *NOT* be provided for TWI. This has the approval of Chairman (TC) and Secretary, DoT. Kindly confirm receipt." The VSNL accordingly intimated CAB of its inability to grant uplinking facility and also returned the amount received earlier in that behalf.

135. Faced with the above developments, the CAB approached the Calcutta High Court by way of a writ petition being Writ Petition No. FMAT Nil of 1993 asserting that in spite of their obtaining all permissions including the TV uplinking facilities from VSNL as contemplated by the proviso to Section 4 of the Indian Telegraph Act, Doordarshan — and other governmental authorities at the instance of Doordarshan — are seeking to block and prevent the telecast of the matches by TWI. The reliefs sought for in the writ petition are the following:

(*i*) A mandamus commanding Respondents 1, 3 and 4 (Union of India, Director General, Information and Broadcasting and Director General, Doordarshan) and other respondents to ensure uninterrupted and unobstructed telecast and broadcast of Hero Cup

tournament between 10-11-1993 and 28-11-1993 and to take all appropriate measures for such telecast and broadcast.

(*ii*) A mandamus to the respondents to provide all arrangements and facilities for telecast and broadcast of the Hero Cup Tournament by the appointed agencies of the petitioners.

(*iii*) A mandamus restraining the respondents from seizing, tampering with, removing or dealing with any equipment relating to transmission, telecast and broadcast of the said tournament; and

(*iv*) Restraining the respondents from interfering or disrupting in any manner the live transmission and broadcast of the said tournament by the petitioners and their agents.

136. A learned Single Judge of the Calcutta High Court heard the matter on 8-11-1993. The learned Judge directed the matter to come up on the next day with a view to enable the Advocate for the Union of India to obtain necessary instructions in the matter. At the same time, he granted an interim order of injunction in terms of prayers (*i*) and (*j*) in the writ petition effective till the end of the next day. Prayers (*i*) and (*j*) in the writ petition read as follows:

"(*i*) Interim order commanding the respondents, their servants, agents, employees or otherwise to provide all adequate assistance and cooperation to the petitioners and/or their appointed agency for free and uninterrupted telecast and broadcast of *Hero Cup Tournament* between 10-11-1993 and 28-11-1993;

(*j*) An interim order of injunction restraining the respondents their servants, agents, employees and others from tampering with, removing, seizing or dealing with any equipments relating to transmission, telecast and broadcast of *Hero Cup Tournament* belonging to and/or their appointed agency in any manner whatsoever."

The order made it clear that the said order shall not prevent Doordarshan from telecasting any match without affecting any arrangement arrived at between CAB and TWI.

137. On the next day, i.e., 9-11-1993, the learned Single Judge heard the Advocate for the Union of India but declined to vacate the interim order passed by him on the previous day. He further restrained the respondents to the writ petition from interfering with the frequency lines given to Respondent 10, i.e., TWI as per request made by VSNL to INTELSAT in view of the fact that VSNL had accepted the proposal of CAB and TWI and had also received the fees therefor. On 11-11-1993, the learned Judge passed another order, on the representation of the learned counsel for the writ petitioners, that the equipment brought by TWI for the purpose of production of transmission and telecasting of cricket matches, which was seized by the Bombay Customs Authorities, allegedly under the instructions of the Ministry of Telecommunications and Ministry of Information and Broadcasting, be released. The learned Judge directed that all the

governmental authorities including the customs authorities shall act in accordance with the interim orders dated 8-11-1993 and 9-11-1993. Meanwhile, it appears, certain individuals claiming to be interested in watching cricket matches on television filed independent writ petitions for a direction to Doordarshan to telecast the matches. The learned Judge expressed the opinion that by their internal fight between Respondents 1 to 5 on one hand and Respondent 6 (reference is to the ranking in the writ petition) on the other, millions of viewers in India are deprived of the pleasure of watching the matches on television. He then referred to the representation that at the instance of Doordarshan and others, All India Radio (AIR) too has stopped broadcasting the matches. The learned Judge observed that there is no reason for AIR to do so and accordingly directed the Union of India and others including the Ministry of Information and Broadcasting to broadcast the remaining cricket matches on AIR as well.

138. Aggrieved by the orders of the learned Single Judge aforementioned, the Union of India and other governmental agencies filed a writ appeal (along with an application for stay) which came up for orders on 12-11-1993 before a Division Bench of the Calcutta High Court. It was submitted by the learned counsel for the Union of India that though Doordarshan is very much keen to telecast the matches, the CAB has really created problems by entering into an agreement with TWI. He submitted that under Section 4 of the Telegraph Act, 1885 the Central Government has the exclusive privilege of establishing, maintaining and working telegraph and that the definition of the expression 'telegraph' includes telecast. He submitted that neither CAB nor TWI have obtained any licence or permission as contemplated by the proviso to Section 4(1) of the Indian Telegraph Act and, therefore, TWI cannot telecast the matches from any place in Indian territory. After referring to the rival contentions of the parties and the correspondence that passed between them, the Division Bench observed that there were two dimensions to the problem arising before them, viz., (1) the right to telecast by Doordarshan within India, and (2) right of TWI to telecast outside India for viewers outside India. Having regard to the urgency of the matter and without going into the merits of the rival contentions, and keeping in view the interest of millions of viewers, the Division Bench observed: "We record, as Doordarshan is inclined to telecast the matches for the Indian viewers on receipt of Rs 5 lakhs per match and to enjoy the exclusive right of signalling within the country being the host broadcaster, we direct the CAB to pay immediately a sum of Rs 5 lakhs per match for this purpose and the collection of revenue on account of sponsorship or otherwise in respect of 28 minutes which is available for commercial purpose be realised by Doordarshan on condition that such amount shall be kept in a separate account and shall not be dealt with and dispose of the said amount until further orders" to be passed in the said writ appeal. Doordarshan was accordingly directed to immediately start telecasting the matches. The Bench then took up the question whether TWI

is entitled to telecast the matches from Indian territory. It noted that no formal order as required under the proviso to Section 4(1) of the Telegraph Act has been granted in favour of either CAB or TWI. Purporting to take notice of the national and international impact of the issue, the Bench directed the 5th appellant before them, viz., the Secretary, Ministry of Telecommunications, Government of India "to consider *the facts and circumstances of the case clearly suggesting that there had already been an implied grant of permission, shall grant a provisional permission or licence without prejudice to the rights and contentions of the parties in this appeal* and the writ application and subject to the condition that Respondent 6 (5th appellant in appeal) in the writ application will be at liberty to impose such reasonable terms and conditions consistent with the provision to Section 4(1) of the Indian Telegraph Act having regard to the peculiar facts and circumstances of the case." (emphasis added) The Secretary was directed to decide the said question within three days from the date of the said order after hearing all the parties before the Division Bench, if necessary.

139. On 14-11-1993 the matter was again taken up by the Division Bench, on being mentioned by the parties. The first problem placed before the Bench was placement of cameras. Doordarshan authorities complained that they have not been given suitable place for the purpose of telecasting. Doordarshan further submitted that there can only be one signalling from the field and that in terms of the orders of the Division Bench, Doordarshan should be the host broadcaster and TWI should take the signals from Doordarshan. This request was opposed by the CAB and TWI. The Bench directed that according to their earlier order the TWI is entitled to telecast outside the country and to send their signals accordingly and in case the signalling is required to be made by TWI separately, the necessary permission should be given by Doordarshan and other competent authorities therefor. Regarding placement of cameras, certain directions were given.

140. Aggrieved by the orders of the Division Bench dated 12-11-1993 and 14-11-1993 the Secretary, Ministry of Information and Broadcasting, Government of India, Director General, Doordarshan and Director General, Akashvani filed two special leave petitions in this Court, viz., SLPs (C) Nos. 18532-33 of 1993. Simultaneously, CAB filed an independent writ petition in this Court under Article 32 of the Constitution being WP (C) No. 836 of 1993. The prayers in this writ petition are practically the same as are the prayers in the writ petition filed in the Calcutta High Court. The additional prayer in this writ petition related to release of equipment imported by TWI which was detained by Customs Authorities at Bombay. On 15-11-1993, this Court directed the Secretary, Ministry of Telecommunications, Government of India to hold the meeting, as directed by the Calcutta High Court, at 4.30 p.m. on that very day (15-11-1993) and communicate the decision before 7.30 p.m. to TWI or its counsel or to CAB or its counsel. The Customs Authorities were directed to release the equipment forthwith. The TWI was, however, restrained from using the equipment for telecast purpose unless a

licence is issued by the Secretary, Ministry of Telecommunications in that behalf.

141. Pursuant to the orders of this Court, Shri N. Vithal, Chairman, Telecommunications and Secretary, DoT passed orders on 15-11-1993 which were brought to the notice of this Court on that very day. This Court stayed the said order to the extent it imposed a condition that TWI will get their signals from Doordarshan for uplinking through VSNL. The TWI was permitted to generate their own signals by focussing their cameras on the ground. It was observed that the said order shall not be treated as a precedent in future since it was made in the particular facts and circumstances of that case.

142. The matches were telecast in accordance with the directions given by this Court and the High Court but the special leave petitions and the writ petition remained pending. While so, a new development took place in 1994 which now requires to be mentioned.

143. In connection with World Cup matches scheduled for the year 1996, certain correspondence took place between Doordarshan and the Board of Cricket Control, India (BCCI). While the said correspondence was in progress, each side reaffirming their respective stand, BCCI arranged certain international cricket matches to be played between the national teams of India, West Indies and New Zealand during the months of October-December 1994. BCCI entered into an agreement with ESPN, a foreign agency, for telecasting all the cricket matches organised by BCCI in India for the next five years for a consideration of US $ 30 million. Doordarshan was totally excluded. ESPN in turn made an offer to Doordarshan to purchase the right to telecast the matches in India from ESPN at a particular consideration which Doordarshan declined.

144. On 20-9-1994, we commenced the hearing of these matters. While the hearing was in progress, the BCCI filed a writ petition, being Writ Petition No. 628 of 1994, for issuance of a writ, order or direction to the respondents (Government of India and its various departments and agencies) to issue and grant the necessary licences and/or permissions in accordance with law to BCCI or its appointed agencies for production, transmission and live telecast of the ensuing international cricket matches to be played during the months of October-December 1994 and to restrain Doordarshan and other authorities from interfering with or obstructing in any manner the transmission, production, uplinking and telecast of the said matches. This writ petition was occasioned because the authorities were said to be not permitting ESPN to either bring in the necessary equipment or to telecast the matches from the Indian territory. The said writ petition was withdrawn later and interlocutory applications filed by the BCCI in the pending special leave petition and writ petition seeking to be impleaded in those matters and for grant of reliefs similar to those prayed for in Writ Petition No. 628 of 1994. Since the hearing was yet to be concluded, we passed certain orders similar

to those passed by this Court earlier — confined, of course, to the matches to be played during the months of October-December 1994.

CONTENTIONS URGED BY THE PARTIES AND THE QUESTIONS ARISING FOR CONSIDERATION

145. The CAB and BCCI have taken a common stand, were represented by the same counsel and have also filed common written submissions. It is not possible to reproduce all their contentions as put forward in their written submissions because of the number of pages they run into. It would suffice if I set out their substance. The submissions are:

(*a*) CAB and BCCI are non-profit-making sporting organisations devoted to the promotion of cricket and its ideals. They organise international cricket tournaments and series from time to time which call for not only good amount of organisation but substantial expense. Payments have to be made to the members of the teams participating. Considerable amount of money has to be expended on the training of players and providing infrastructural facilities in India. All this requires funds which have to be raised by these organisations on their own. Accordingly, CAB entered into an agreement with TWI for telecasting the Hero Cup Tournament matches to be played in the year 1993. The necessary permissions were applied for and granted by the Ministries of Home, Defence, Human Resource Development and Telecommunications. The Ministry of Telecommunications/VSNL accepted the monies for the purpose of providing uplinking facilities, which does amount to implied grant of permission under the proviso to Section 4(1) of the Telegraph Act. In any event, the acceptance of the monies made it obligatory upon the ministries to grant the said licence. It is only on account of the interference and lobbying by Doordarshan and Ministry of Information and Broadcasting that the other ministries went back and refused to permit the telecast. The action of Doordarshan and the Ministry of Information and Broadcasting is mala fide, unreasonable and authoritarian besides being illegal.

(*b*) The game of cricket provides entertainment to public. It is a form of expression and is, therefore, included within the freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. This right includes the right to telecast and broadcast the matches. This right belongs to the organiser of the matches which cannot be interfered with by anyone. The organiser is free to choose such agency as it thinks appropriate for telecasting and broadcasting its matches. Doordarshan or the Ministry of Information and Broadcasting can claim no right whatsoever to telecast or broadcast the said matches. If they wish to do so, they must negotiate with the organiser and obtain the right. They have no inherent right, much less a monopoly, in the matter of telecasting and broadcasting these matches. It is not their events. If the organisers, CAB and BCCI herein, choose to entrust the said rights to a foreign agency, such foreign agency is merely an agency of the

organisers and the mere fact that it happens to be a foreign agency is no ground for depriving the organisers, who as Indian citizens, are entitled to the fundamental right guaranteed by Article 19(1)(*a*). The said right can be restricted or regulated only by a law made with reference to the grounds mentioned in clause (2) of Article 19 and on no other ground.

(*c*) Section 4 of the Indian Telegraph Act must be understood and construed in the light of Article 19(1)(*a*). So read and understood, it is only a regulatory provision. If a person applies for a licence for telecasting or broadcasting his speech and expression — in this case the game of cricket — the appropriate authority is bound to grant such licence unless it can seek refuge under a law made in terms of clause (2) of Article 19. The appropriate authority cannot also impose such conditions as would nullify or defeat the guaranteed freedom. The conditions to be imposed should be reasonable and relevant to the grant.

(*d*) Doordarshan or AIR has no monopoly in the matter of telecasting/broadcasting. Radio and television are only a medium through which freedom of speech and expression is expressed. Article 19(2) does not permit any monopoly as does clause (6) in the matter of Article 19(1)(*g*). Section 4, which contemplates grant of telegraph licences is itself destructive of the claim of monopoly by Doordarshan/AIR.

(*e*) Right to disseminate and receive information is a part of the right guaranteed by Article 19(1)(*a*). Televising the cricket match is a form of dissemination of information. The mere fact that the organisers earn some income from such activity does not make it anytheless a form of expression. It has been held repeatedly by this Court in the matter of freedom of press that the mere fact that publication of newspaper has also certain business features is no ground to treat it as a business proposition and that it remains an activity relatable to Article 19(1)(*a*). Business activity is not the main but only an incidental activity of CAB/BCCI, the main activity being promotion of cricket. It follows that whenever any citizen of this country seeks to exercise this right, all necessary permissions have to be granted by the appropriate authorities. The only ground upon which it can be refused is with reference to law made in the interest of one or the other ground mentioned in Article 19(2) and none else.

(*f*) With the technological advance and the availability of a large number of frequencies and channels, being provided by the increasing number of satellites, the argument of limited frequencies and/or scarce resource is no longer tenable. The BCCI does not want allotment of frequency — not even the uplinking facility, since it has the facility to uplink directly from the earth station to Gorizon — Russian satellite — with which ESPN has an arrangement. All that the BCCI wants is a licence/permission for importing and operating the earth station,

wherever the match is played. In such an eventuality, Doordarshan does not come into picture at all. Of course, in connection with Hero Cup matches, the CAB wanted uplinking facility for the reason that it wanted uplinking to INTELSAT, which is provided only through VSNL. If an organiser does not want uplinking to INTELSAT, he need not even approach VSNL. As a matter of fact, major networks in United States have their own satellites.

146. *On the other hand*, the submissions on behalf of Doordarshan and the Ministry of Information and Broadcasting are the following:

(*i*) The CAB or for that matter BCCI did not even apply for a licence under the proviso to Section 4(1) nor was such licence granted by the appropriate authority at any time or on any occasion. The grant of permission by other departments including the collection of fees by VSNL does not amount to and cannot take the place of licence under the proviso to Section 4(1). In the absence of such a licence, the CAB/BCCI or their agents had no right to telecast or broadcast the matches from the Indian territory. The argument of implied permission — or the alternate argument that the authorities were bound to grant such permission — is misconceived, more particularly, in the absence of even an application for grant of licence under Section 4 of the Telegraph Act.

(*ii*) The Calcutta High Court was not right in giving the directions it did. Particularly the direction given in its order dated 12-11-1993 to the Secretary, Ministry of Telecommunications, Government of India, was contrary to law. While directing the Secretary to consider the facts and circumstances of the case, the High Court expressly opined that there was already an implied grant of permission. After expressing the said opinion, the direction to consider was a mere formality and of little significance. The charge of mala fides and arbitrary and authoritarian conduct levelled against Doordarshan and the Ministry of Information and Broadcasting is wholly unfounded and unsustainable in the facts and circumstances of the case. In the absence of a licence under Section 4 of the Telegraph Act, VSNL could not have granted uplinking facility and it is for that reason that the Department of Telecommunications wrote its letter dated 3-11-1993 to VSNL.

(*iii*) Realising the lack of coordination among the various ministries concerned in granting permission in such a matter, the Government of India has since taken a policy decision in the meeting of the Committee of Secretaries held on 12-11-1993. It has been decided that satellite uplinking from the Indian soil should be within the exclusive competence of the Ministry of Information and Broadcasting/Department of Space/Department of Telecommunications and that similarly the telecast of sports events shall be within the exclusive purview of Doordarshan/Ministry of Information and Broadcasting who in turn could market their rights to other parties on occasion in whole or in part. It has been further decided that in respect of any such event, the

organiser shall contact the specified nodal ministry which in turn will coordinate with all other departments concerned. In short, what may be called a "Single Window System" has been evolved which is indeed in the interest of organisers of such events.

(*iv*) So far as the contention based upon Article 19(1)(*a*) is concerned, the contentions of CAB/BCCI are misleading and over-simplistic. The right guaranteed by Article 19(1)(*a*) is not limited to organisers of such sports events. The said right is guaranteed equally to the broadcaster and the viewers. Among them, the right of the viewers is the more important one. The decisions rendered by this Court in the matter of freedom of press are not strictly relevant in the matter of broadcast/telecast. Telecasting a sports event is distinct from the event itself. It is evident that the CAB/BCCI are seeking to earn as much as possible by selling the telecasting rights. It is nothing but commerce and an activity solely relatable to Article 19(1)(*g*) and not to Article 19(1)(*a*). Inviting bids from all over the world and selling the telecast rights to the highest bidder has nothing to do with Article 19(1)(*a*). In any event, the predominant element in such activity is that of business. The interest of general public is, therefore, a relevant consideration in such matters. The public interest demands that foreign agencies should not be freely permitted to come and set up their telecasting facilities in India in an unrestricted fashion. The occasion for inviting foreign agencies may possibly arise only if Doordarshan and AIR refuse to telecast or broadcast the event which they have never done. Doordarshan was and is always ready to undertake the telecasting on reasonable terms but the CAB and BCCI were more interested in deriving maximum profit from the event. Doordarshan cannot certainly compete with foreign agencies who are offering more money not merely for obtaining the right to telecast these events but with the real and ultimate object of gaining a foothold in the Indian telecasting scene. Through these events, the foreign telecasting organisations, particularly ESPN, are seeking entry into Indian market and it is for this reason that they are prepared to pay more. Their interest is something more than mere commercial.

(*v*) The present situation is that Doordarshan and AIR has got all the facilities of telecasting and broadcasting the events in India. They have been doing it for over the last several decades and they have the necessary infrastructure. Doordarshan is taking all steps for updating its equipment and for training its technicians to handle the latest equipment. It is also entering into tie-ups with certain foreign agencies for the purpose. They have always been prepared for any reasonable terms. Both Doordarshan and AIR are agencies of the State. Until recently, 97% of the telecasts made by Doordarshan did not earn any income. They only involved expense. Its income was derived mainly from the remaining 3% of its activities including sports events like cricket. Recently, there has been a slight change in policy but the picture largely remains the same.

There is nothing illegitimate or unreasonable in Doordarshan seeking to earn some money in the matter of telecast of such events.

(*vi*) The very nature of television media is such that it necessarily involves the marshalling of the resource for the greatest public good. The State monopoly is created as a device to use the resource for public good. It is not violative of the right of free speech so long as the paramount interest of the viewers is subserved and access to media is governed by the "fairness doctrine". Section 4 of the Telegraph Act cannot be faulted on any ground. Indeed, in none of the petitions filed by the CAB/BCCI has the validity of the monopoly of Doordarshan questioned. If the argument of the CAB/BCCI is accepted it would mean a proliferation of television stations and telecasting facilities by all and sundry, both domestic and foreign, which would not be in the interest of the country. Indeed, the other side has not placed any material to show that such free grant of licences would serve the public interest.

(*vii*) Section 4 of the Telegraph Act is in no way inconsistent with the monopoly of Doordarshan/AIR. Indeed, it supports it. The American decisions are not really relevant to the Indian context. The availability of more or unlimited number of frequencies or channels is no ground to permit free and unrestricted import, establishment and operation of radio/television stations, earth stations or other such equipment.

147. In the light of the contentions advanced, *the following questions arise for consideration*:

1. (*a*) Whether a licence or permission can be deemed to have been granted to CAB under the proviso to Section 4 of the Indian Telegraph Act, 1885 for telecasting the Hero Cup Tournament matches played in November 1993?

(*b*) If it is found that there was no such permission, was it open to the Calcutta High Court to give the impugned directions?

(*c*) Whether the charge of mala fides and arbitrary and authoritarian conduct attributed to Doordarshan by CAB is justified?

2.(*a*) Whether organising a cricket match or other sports event is a form of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution?

(*b*) If the question in clause (*a*) is answered in the affirmative, the further question is whether the right to telecast such event is also included within the right of free speech and expression?

(*c*) Whether the organiser of such sports events can claim the right to sell the telecasting rights of such events to such agency as they think proper and whether they have the right to compel the Government to issue all requisite permissions, licences and facilities to enable such agency to telecast the events from the Indian soil? Does the right in Article 19(1)(*a*) take in all such rights?

(*d*) If the organiser of sports does have the rights mentioned in (*c*), whether the Government is not entitled to impose any conditions thereon except charging technical fees or service charges, as the case may be?

3. Whether the impact of Article 19(1)(*a*) upon Section 4 of the Telegraph Act is that whenever a citizen applies for a licence under the proviso to Section 4(1) it should be granted unless the refusal can be traced to a law within the meaning of Article 19(2)?

4. Whether the virtual monopoly existing in favour of Doordarshan in the matter of telecasting from Indian soil is violative of Article 19(1)(*a*) of the Constitution?

ANSWERS TO THE QUESTION

Question No. 1

148. The facts narrated in Part II show that neither CAB nor BCCI ever applied for a licence under the first proviso to sub-section (1) of Section 4 of the Telegraph Act. The permissions obtained from other departments, viz., from the Ministry of Human Resource, VSNL, Ministry of Home Affairs, Ministry of Finance or the Central Board of Excise and Customs cannot take the place of licence under Section 4(1). Indeed, this fact was recognised by the Division Bench of the Calcutta High Court and it is for the said reason that it directed the Secretary to the Telecom Department to decide the question whether such licence should be granted to CAB in connection with Hero Cup matches. But while directing the Secretary to consider the said question, it chose to make certain observations which had the effect of practically foreclosing the issue before the Secretary. The Division Bench observed that the Secretary should proceed on the assumption that there was an implied grant of permission. As a matter of fact, the Secretary was directed to grant the licence in so many words, thus leaving no discretion in him to examine the matter in accordance with law. It became an empty formality. I am of the opinion that while asking the Secretary to decide the issue under proviso to Section 4(1), his discretion and judgment could not have been restricted or forestalled in the above manner. Be that as it may, in pursuance of the said directions — and the directions of this Court — the Secretary passed certain orders, the legality of which has now become academic for the reason that both the events, viz., the Hero Cup matches as well as the recent international matches (October-December 1994) are over. The only thing that remains to be considered is whether the charge of mala fides and arbitrary and authoritarian conduct attributed to Doordarshan by CAB and BCCI is justified. Firstly, neither the CAB nor its foreign agent had applied for or obtained the licence/permission under Section 4(1). The permissions granted by other departments are no substitute for the licence under the proviso to Section 4(1). There is nothing to show that seizure of imported equipment by Customs Authorities was at the instance of Doordarshan; it appears to be for non-compliance with the requirements subject to which permission to import was granted. Secondly, this issue, in

my opinion, cannot be examined in isolation but must be judged in the light of the entire relevant context. Doordarshan did enjoy monopoly of telecasting in India which is the product of and appears to be sustained by Section 4(1) of the Telegraph Act. There was no occasion when a foreign agency was allowed into India without the consent of or without reference to Doordarshan to telecast such events. All these years, it was Doordarshan which was telecasting these matches. On one previous occasion, a foreign agency was allowed but that was by Doordarshan itself or at any rate with the consent of and in cooperation with Doordarshan. It is for this reason that Doordarshan was asserting its exclusive right to telecast the event taking place on Indian soil and was not prepared to purchase the said right from a foreign agency to whom the CAB and BCCI sold all their rights. It is also worth noticing that neither CAB nor BCCI or for that matter any other sports organisation had ever before invited a foreign agency to telecast or broadcast their events — at any rate, not without the consent of Doordarshan. The agreement with TWI entered into by CAB and the agreement with ESPN entered into by the BCCI were unusual and new developments for all concerned. Like the bureaucracy everywhere, the Indian bureaucracy is also perhaps slow in adjusting to the emerging realities, more particularly when they see a threat to their power and authority in such developments. In the circumstances, their objection to a foreign agency coming in and telecasting such events without even obtaining a licence under the proviso to Section 4(1) of the Telegraph Act cannot be termed mala fide or arbitrary. So far as the charge of authoritarianism is concerned, it is equally unsustainable for the reason that the CAB/BCCI had no legal right nor any justification in insisting upon telecasting their events through foreign agencies without even applying for and/or obtaining a licence required by law. The correspondence between them shows that each was trying to get the better of the other; it was like a game of fencing. In my opinion, therefore, the charge of mala fides or for that matter, the charge of arbitrary or authoritarian conduct levelled against Doordarshan and/or other governmental authorities is unacceptable in the facts and circumstances of this case.

Questions Nos. 2, 3 and 4

149. The contentions of Shri Kapil Sibal, learned counsel for the BCCI/CAB have been set out hereinbefore. What do they really mean and imply? It is this: The game of cricket provides entertainment to public at large. The entertainment is organised and provided by the petitioners. Providing entertainment is a form of expression and, therefore, covered by Article 19(1)(*a*) of the Constitution. Except in accordance with a law made in terms of clause (2) of Article 19, no restriction can be placed thereon. The organiser of the game has the right to telecast and broadcast the game. None can stop it — neither Doordarshan nor AIR. The monopoly in favour of Doordarshan and AIR is inconsistent with Article 19(1)(*a*) as well as Section 4 of the Telegraph Act. If Section 4(1) is construed as conferring or affirming such monopoly, it is void and unconstitutional and may fall foul of Article 19(1)(*a*). The first proviso to Section 4(1) is bad for the added reason that it

or the Act does not furnish any guidance in the matter of exercise of discretion conferred upon the Central Government thereunder. The organiser of the game is free to choose such agency as he thinks appropriate for telecasting and broadcasting the game — whether domestic or foreign — and if the organiser asks for a licence under the proviso to Section 4(1) for importing and operating the earth station or other equipment for the purpose, it must be granted. No conditions can be placed while granting such permits except collection of technical fees. This in substance is the contention. It must be said at once that this may indeed be the first decision in this country, when such an argument is being addressed, though such arguments were raised in certain European courts and the European Court of Human Rights, with varying results as we shall indicate in a little while.

150. There may be no difficulty in agreeing that a game of cricket like any other sports event provides entertainment — and entertainment is a facet, a part, of free speech,[12] subject to the caveat that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing societal interests.[21] It attracts a large audience. But the question is whether the organiser of the event can say that his freedom of expression takes in the right to telecast it from the Indian soil without any restrictions or regulations. The argument really means this — "I have a right to propagate my expression, viz., the game, by such means as I think appropriate, I may choose to have a television station of my own or I may invite a foreign agency to do the job. Whatever I wish, the State must provide to enable me to propagate my game. I may make money in the process but that is immaterial." In effect, this is an assertion of an absolute and unrestricted right to establish private radio and television stations, since there is no distinction in principle between having a mobile earth station (which beams its programmes to a satellite via VSNL or directly to another satellite which in turn beams it back to earth) *and* a stationary television station. Similarly, there is no distinction in law between a permanent telecasting facility and a facility for a given occasion. The question is, is such a stand acceptable within the framework of our Constitution? [The question relating to interpretation of Section 4(1), I will deal with separately.] I may clarify that I am concerned herein with "live telecast" which requires the telecast equipment to be placed at or near the field where the event is taking place, i.e., telecasting from the Indian territory. This clarification is appended in view of the contention urged that nothing prevents the organisers — or for that matter, anybody — from video recording the event and then take the video cassette out of this country and telecast it from outside stations. Undoubtedly, they can do so. Only thing is that it will not be a live telecast and it would also not be a telecast from the Indian soil.

12 *Burstyn* v *Wilson*, 343 US 495 96 L Ed 1098 (1952)

21 *Los Angeles* v *Preferred Communications*, 476 US 488 90 L Ed 2d 480 (1986)

151. Article 19(1)(*a*) declares that all citizens shall have the right of freedom of speech and expression. Clause (2) of Article 19, at the same time, provides that nothing in sub-clause (*i*) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with the foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence. The grounds upon which reasonable restrictions can be placed upon the freedom of speech and expression are designed firstly to ensure that the said right is not exercised in such a manner as to threaten the sovereignty and integrity of India, security of the State, friendly relations with the foreign States, public order, decency or morality. Similarly, the said right cannot be so exercised as to amount to contempt of court, defamation or incitement of an offence. Existing laws providing such restrictions are saved and the State is free to make laws in future imposing such restrictions. The grounds aforesaid are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully and peacefully be exercised by the citizens of this country.

152. The freedom of speech and expression is a right given to every citizen of this country and not merely to a few. No one can exercise his right of speech in such a manner as to violate another man's right of speech. One man's right to speak ends where the other man's right to speak begins. Indeed, it may be the duty of the State to ensure that this right is available to all in equal measure and that it is not hijacked by a few to the detriment of the rest. This obligation flows from the Preamble to our Constitution which seeks to secure to all its citizens liberty of thought, expression, belief and worship. State being a product of the Constitution is as much committed to this goal as any citizen of this country. Indeed, this obligation also flows from the injunction in Article 14 that "the State shall not deny to any person equality before the law" and the direction in Article 38(2) to the effect: "The State, shall, in particular — endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people...." Under our constitutional scheme, the State is not merely under an obligation to respect the fundamental rights guaranteed by Part III but under an equal obligation to ensure conditions in which those rights can be meaningfully and effectively enjoyed by one and all.

153. The fundamental significance of this freedom has been stressed by this Court in a large number of decisions and it is unnecessary to burden this judgment with those decisions. Freedom of speech and expression, it has been held repeatedly, is basic to and indivisible from a democratic polity. It encompasses freedom of press. It includes right to impart and receive information. The question now in issue is: *Does it include the freedom to broadcast and telecast one's views, ideas and opinions and whether, if one wishes to do so, is the State bound to provide all necessary licences, permits and facilities therefor*? This requires an examination of the history of

broadcasting and telecasting in this country as well as in certain leading democracies in the world. In this judgment, the expression "broadcasting media" wherever used denotes the electronic media of radio and television now operated by AIR and Doordarshan — and not any other radio/TV services.

INDIA

154. Though several countries have enacted laws on the subject of broadcasting, India has not. The Indian Telegraph Act, enacted in 1885 (as amended from time to time) is the only enactment relevant in this behalf. Clause (1) of Section 3 defines the expression 'telegraph' in the following words:

> " 'telegraph' means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means;
>
> *Explanation.*— 'Radio waves' or 'Hertzian waves' means electromagnetic waves of frequencies lower than 3000 giga-cycles per second propagated in space without artificial guide."

155. Sub-section (1) of Section 4 which occurs in Part II entitled "Privileges and Powers of the Government" confers the exclusive privilege of establishing, maintaining and working telegraphs in India upon the Central Government. At the same time, the first proviso to sub-section empowers the Central Government itself to grant a licence on such conditions and in consideration of such payments as it thinks fit, to establish, maintain or work a telegraph within any part of India. Section 4 may be set out for ready reference:

> "4. (1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:
>
> Provided that the Central Government may grant a licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India:
>
> Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working—
>
> (*a*) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters, and
>
> (*b*) of telegraphs other than wireless telegraphs within any part of India.

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions the Central Government may, by the notification, think fit to impose."

156. The arguments before us have proceeded on the footing that the radio broadcasting and telecasting fall within the definition of 'telegraph', which means that according to Section 4, the Central Government has the exclusive privilege and right of establishing, maintaining and working the radio and television stations and/or other equipment meant for the said purpose. The power to grant licence to a third party for a similar purpose is also vested in the Central Government itself — the monopoly-holder. The first proviso says that the Central Government may grant such a licence and if it chooses to grant, it can impose such conditions and stipulate such payments therefor as it thinks fit. The section is absolute in terms and as rightly pointed out by the petitioners' counsel, it does not provide any guidance in the matter of grant of licence, viz., in which matters the Central Government shall grant the licence and in which matters refuse. The provision must, however, be understood in the context of and having regard to the times in which it was enacted.

157. In *LIC* v. *Manubhai D. Shah*[16] Ahmadi, J. (as the learned Chief Justice then was) held that the refusal of Doordarshan to telecast a film *Beyond Genocide* on Bhopal gas disaster (which film was certified by censors and had also received the Golden Lotus Award) on the ground of lacking moderation, restraint, fairness and balance is bad. The Court noted that while Doordarshan conceded that the film depicted the events faithfully, it failed to point out in what respects it lacked in moderation etc. Merely because it was critical of the Government, it was held, Doordarshan cannot refuse to telecast it. It was pointed out pertinently that the refusal to telecast was not based upon the ground that the list of award-winning films was long and that having regard to inter se priorities among them, it was not possible to telecast the film or that the film was not consistent with the accepted norms evolved by Doordarshan. In this connection, the learned Judge, speaking for the Bench, observed: (SCC pp. 650-51, para 8)

"The words 'freedom of speech and expression' must, therefore, be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. *It*, therefore, *includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. The print media, the radio and the tiny screen*

16 (1992) 3 SCC 637

play the role of public educators, so vital to the growth of a healthy democracy. Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. It cannot be gainsaid that modern communication mediums advance public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. Therefore, in any set-up, more so in a democratic set-up like ours, dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2) of the Constitution. It follows that *a citizen for propagation of his or her ideas has a right to publish for circulation his views in periodicals, magazines and journals or through the electronic media* since it is well known that these communication channels are great purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on vital issues of national importance. Once it is conceded, and it cannot indeed be disputed, that freedom of speech and expression includes freedom of circulation and propagation of ideas, there can be no doubt that the right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him. Every free citizen has an undoubted right to lay what sentiments he pleases before the public; to forbid this, except to the extent permitted by Article 19(2), would be an inroad on his freedom. *This freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest.* It is manifest from Article 19(2) that the right conferred by Article 19(1)(*a*) is subject to imposition of reasonable restrictions in the interest of, amongst others, public order, decency or morality or in relation to defamation or incitement to an offence. It is, therefore, obvious that subject to reasonable restrictions placed under Article 19(2) a citizen has a right to publish, circulate and disseminate his views and any attempt to thwart or deny the same would offend Article 19(1)(*a*)." (emphasis added)

158. Similarly, it was held in *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana*[9]: (SCR p. 490 : SCC p. 414, para 5)

"It can no longer be disputed that the right of a citizen to exhibit films on Doordarshan subject to the terms and conditions to be imposed by Doordarshan is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(*a*) of the Constitution of India which can be curtailed only under circumstances which are set out in clause (2) of Article 19 of the Constitution of India. The right is similar

9 (1988) 3 SCC 410 1988 Supp (1) SCR 486

to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisement hoardings etc. subject to the terms and conditions of the owners of the media. We hasten to add that what we have observed here does not mean that a citizen has a fundamental right to establish a private broadcasting station, or television centre. On this question we reserve our opinion. It has to be decided in an appropriate case."

The Court held that since the Union of India and Doordarshan have failed to produce any material to show that "the exhibition of the serial was prima facie prejudicial to community", the refusal cannot be sustained.

159. Be that as it may, by virtue of Section 4, radio and television have remained a monopoly of the Central Government. Though in the year 1990, Parliament enacted the Prasar Bharati (Broadcasting Corporation of India) Act, 1990, it never came into force because the Central Government did not choose to issue a notification appointing the date (from which the Act shall come into force) as contemplated by Section 1(3) of the said Act. Be that as it may, Government monopoly over broadcasting media is nothing unusual and it is not solely because of the fact that India was not an independent country, or a democracy, until 1947-50. Even in well-established democracies, the position has been the same, to start with, as would be evident from a brief resume of the broadcasting history in those countries which we may now proceed to examine. It would help us understand how the freedom of speech and expression is understood in various democracies with reference to and in the context of right to broadcast and telecast — compendiously referred to hereinafter as broadcasting.

BROADCASTING LAW IN OTHER COUNTRIES

160. The history of broadcasting in United States and other European countries has been basically different, perhaps because of historical factors besides constitutional principles. In the United States, courts have regarded freedom of speech almost entirely as a liberty against the State, while the constitutional courts in Europe have looked upon it as a value which may sometimes compel the Government to act to ensure the right. Constitutions of most of the countries in Western Europe, e.g., Germany, Italy and France are of post-World War II vintage whereas the First Amendment to the United States' Constitution is more than 200 years old. These modern European Constitutions cast an obligation upon their Governments to promote broadcasting freedom and not merely to refrain from interfering with it. The Constitution of Germany expressly refers to the right to broadcast as part of freedom of speech and expression. So far as the United Kingdom is concerned, the development there has to be understood in the context of its peculiar constitutional history coupled with the fact that it has no written constitution. Even so, freedom of thought and expression has been an abiding faith with that nation. It has been a refuge for non-conformists and radical thinkers all over the world — a fact which does not beg any proof. And yet broadcasting in all these countries was a State or a public monopoly

to start with. Only much later have these countries started licensing private broadcasting stations. The main catalyst for this development has been Article 10 of the European Convention on Human Rights which guarantees freedom of expression to all the citizens of the member countries and refers specifically to radio and television. It says:

> "10. (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, may be 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." (emphasis added)

More about this provision later.

161. In the United States, of course, radio and television have been operated by private undertakings from the very beginning. As pointed out by the United States Supreme Court in *Columbia Broadcasting System* v. *Democratic National Committee*[19], at the advent of the radio, the Government had a choice either to opt for government monopoly or government control and that it chose the latter. The role of the Government has been described as one of an 'overseer' and that of the licensee as a "public trustee". The position obtaining in each country may now be noted briefly.

UNITED KINGDOM*

162. The first licence to operate eight radio stations was granted to British Broadcasting Company (BBC) in 1922. In 1927, British Broadcasting Company was replaced by British Broadcasting Corporation. The Sykes Committee, appointed in 1920s, considered the overall State control of radio essential in view of its influence on public opinion but rejected operation of the medium by the State. The other committee appointed in 1920s, viz., Crawford Committee, also recommended that radio should remain a public monopoly in contra-distinction to the United States

19 412 US 94 . 36 L Ed 2d 772 (1973)

* This part of the judgment dealing with the broadcasting law obtaining in United Kingdom and other European countries is drawn largely from the book *Broadcasting Law — A Comparative Study* (1993 Edition) by Eric Barendt, Goodman, Professor of Media Law, University College, London and his article *"The Influence of the German and Italian Constitutional Courts on their National Broadcasting Systems"*, published in Public Law, Spring 1991.

system of "free and uncontrolled transmission". It, however, recommended that the government company should be reorganised as a commission either under a statute or as a public company limited by guarantee. In 1927, a Royal Charter was granted with a view to ensure the independence of BBC, which charter has been renewed from time to time. It prohibits the BBC from expressing its own opinion on current political and social issues and from receiving revenue from advertisement or commercial sponsorship. The power to give directions is reserved to the Government. In 1935, the Corporation was licensed by the Post-Master General to provide a public television service, which was introduced in the following year. The monopoly of BBC continued till 1954. In that year, the British Parliament enacted the Television Act, 1954 establishing the Independent Television Authority (ITA) to provide television broadcasting services additional to those of the BBC. The function of the Authority was to enter into contracts with programme companies for the broadcast of commercial programmes. In 1972, ITA was re-designated as Independent Broadcasting Authority (IBA). In 1984, IBA acquired powers in respect of direct broadcasting by satellite.

163. The Peacock Committee appointed in 1980s to examine the question whether BBC should be compelled to take advertising, rejected the idea but advocated de-regulation of radio and television. The Government accepted the proposal and, accordingly, Parliament enacted the Broadcasting Act, 1990. Section 1 established the Independent Television Commission (ITC) with effect from 1-1-1991 in the place of IBA and the Cable Authority. The ITC is vested with the power to licence and regulate non-BBC television services including Channels 3 and 4 and the proposed Channel 5 besides cable and satellite services. Section 2 requires that the ITC discharge its functions in the manner it considers best to ensure a wide range of TV programme services and also to ensure that the programmes are of high quality and cater to a variety of tastes and interests. In 1991, ITV decided to grant 16 new channels and 3 licences to private bodies with effect from 1-1-1993. The allocation was to be made by calling for tenders — the highest bidder getting it — subject, of course, to the bidder satisfying the qualifying criteria. The eligibility criteria prescribed guards against granting licences to non-EEC nationals, political bodies, religious bodies and advertising agencies. It also guards against concentration of these licences in the hands of few individuals or bodies. Sections 6 and 7 impose strict programme controls on the licensees while Sections 8 and 9 regulate the advertisements. The programme controls include political impartiality, eschewing of excessive violence, due regard for decency and good taste among others. The programmes should not also offend religious feelings of any community. Section 10 provides for government control over licensed services. Section 11 provides for monitoring by ITC of the programmes broadcast by licensed services. It is obvious that this Act has no application to BBC, which is governed by the Royal Charter, as stated hereinabove. The Act has also set up a Radio Authority to exercise comparable powers over radio services. It is

said that this Act ultimately imposed as many restraints on broadcasters' freedom as there were in force earlier.

FRANCE

164. Para 11 of the Declaration of the Rights of Man adopted by the National Assembly in 1789** — affirmed in the Preamble to the Constitution of the Fifth Republic (1958) and treated as binding on all branches of the Government — guarantees freedom of dissemination of thought and opinion. This provision — the child of the French Revolution — has greatly influenced the development of broadcasting freedom in that country. Initially, licences were granted to private radio stations to function alongside the public network but with the outbreak of the World War II, the licences of private broadcasters were suspended and later revoked. From 1945 to 1982, broadcasting remained a State monopoly. The Government exercised tight control over the radio. An ordinance issued in 1959 legalised government control. In 1964, public monopoly was reaffirmed by law. In 1974, the State Organisation, Office de la radio diffusion-television Francaise (ORTF) was divided into seven separate institutions catering to radio and television broadcasts in the country. This was done with a view to introduce competition among the public television companies. The Government exercised a significant degree of control over all these units. No private broadcasting was allowed since broadcasting services were regarded as essentially public. *The State monopoly in the matter of broadcasting was upheld by Conseil Constitutionnel* (Constitutional Court) in 1978. In 1982, however, a significant change took place. The State recognised the right of citizens to have a "free and pluralist broadcasting system". Even so, permission to institute a private broadcasting station was dependent on prior authorization of the Government. This provision was upheld by the Conseil Constitutionnel as compatible with para 11 of the Declaration of the Rights of Man. In 1985, the law was amended providing for private broadcasting and television stations. In 1986, the Government sought to privatise one of the public television channels which immediately provoked controversy. The Conseil Constitutionnel ruled (in 1986) that *principle of pluralism of sources of opinion was one of constitutional significance, against which the concrete provisions of the proposed Bill must be assessed. It observed that access to a variety of views was necessary for the effective guarantee of the freedom of speech protected by the Declaration of the Rights of Man.* At the same time,

** Para 11 reads

> "XI. The unrestrained communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he is responsible for the abuse of this liberty in cases determined by law."

At the same time, para 4 sets out the limitation implicit in all freedoms comprised in the concept of political liberty It says

> " The exercise of the natural rights of every man has no other limits than those which are necessary to secure to every *other* man the free exercise of the same rights, and these limits are determinable only by the law "

it found nothing wrong with the decision to favour private television but held that it was for Parliament to determine the appropriate structure for broadcasting in the light of freedom of communication and other relevant constitutional values like public order, rights of other citizens and pluralism of opinion. The law was accordingly amended. Wherever private broadcasting is allowed it is governed by a contract between the applicant and the administrative authority.

GERMANY

165. After the occupying authorities withdrew from West Germany in 1949, the pattern that emerged was one of nine regional public broadcasting organisations. They formed into an association, the Arbeitsgemeinschaft der offentlich-techtlichen Rundfunkanstalten der Bundersrepublik Deutschland (ARD), in 1950 and under its auspices the first public television channel was formed. Article 5 of the Basic Law of 1949 states:

> "(E)very one shall have the right freely to express and disseminate his opinion by speech, writing, and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship."

In a decision rendered in 1961, the Federal Constitutional Court held inter alia that in view of the shortage of frequencies and the heavy cost involved in establishing a TV station, public broadcasting monopoly is justifiable, though not constitutionally mandatory. It held further that broadcasting, whether public or private, should not be dominated by State or by commercial forces and should be open for the transmission of a wide variety of opinion. [(12 BVerfGE 205-1961)]. There was a long battle before private commercial broadcasting was introduced. Many of the States in West Germany were opposed to private commercial broadcasting. The Constitutional Court ruled in 1981 *(Third Television case*[23]*) that private broadcasting was not inconsistent with Article 5 of the Basic Law but it observed that unlike the press, private broadcasting should not be left to market forces in the interest of ensuring that a wide variety of voices enjoy access to it.* It recognised that the regulation of private broadcasting can be different in content from the regulation applying to public broadcasting. In course of time, private television companies came into existence but in the beginning they were confined to cable. In the *Fourth Television case*[24] decided in 1986, the court held in the present circumstances, the principal public service functions of broadcasting are the responsibility of the public institutions whereas private broadcasters may be subjected to less onerous programme restrictions. Only after the decision of the Constitutional Court in 1987 were the private companies allocated terrestrial frequencies. It appears that notwithstanding the establishment of private companies, it is the public broadcasting companies which dominate the scene and attract more

23 57 BVerfGE 295, 322-3 (1981)

24 73 BVerfGE 118

advertisement revenue. The German Constitutional Court has exercised enormous influence in shaping the contours of broadcasting law. It has interpreted the broadcasting freedom in a manner wholly different from the United States Supreme Court casting an obligation upon the State to act to ensure the right to all citizens.

ITALY

166. In Italy too, the broadcasting was under State control, to start with. In 1944, Radio Audizioni Italia (RAI) was created having a monopoly in broadcasting. It still holds the concession for public radio and broadcasting. Article 21(1) of the Italian Constitution, 1947 provides that: "(E)veryone has the right to express himself freely verbally, in writing, and by any other means." This provision was relied upon by potential private broadcasters in support of their claim for setting up private commercial stations. In a decision rendered in 1960 [Decision 59/60 (1960) Giurisprudenza Constituzionale 759] the Constitutional Court of Italy upheld RAI's monopoly with reference to Article 43 of the Constitution which enables legislation to reserve (or expropriate subject to compensation) for the State, businesses which are concerned with vital public service or are natural monopolies and which are of pre-eminent public interest. It denied the right of applicants to establish private radio or television stations. It opined that *private broadcasting would inevitably be dominated by a few corporations and, therefore, not in public interest,* an aspect which was reaffirmed in a decision in 1974. [Decision 225/74 (1974) Giurisprudenza Constituzionale 1775.] It held that *broadcasting provides an essential service in a democratic society and could legitimately be reserved for a public institution, provided certain conditions were met.* In particular, it said that *radio and television should be put under parliamentary and not executive control to ensure their independence and that rules should be drawn up to guarantee the access of significant political and social groups.* Accordingly, Parliament enacted the *Legge* in April 1975 which provided for a greater control by a Parliamentary Commission over the programmes and their content. In 1976, the Constitutional Court ruled [Decision 202/76 (1976) Giurisprudenza Constituzionale 1276] that while at the national level, the monopoly of RAI is valid, at the local level, it is not, since at the local level there is no danger of private monopolies or oligopolies emerging — a hope belied by subsequent developments. This ambiguous decision resulted in establishment of a large number of private radio stations in Italy notwithstanding the reaffirmation of RAI's national monopoly in 1981 by the court. One of the major — rather the largest — private television and radio networks which thus came into existence is the $ 7 billion Fininvest Company, controlled by Silvio Berlusconi (the ex-Prime Minister of Italy, who resigned in December 1994). It owns three major TV networks in Italy. This development prompted the Constitutional Court, in 1988, to call for a prompt and comprehensive regulation of private broadcasting containing adequate anti-trust and other anti-monopolistic provisions to safeguard

pluralism. Accordingly, a law was made in 1990 which devised a system for licensing private radio and television stations.

AUSTRIA

167. Broadcasting has been under public control in Austria throughout. This monopoly was challenged as inconsistent with Article 10 of the European Convention before the Austrian Constitutional Court which repelled the attack with reference to clause (2) of Article 10. It held that inasmuch as a law made by the State, viz., Constitutional Broadcasting Law had introduced a licensing system within the meaning of the last sentence in Article 10(1) of the Convention and since the said system was intended to secure objectivity and diversity of opinions, nothing further need be done. It held that the Austrian Broadcasting Corporation with the status of an autonomous public law corporation is a sufficient compliance not only with the national laws but also with Article 10 of the Convention and that granting licence to every applicant would defeat the objectives of pluralism, diversity of views and range of opinions underlying the said Austrian law. Several individuals and organisations, who were refused television/radio licences, lodged complaints with the European Human Rights Commission, which referred the matter for the opinion of the European Human Rights Court (EHRC) (at Strasbourg). The Court held that the refusal to consider the applications for licence amounted to a violation of Article 10[25]. The reasoning of the Court is to be found in paras 38 and 39 which read thus:

> "38. The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (*see*, for example, mutatis mutandis, *The Observer and Guardian* v. *The United Kingdom*[26] judgment of 26-11-1991, Series A No. 216, pp. 29-30, § 59). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.
>
> 39. Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.
>
> As a result of the technical progress made over the last decades, justification of these restrictions can no longer today be found in considerations relating to the number of frequencies and channels

25 (*Informationsverein Lentia* v *Austria*, 15 Human Rights Law Journal 31 (judgment dated 24-11-1993)

26 13 Human Rights Law Journal 16 (1992)

available; the Government accepted this. Secondly, for the purposes of the present case they have lost much of their raison d'être in view of the multiplication of foreign programmes aimed at Austrian audiences and the decision of the Administrative Court to recognise the lawfulness of their re-transmission by cable (*see* paragraph 21 above). Finally and above all, it cannot be argued that there are no equivalent less restrictive solutions; it is sufficient by way of example to cite the practice of certain countries which either issue licences subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation."

The Court then dealt with the argument that "Austrian market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of the private monopolies" and rejected it in the following words:

> "42. The court is not persuaded by the Government's argument. Their assertions are contradicted by the experience of several European States, of a comparable size of Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless."

The Court finally concluded:

> "43. In short, like the Commission, the Court considers that the interferences in issue were disproportionate to the aim pursued and were, accordingly, not necessary in a democratic society. There has therefore been a violation of Article 10."

In our opinion, the reasoning of EHRC is unacceptable for various reasons which we shall set out at the proper stage.

OTHER WESTERN EUROPEAN COUNTRIES

168. In Denmark, private broadcasting was permitted by Legislation enacted in 1985. In Portugal, private broadcasting was allowed only in 1989, by amending the Constitution. In Switzerland too, private broadcasting has been allowed only recently. Private broadcasting is, however, subject to strict programme control.

UNITED STATES OF AMERICA

169. In the United States, there was no law regulating the establishment and working of broadcasting companies till 1927. In that year Radio Act, 1927 was enacted by Congress creating the Federal Radio Commission with authority to grant three-year licences to operate radio stations on an assigned frequency. In the year 1934, Congress enacted the Federal Communications Act. This Act placed the telephone and wireless communications under one authority, viz., Federal Communications Commission (FCC). The Commission had the authority to assign frequency for particular areas, to prescribe the nature of the service to be provided for different types of stations and to decide licence applications. The only guideline issued to the

Commission was that it should exercise its powers keeping in view the "public interest, convenience and necessity". It is under these guidelines that the FCC evolved the Fairness Doctrine in 1949. Notwithstanding the First Amendment, the United States Supreme Court held that the freedom of speech did not entail a right to broadcast without a licence. It held: "*Unlike other modes of expression, radio inherently is not available to all*"[17]. The Fairness Doctrine was approved by the Supreme Court in *Red Lion Broadcasting Co.* v. *FCC*[18]. The Court observed:

> "Although broadcasting is clearly a medium affected by a First Amendment interest, ... differences in the characteristics of news media justify differences in the First Amendment standards applied to them.
>
> * * *
>
> *Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.*
>
> ... those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.
>
> * * *
>
> ... the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. ... *It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. ... It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here.*"

In 1967-70, public broadcasting was established on a national basis through the institution of the Corporation for Public Broadcasting (CPB), viz., the Public Broadcasting Service (PBS) for television and National Radio Service. The CPB is funded by appropriations made by Congress. In 1978, the Supreme Court affirmed in *FCC* v. *National Citizens Committee for Broadcasting*[27] that:

> "[I]n making (its) licensing decisions between competing applicants, the Commission has long given 'primary significance' to 'diversification of control of the media of mass communications'. This policy is consistent with the statutory scheme and with the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources'.* Petitioners argue that the regulations

17 *National Broadcasting Co. (NBC)* v *US*, 319 US 190 87 L Ed 1344 (1943)

18 395 US 367 23 L Ed 2d 371 (1969)

27 436 US 775 56 L Ed 2d 697 (1978)

* As far back as 1948, the Court held in *U S* v *Paramount Pictures* (334 US 131 92 L Ed 1260) that no monopoly can be countenanced in the matter of First Amendment rights

are invalid because they seriously restrict the opportunities for expression of both broadcasters and newspapers. But as we stated in *Red Lion*[18], 'to deny a station license because "the public interest" requires it "is not a denial of free speech" '. The regulations are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them."

170. It is significant to notice the statement that "to deny a station license because 'the public interest' requires it 'is not a denial of free speech' " — a holding to which we shall have occasion to advert to later. Yet another relevant observation of Burger, C.J. is to the following effect:

> *"The Commission (FCC) was justified in concluding that the public interest in providing access to market place of 'ideas and expressions' would scarcely be served by a system so heavily weighted in favour of the financially affluent or those with access to wealth...."*
>
> (emphasis added)

171. In 1970s, however, it was argued that programming restraints were contrary to the First Amendment besides being unproductive and that broadcasting licensees should enjoy the same rights as newspaper editors and owners. In course of time, the Government moved towards deregulation of broadcasting and ultimately in 1987 the Fairness Doctrine was repealed by FCC. An attempt by Congress to restore the said rule by an enactment was vetoed by the President.

172. Having examined the systems obtaining in the United States and major West European countries, Eric Barendt says:

> "These developments illustrate the widely divergent approaches to broadcasting regulation in the United States and (for the most part) in Europe. This is partly an aspect of the more sceptical attitude to Government and to administrative regulation which has prevailed in the USA, at any rate in the last twenty years. The First Amendment has been interpreted as conferring on broadcasters rights, which have not been derived from the comparable provisions in continental countries. Another explanation is that in the USA private commercial broadcasting enjoyed for a long time a de facto monopoly, while in Britain, France, Germany and Italy there was a public monopoly. It is interesting that there has been a continuity to US broadcasting law, which (perhaps sadly) is not found in these European jurisdictions. The Federal Communications Act has remained in force since its passage in 1934, though it has been amended on a handful of occasions."*

173. We may now proceed to examine what does "Broadcasting freedom" mean and signify?

18 395 US 367 23 L Ed 2d 371 (1969)

* Eric Barendt *Broadcasting Law*, p 31

Broadcasting freedom : Meaning and content of

174. There is little doubt that broadcasting freedom is implicit in the freedom of speech and expression. The European Court of Human Rights also has taken the view that broadcasting like press is covered by Article 10 of the Convention guaranteeing the right to freedom of expression. But the question is what does broadcasting freedom mean? Broadly speaking, broadcasting freedom can be said to have four facets — (*a*) freedom of the broadcaster, (*b*) freedom of the listeners/viewers to a variety of view and plurality of opinion, (*c*) right of the citizens and groups of citizens to have access to the broadcasting media, and (*d*) the right to establish private Radio/TV stations. We shall examine them under separate heads.

(*a*) *Freedom of the broadcaster*

175. The first facet of the broadcasting freedom is freedom from State or government control, in particular from the censorship by the Government. As the Peacock Committee put it, pre-publication censorship has no place in a free society. Pre-publication censorship is prohibited in Germany by Article 5 of the Basic Law. This principle applies in equal measure both to public and private broadcasting. It is, however, necessary to clarify here that *public broadcasting is not to be equated with State broadcasting. Both are distinct.* Broadcasting freedom in the case of public broadcasting means the composition of these bodies in a manner so as to genuinely guarantee their independence. In Germany, the Constitutional Court has ruled that freedom from State control requires the legislature to frame some basic rules to ensure that Government is unable to exercise any influence over the selection, content or scheduling of programmes. Laws providing to the contrary were held bad. Indeed, the Court also enunciated certain guidelines for the composition and selection of the independent broadcasting authorities on the ground that such a course is necessary to ensure freedom from government control. It should be noted that an unfettered freedom for licensees to select which programmes appear on their schedule to the complete disregard of the interests of public appears more like a property right than an attribute of freedom of speech. It is for this reason that the German Constitutional Court opined in 1981 (*Third Television case*[23]) and in 1987 (*Fourth Television case*[24]) that *television and radio is an instrument of freedom serving the more fundamental freedom of speech in the interest of both broadcasters and the public.* The Court opined that *broadcasting freedom is to be protected insofar as its exercise promotes the goals of free speech, i.e., an informed democracy and lively discussion of a variety of views.* The freedom of broadcaster cannot be understood as merely an immunity from government intervention but must be understood as a freedom to safeguard free speech right of all the people without being dominated either by the State or any commercial group. This is also the view taken by the Italian and French courts.

23 57 BVerfGE 295, 322-3 (1981)

24 73 BVerfGE 118

(*b*) *Listeners'/viewers' right*

176. Broadcasting freedom involves and includes the right of the viewers and listeners who retain their interest in free speech. It is on this basis that the European courts have taken the view that *restraints on freedom of broadcasters are justifiable on the very ground of free speech.* It has been held that freedom of expression includes the right to receive information and ideas as well as freedom to impart them.

> "The free speech interests of viewers and listeners in exposure to a wide variety of material can best be safeguarded by the imposition of programme standards, limiting the freedom of radio and television companies. What is important according to this perspective is that the broadcasting institutions are free to discharge their responsibilities of providing the public with a balanced range of programmes and a variety of views. These free speech goals require positive legislative provision to prevent the domination of the broadcasting authorities by the Government or by private corporations and advertisers, and perhaps for securing impartiality...."

177. The Fairness Doctrine evolved by FCC and approved by the United States Supreme Court in *Red Lion*[18] protected the interest of persons by providing a right of reply to personal attacks. But difficulties have arisen in the matter of enforcing the listeners'/viewers' rights through courts.

(*c*) *Access to broadcasting*

178. The third facet of broadcasting freedom is the freedom of individuals and groups of individuals to have access to broadcasting media to express their views. The first argument in support of this theory is that public is entitled to hear range of opinions held by different groups so that it can make sensible choices on political and social issues. In particular, these views should be exposed on television, the most important contemporary medium. It is indeed the interest of audience that justified the imposition of impartiality rules and positive programme standards upon the broadcasters. The theoretical foundation for the claim for access to broadcasting is that freedom of speech means the freedom to communicate effectively to a mass audience which means through mass media. This is also the view taken by our Court as pointed out supra.

179. An important decision on this aspect is that of the United States Supreme Court in *Columbia Broadcasting System* v. *Democratic National Committee*[19]. The CBS denied to Democrats and a group campaigning for peace in Vietnam any advertising time to comment upon contemporary political issues. Its refusal was upheld by the FCC, but the District of Columbia Circuit Court of Appeals ruled that an absolute ban on short pre-paid editorial advertisements infringed the First Amendment and constituted impermissible discrimination. The Supreme Court, however, allowed the

18 395 US 367 23 L Ed 2d 371 (1969)
19 412 US 94 36 L Ed 2d 772 (1973)

plea of CBS holding that recognition of a right of access of citizens and groups would be inconsistent with the broadcasters' freedom. They observed that if such right was to be recognised, wealthy individuals and pressure groups would have greater opportunities to purchase advertising time. *It rejected the "view that every potential speaker is 'the best judge' of what the listening public ought to hear"*. (Burger, C.J.) Some Judges expressed the opinion that the broadcaster enjoyed the same First Amendment rights as the newspapers whereas the minority represented by Brennan and Marshall, JJ. was of the view that freedom of groups and individuals to effective expression justified recognition of some access rights to radio and television.

180. It appears that this aspect has been debated more intensively in Italy. The Italian Constitutional Court held that the monopoly of RAI can be justified only on certain conditions, one of them being that access must be allowed so far as possible to the political, religious and social groups, representing various strands of opinion in society. It opined that statutory provision for access was required by Article 21 of the Constitution guaranteeing freedom of expression. The Italian courts viewed access as a goal or a policy rather than a matter of fundamental right while at the same time protecting the individual's right of reply. On this aspect, Barendt says:

> *"There are also practical objections to access rights. It may be very difficult to decide, for example, which groups are to be given access and when and how often such programmes are shown. There is a danger some groups will be unduly privileged...."*

(*d*) *The rights to establish private broadcasting stations*

181. The French Broadcasting Laws of 1982 and 1989 limit the right of citizens to establish private broadcasting stations in the light of the necessity to respect individual rights, to safeguard pluralism of opinion and to protect public interests such as national security and public order. No private radio or television channel or station can be established without prior authorisation from the regulatory body, Conseil superieur de l'audiovisuel. In Britain, the ITC and the Radio Authority must grant the necessary licence for establishing a private television or radio station. In none of the European countries is there an unregulated right to establish private radio/television station. It is governed by law. Even in United States, it requires a licence from FCC.

182. Let us examine the position obtaining in Italy and Germany where constitutional provisions corresponding to Article 19(1)(*a*) — indeed more explicit in the case of Germany — obtain. *Notwithstanding Article 21*, referred to hereinbefore, *the Italian Constitutional Court continues to hold that public monopoly of broadcasting is justified, at least at national level till adequate anti-trust laws are enacted to prevent the development of private media oligopolies*. In fact, this principle has been applied in the case of local broadcasting and private broadcasting allowed at local level. *The Italian Constitutional Court is of the view that Article 21 of the Italian Constitution does no doubt confer right to speak freely but this right is to be exercised by "using means already at one's disposal, not a right to use*

public property, such as the airwaves". The analogy with the right to establish private schools was held to be a weak one and rejected by the Constitutional Court. More particularly, it is of the view that *it is impossible to justify recognition of a right which only a handful of individuals and media companies can enjoy in practice.*

183. In Germany too, the Constitutional Court has not recognised a right in the citizens to establish private television/radio stations at their choice. The question was left open in what is called the *Third Television case*. This question has, however, lost its significance in view of the laws made in 1980s permitting private broadcasting. What is relevant is that *even after the enactment of the said laws, the Constitutional Court held in Sixth Television case (decided in 1991) that establishment of private broadcasting stations is not a matter of right but a matter for the State (legislature) to decide.* If the State legislation does permit such private broadcasting, it has been held at the same time, it cannot impose onerous programme and advertising restrictions upon them so as to imperil their existence.

184. So far as the United States is concerned, where licensing of private broadcasting stations has been in vogue since the very beginning, the Supreme Court said in *CBS* v. *Democratic Committee*[19] that : "(B)ecause the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values." It then affirmed the holding in *Red Lion*[18] that "no one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech' "*. The Court also affirmed that *"it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish*". It is relevant to mention here that the distinction made between the press and the broadcasting media vis-à-vis the First Amendment has been justified by an American jurist Bollinger as based on First Amendment values and not on notions of expediency. He says that in "permitting different treatment of the two institutions ... (the) Court has imposed a compromise — a compromise, however, not based on notions of expediency, but rather on a reasoned and principled accommodation of competing First Amendment values".†

185. It is true that with the advances in technology, the argument of few or limited number of frequencies has become weak. Now, it is claimed that

19 412 US 94 36 L Ed 2d 772 (1973)

18 395 US 367 23 L Ed 2d 371 (1969)

* It is true that reference to "the public interest" in the above extract must be understood in the light of the guidance provided to F C C., which inter alia directs the F C C to perform its functions consistent with public interest, the fact yet remains that even the guidance so provided was understood to be within the ambit of First Amendment and consistent with the free speech right guaranteed by it It was held in *National Broadcasting Co* v *United States* that the guidance provided to F.C C to exercise its powers 'as public convenience, interest or necessity requires' did not violate the First Amendment

† 75 Michigan Law Review 1, 26-36 (1976) quoted in *Constitutional Law* by Stone, Seidman and others (2nd Edn) at 1427-28

an unlimited number of frequencies are available. We shall assume that it is so. Yet the fact remains that airwaves are public property that they are to be utilised to the greatest public good; that they cannot be allowed to be monopolised or hijacked by a few privileged persons or groups; that granting licence to everyone who asks for it would reduce the right to nothing and that such a licensing system would end up in creation of oligopolies as the experience in Italy has shown — where the limited experiment of permitting private broadcasting at the local level though not at the national level, has resulted in creation of giant media empires and media magnates, a development not conducive to free speech right of the citizens. It would be instructive to note the lament of the United States Supreme Court regarding the deleterious effect the emergence of media empires had on the freedom of press in that country. In *Miami Herald Publishing Co.* v. *Tornillo*[28] the Court said:

> "Access advocates submit that... the press of today is in reality very different from that known in the early years of our national existence.
>
> * * *
>
> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspapers being owned by the same interests which own a television station and a radio station, are important components of this trend towards concentration of control of outlets to inform the public.
>
> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues.
>
> * * *
>
> The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the market-place of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be 'surrogates for the public' carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for Government to take affirmative action. *The First Amendment interest of the public in being*

28 418 US 241 41 L Ed 2d 730 (1974)

informed is said to be in peril because the 'market-place of ideas' is today a monopoly controlled by the owners of the market."

(emphasis added)

Of course, there is another side to this picture: The media giants in United States are so powerful that Government cannot always manipulate them — as was proved in the *Pentagon Papers' case* (*New York Times* v. *United States*[29]) and in the case of President's Claim of Privilege (*United States* v. *Nixon*[30]). These considerations — all of them emphasised by Constitutional Courts of United States and major West European countries — furnish valid grounds against reading into Article 19(1)(*a*) a right to establish private broadcasting stations, whether permanent or temporary, stationary or mobile. Same holding holds good for earth stations and other telecasting equipment which the petitioners want to bring in through their chosen agencies. As explained hereinbefore, there is no distinction in principle between a regular TV station and an earth station or other telecasting facility. More about this aspect later.

186. Having noticed the judicial wisdom of the Constitutional Courts in leading democracies, we may turn to the issues arising herein.

The nature of grounds specified in Article 19(2) of the Constitution

187. A look at the grounds in clause (2) of Article 19, in the interests of which a law can be made placing reasonable restrictions upon the freedom of speech and expression goes to show that they are all conceived in the national interest as well as in the interest of society. The first set of grounds, viz., the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are grounds referable to national interest whereas the second set of grounds, viz., decency, morality, contempt of court, defamation and incitement to offence are conceived in the interest of society. The interconnection and the interdependence of freedom of speech and the stability of society is undeniable. They indeed contribute to and promote each other. Freedom of speech and expression in a democracy ensures that the change desired by the people, whether in political, economic or social sphere, is brought about peacefully and through law. That change desired by the people can be brought about in an orderly, legal and peaceful manner is by itself an assurance of stability and an insurance against violent upheavals which are the hallmark of societies ruled by dictatorships, which do not permit this freedom. The stability of, say, the British nation and the periodic convulsions witnessed in the dictatorships around the world is ample proof of this truism. The converse is equally true. The more stable the society is, the more scope it provides for exercise of right of free speech and expression. A society which feels secure can and does permit a greater latitude than a society whose stability is in constant peril. As observed by Lord Sumner in *Bowman* v. *Secular Society Ltd.*[31]:

29 403 US 713 29 L Ed 2d 822 (1971)
30 418 US 683 41 L Ed 2d 1039 (1974)
31 1917 AC 406 (1916-17) All ER Rep 1

"The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day, meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before.... After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion ... which prevents us from varying their application to the particular circumstances of our time in accordance with that experience."

188. It is for this reason that our Founding Fathers while guaranteeing the freedom of speech and expression provided simultaneously that the said right cannot be so exercised as to endanger the interest of the nation or the interest of the society, as the case may be. This is not merely in the interest of nation and society but equally in the interest of the freedom of speech and expression itself, the reason being the mutual relevance and interdependence aforesaid.

189. Reference may also be made in this connection to the decision of the United States Supreme Court in *FCC* v. *National Citizens Committee for Broadcasting*[27] referred to hereinbefore, where it has been held that "to deny a station licence because the public interest requires it is not a denial of free speech". It is significant that this was so said with reference to First Amendment to the United States Constitution which guarantees the freedom of speech and expression in absolute terms. The reason is obvious. The right cannot rise above the national interest and the interest of society which is but another name for the interest of general public. It is true that Article 19(2) does not use the words "national interest", "interest of society" or "public interest" but as pointed hereinabove, the several grounds mentioned in clause (2) are ultimately referable to the interests of the nation and of the society. As observed by White, J. speaking for the United States Supreme Court in *Red Lion*[18]:

"*It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. Associated Press* v. *United States*[32]; *New York Times Co.* v. *Sullivan*[33]; *Abrams* v. *United States*[34]

27 436 US 775 56 L Ed 2d 697 (1978)
18 395 US 367 23 L Ed 2d 371 (1969)
32 326 US 1, 20 89 L Ed 2013, 2030 (1945)
33 376 US 254, 270 11 L Ed 2d 686, 700 (1964)
34 250 US 616, 630 63 L Ed 1173, 1180 (1919)

(Holmes, J., dissenting). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*[35]. See Brennan, "*The Supreme Court and the Meiklejohn Interpretation of the First Amendment*", 79 Harv L Rev 1 (1965). It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here."
(emphasis added)

190. We may have to bear this in mind while delineating the parameters of this freedom. It would also be appropriate to keep in mind the observations in *Columbia Broadcasting System* v. *Democratic National Committee*[19]. Burger, C.J. quoted the words of Prof. Chafee to the following effect:

"Once we get away from the bare words of the First Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. *The First Amendment should be interpreted so as not to cripple the regular work of the Government.*"

191. We must also bear in mind that the obligation of the State to ensure this right to all the citizens of the country (emphasised hereinbefore) creates an obligation upon it to ensure that the broadcasting media is not monopolised, dominated or hijacked by privileged, rich and powerful interests. Such monopolisation or domination cannot but be prejudicial to the freedom of speech and expression of the citizens in general — an aspect repeatedly stressed by the Supreme Court of United States and the Constitutional Courts of Germany and Italy.

192. *The importance and significance of television in the modern world* needs no emphasis. Most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The television is unique in the way in which it intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. Call it idiot box or by any other pejorative name, it has a tremendous appeal and influence over millions of people. Many of them are glued to it for hours on end each day. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far. Younger generation is particularly addicted to it. It is a powerful instrument, which can be used for greater good as also for doing immense harm to the society. It depends upon how it is used. With the advance of technology, the number of channels available has grown enormously. National borders have become meaningless. The reach of some of the major networks is international; they are not confined to one country or one region. It is no longer possible for any government to control or manipulate the news, views and information available to its people. In a

35 379 US 64, 74-75 13 L Ed 2d 125, 133 (1964)
19 412 US 94 36 L Ed 2d 772 (1973)

manner of speaking, *the technological revolution is forcing internationalism upon the world*. No nation can remain a fortress or an island in itself any longer. Without a doubt, this technological revolution is presenting new issues, complex in nature — in the words of Burger, C.J. "complex problems with many hard questions and few easy answers". Broadcasting media by its very nature is different from press. Airwaves are public property. The fact that a large number of frequencies/channels are available does not make them anytheless public property. It is the obligation of the State under our constitutional system to ensure that they are used for public good.

193. Now, what does this public good mean and signify in the context of the broadcasting medium? In a democracy, people govern themselves and they cannot govern themselves properly unless they are *aware* — aware of social, political, economic and other issues confronting them. To enable them to make a proper judgment on those issues, they must have the benefit of a range of opinions on those issues. Right to receive and impart information is implicit in free speech. This plurality of opinions, views and ideas is indispensable for enabling them to make an informed judgment on those issues to know what is their true interest, to make them responsible citizens, to safeguard their rights as also the interests of society and State. All the constitutional courts of leading democracies, reference to which has been made heretobefore, have recognised and reiterated this aspect. This is also the view of the European Court of Human Rights. In *Castells* v. *Spain*[36] the court held that free political debate is "at the very core of the concept of a democratic society".

194. From the standpoint of Article 19(1)(*a*), what is paramount is the right of the listeners and viewers and not the right of the broadcaster — whether the broadcaster is the State, public corporation or a private individual or body. A monopoly over broadcasting, whether by Government or by anybody else, is inconsistent with the free speech right of the citizens. State control really means governmental control, which in turn means, control of the political party or parties in power for the time being. Such control is bound to colour the views, information and opinions conveyed by the media. The free speech right of the citizens is better served in keeping the broadcasting media under the control of public. Control by public means control by an independent public corporation or corporations, as the case may be, formed under a statute. As held by the Constitutional Court of Italy, broadcasting provides an essential service in a democratic society and could legitimately be reserved for a public institution, provided certain conditions are met. The corporation(s) must be constituted and composed in such a manner as to ensure its independence from Government and its impartiality on public issues. When presenting or discussing a public issue, it must be ensured that all aspects of it are presented in a balanced manner, without appearing to espouse any one point of view. This will also enhance the credibility of the media to a very large extent; a controlled media cannot

36 14 EHRR 445 (quoted in 1994 Public Law at p 524)

command that level of credibility. For the purpose of ensuring the free speech rights of the citizens guaranteed by Article 19(1)(*a*), it is not *necessary* to have private broadcasting stations, as held by the Constitutional Courts of France and Italy. Allowing private broadcasting would be to open the door for powerful economic, commercial and political interests, which may not prove beneficial to free speech right of the citizens — and certainly so, if strict programme controls and other controls are not prescribed. The analogy with press is wholly inapt. Above all, airwaves constitute public property. While, the freedom guaranteed by Article 19(1)(*a*) does include the right to receive and impart information, no one can claim the fundamental right to do so by using or employing public property. Only where the statute permits him to use the public property, then only — and subject to such conditions and restrictions as the law may impose — he can use the public property, viz., airwaves. In other words, Article 19(1)(*a*) does not enable a citizen to impart his information, views and opinions by using the airwaves. He can do so without using the airwaves. It need not be emphasised that while broadcasting cannot be effected without using airwaves, receiving the broadcast does not involve any such use. Airwaves, being public property must be utilised to advance public good. Public good lies in ensuring plurality of opinions, views and ideas and that would scarcely be served by private broadcasters, who would be and who are bound to be actuated by profit motive. There is a far greater likelihood of these private broadcasters indulging in misinformation, disinformation and manipulation of news and views than the government-controlled media, which is at least subject to public and parliamentary scrutiny. The experience in Italy, where the Constitutional Court allowed private broadcasting at the local level while denying it at the national level should serve as a lesson; this limited opening has given rise to giant media oligopolies as mentioned supra. Even with the best of programme controls it may prove counter-productive at the present juncture of our development; the implementation machinery in our country leaves much to be desired which is shown by the ineffectiveness of the several enactments made with the best of the intentions and with most laudable provisions; this is a reality which cannot be ignored. It is true that even if private broadcasting is not allowed from Indian soil, such stations may spring up on the periphery of or outside our territory, catering exclusively to the Indian public. Indeed, some like stations have already come into existence. The space, it is said, is saturated with communication satellites and that they are providing and are able to provide any number of channels and frequencies. More technological developments must be in the offing. But that cannot be a ground for enlarging the scope of Article 19(1)(*a*). It may be a factor in favour of allowing private broadcasting — or it may not be. It may also be that Parliament decides to increase the number of channels under Doordarshan, diversifying them into various fields, commercial, educational, sports and so on. Or Parliament may decide to permit private broadcasting, but if it does so permit, it should not only keep

in mind the experience of the countries where such a course has been permitted but also the conditions in this country and the compulsions of technological developments and the realities of situation resulting from technological developments. We have no doubt in our mind that it will so bear in mind the above factors and all other relevant circumstances. We make it clear, we are not concerned with matters of policy but with the *content of Article 19(1)(a)* and we say that *while public broadcasting is implicit in it, private broadcasting is not*. Matters of policy are for Parliament to consider and not for courts. On account of historical factors, radio and television have remained in the hands of the State exclusively. Both the networks have been built up over the years with public funds. They represent the wealth and property of the nation. It may even be said that they represent the material resources of the community within the meaning of Article 39(*b*). They may also be said to be 'facilities' within the meaning of Article 38. They must be employed consistent with the above articles and consistent with the constitutional policy as adumbrated in the Preamble to the Constitution and Parts III and IV. We must reiterate that the press whose freedom is implicit in Article 19(1)(*a*) stands on a different footing. The petitioners — or the potential applicants for private broadcasting licences — cannot invoke the analogy of the press. To repeat, *airwaves are public property and better remain in public hands in the interest of the very freedom of speech and expression of the citizens of this country*.

195. It would be appropriate at this stage to deal with the reasoning of the European Court of Human Rights in the case of *Informationsverein Lentia*[25]. The first thing to be noticed in this behalf is the language of Article 10(1) of the European Convention, set out hereinbefore. Clause (1) of Article 10 not only says that everyone has the right to freedom of expression but also says that the said right shall include freedom to hold opinions and to receive and impart information and ideas *without interference by public authority and regardless of frontiers*. The clause then adds that Article 10 shall not, however, prevent the State from requiring the licensing of broadcasting, television or cinema enterprises. Clause (2) of course is almost in pari materia with clause (2) of Article 19 of our Constitution. What is, however, significant is that Article 10(1) expressly conferred the right "to receive and impart information and ideas without interference by public authority". The only power given to public authority, which in the context means the State/Government, is to provide the requirement of licence and nothing more. It is this feature of clause (1) which has evidently influenced the decision of the European Court. The decision cannot, therefore, be read as laying down that the right of free expression by itself implies and includes the right to establish private broadcasting stations. It is necessary to emphasise another aspect. While I agree with the statement in para 38 to the effect that freedom of expression is fundamental to a democratic society and that the said right "cannot be successfully accomplished unless it is grounded

25 (*Informationsverein Lentia* v *Austria*, 15 Human Rights Law Journal 31 (judgment dated 24-11-1993)

in the principle of pluralism, of which the State is the ultimate guarantor", I find it difficult to agree that such pluralism cannot be ensured by a public/statutory corporation of the nature already in existence in Austria and that it is necessary to provide for private broadcasting to ensure pluralism, as held in para 39. The fact that as a result of technological advances, the argument of limited number of frequencies is no longer available, cannot be a ground for reading the right to private broadcasting into freedom of expression. The decision as such is coloured by the particular language of clause (1) of Article 10, as stated above. I must also say that the last observation in para 39, viz., that there can be other less restrictive solutions is also not a ground which we can give effect to under the legal system governing us. The question in such cases always is whether the particular restriction placed is reasonable and valid and not whether other less restrictive provisions are possible. I may also mention that the arguments which weighed with other constitutional courts, viz., that airwaves represent public property and that they cannot be allowed to be dominated or monopolised by powerful commercial, economic and political interests does not appear to have been argued or considered by the European Court. As has been emphasised by other constitutional courts, the very free speech interest of the citizens requires that the broadcasting media is not dominated or controlled by such powerful interests.

196. There is yet another aspect of the petitioners' claim which requires to be explained. According to their own case, they have sold the telecasting rights with respect to their matches to a foreign agency with the understanding that such foreign agency shall bring in its own equipment and personnel and telecast the matches from the Indian territory. Once they have sold their rights, the foreign agency is not their agent but an independent party. It is a principal by itself. The foreign agency cannot claim or enforce the right guaranteed by Article 19(1)(*a*). Petitioners cannot also claim because they have already sold the rights. In other words, the right to telecast is no longer with them but with the foreign firm which has purchased the telecasting rights. For this reason too, the petitioners' claim must be held to be unacceptable.

197. Having held that Article 19(1)(*a*) does not encompass the right to establish, maintain or run broadcasting stations or broadcasting facilities, we feel it necessary to clarify the true purport of the said freedom in the context of broadcasting media. This is necessary to ensure that I am not misunderstood or misinterpreted. Indeed, what I propose to say hereafter flows logically from what I have said heretofore.

198. It has been held by this Court in *LIC* v. *Manubhai Shah*[16] that the freedom of speech and expression guaranteed to the citizens of this country "includes the right to propagate one's views through print media or through any other communication channel, e.g., the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views

16 (1992) 3 SCC 637

through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution". It has also been held in the said decision that: (SCC pp. 650-51, para 8)

> "The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy. Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. ... It follows that a citizen for propagation of his or her ideas has a right to publish for circulation his views in periodicals, magazines and journals or through the electronic media since it is well known that these communication channels are great purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on vital issues of national importance."

To the same effect is the holding in *Odyssey Communications*[9] referred to supra. Once this is so, it follows that no monopoly of this media can be conceived for the simple reason that Article 19(2) does not permit State monopoly unlike clause (6) of Article 19 vis-à-vis the right guaranteed by Article 19(1)(*g*).

199. All the constitutional courts whose opinions have been referred to hereinbefore have taken the uniform view that in the interest of ensuring plurality of opinions, views, ideas and ideologies, the broadcasting media cannot be allowed to be under the monopoly of any one — be it the monopoly of Government or of an individual, body or organisation. Government control in effect means the control of the political party or parties in power for the time being. Such control is bound to colour and in some cases, may even distort the news, views and opinions expressed through the media. It is not conducive to free expression of contending viewpoints and opinions which is essential for the growth of a healthy democracy. I have said enough hereinbefore in support of the above propositions and we do not think it necessary to repeat the same over again here. I have also mentioned hereinbefore that for ensuring plurality of views, opinions and also to ensure a fair and balanced presentation of news and public issues, the broadcast media should be placed under the control of public, i.e., in the hands of statutory corporation or corporations, as the case may be. This is the implicit command of Article 19(1)(*a*). I have also stressed the importance of constituting and composing these corporations in such a manner that they ensure impartiality in political, economic and social and other matters touching the public and to ensure plurality of views, opinions and ideas. This again is the implicit command of Article 19(1)(*a*). This medium should promote the public interest by providing information, knowledge and entertainment of good quality in a balanced way. Radio and television should serve the role of public educators as well. Indeed, more than one corporation for each media can be provided with a view to provide

9 (1988) 3 SCC 410 1988 Supp (1) SCR 486

competition among them (as has been done in France) or for convenience, as the case may be.

200. Now, coming to the Indian Telegraph Act, 1885, a look at its scheme and provisions would disclose that it was meant for a different purpose altogether. When it was enacted, there was neither radio* nor, of course, television, though it may be that radio or television fall within the definition of 'telegraph' in Section 3(1). Except Section 4 and the definition of the expression 'telegraph', no other provision of the Act appears to be relevant to broadcasting media. Since the validity of Section 4(1) has not been specifically challenged before us, we decline to express any opinion thereon. The situation is undoubtedly unsatisfactory. This is the result of the legislation in this country not keeping pace with the technological developments. While all the democracies in the world have enacted laws specifically governing the broadcasting media, this country has lagged behind, rooted in the Telegraph Act of 1885 which is wholly inadequate and unsuited to an important medium like radio and television, i.e., broadcasting media. It is absolutely essential, in the interests of public, in the interests of the freedom of speech and expression guaranteed by Article 19(1)(*a*) and with a view to avoid confusion, uncertainty and consequent litigation that Parliament steps in soon to fill the void by enacting a law or laws, as the case may be, governing the broadcasting media, i.e., both radio and television media. The question whether to permit private broadcasting or not is a matter of policy for Parliament to decide. If it decides to permit it, it is for Parliament to decide, subject to what conditions and restrictions should it be permitted. (This aspect has been dealt with supra.) The fact remains that private broadcasting, even if allowed, should not be left to market forces, in the interest of ensuring that a wide variety of voices enjoy access to it.

SUMMARY

201. In this summary too, the expression "broadcasting media" means the electronic media now represented and operated by AIR and Doordarshan and not any other services.

1. (*a*) Game of cricket, like any other sports event, provides entertainment. Providing entertainment is implied in freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution subject to this rider that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing societal interests. The petitioners (CAB and BCCI) therefore have a right to organise cricket matches in India, whether with or without the participation of foreign teams. But what they are now seeking is a licence to telecast their matches through an agency of their choice — a foreign agency in both the cases — and through telecasting equipment brought in by such foreign agency from outside the country. In the case of Hero Cup matches organised by CAB, they wanted uplinking facility

* It was only in 1895 that G Marconi succeeded in transmitting wireless signals between sending and receiving points without the use of connecting wires over a distance of two kilometres

to INTELSAT through the government agency VSNL also. In the case of later international matches organised by BCCI they did not ask for this facility for the reason that their foreign agent has arranged direct uplinking with the Russian satellite Gorizon. In both cases, they wanted the permission to import the telecasting equipment along with the personnel to operate it by moving it to places all over the country wherever the matches were to be played. They claimed this licence, or permission, as it may be called, as a matter of right said to be flowing from Article 19(1)(*a*) of the Constitution. They say that the authorities are bound to grant such licence/permission, without any conditions, all that they are entitled to do, it is submitted, is to collect technical fees wherever their services are availed, like the services of VSNL in the case of Hero Cup matches. This plea is in principle no different from the right to establish and operate private telecasting stations. In principle, there is no difference between a permanent TV station and a temporary one; similarly there is no distinction in principle between a stationary TV facility and a mobile one; so also is there no distinction between a regular TV facility and a TV facility for a given event or series of events. If the right claimed by the petitioners (CAB and BCCI) is held to be constitutionally sanctioned one, then each and every citizen of this country must also be entitled to claim similar right in respect of his event or events, as the case may be. I am of the opinion that no such right flows from Article 19(1)(*a*).

(*b*) Airwaves constitute public property and must be utilised for advancing public good. No individual has a right to utilise them at his choice and pleasure and for purposes of his choice including profit. The right of free speech guaranteed by Article 19(1)(*a*) does not include the *right* to use airwaves, which are public property. The airwaves can be used by a citizen for the purpose of broadcasting only when allowed to do so by a statute and in accordance with such statute. Airwaves being public property, it is the duty of the State to see that airwaves are so utilised as to advance the free speech right of the citizens which is served by ensuring plurality and diversity of views, opinions and ideas. This is imperative in every democracy where freedom of speech is assured. The free speech right guaranteed to every citizen of this country does not encompass the right to use these airwaves at his choosing. Conceding such a right would be detrimental to the free speech rights of the body of citizens inasmuch as only the privileged few — powerful economic, commercial and political interests — would come to dominate the media. By manipulating the news, views and information, by indulging in misinformation and disinformation, to suit their commercial or other interests, they would be harming — and not serving — the principle of plurality and diversity of views, news, ideas and opinions. This has been the experience of Italy where a limited right, i.e., at the local level but not at the national level was recognised. It is also not possible to imply or infer a right from the guarantee of free speech which only a few can enjoy.

(*c*) Broadcasting media is inherently different from press or other means of communication/information. The analogy of press is misleading and inappropriate. This is also the view expressed by several constitutional courts including that of the United States of America.

(*d*) I must clarify what I say; it is that the right claimed by the petitioners (CAB and BCCI) — which in effect is no different in principle from a right to establish and operate a private TV station — does not flow from Article 19(1)(*a*); that such a right is not implicit in it. The question whether such right should be given to the citizens of this country is a matter of policy for Parliament. Having regard to the revolution in information technology and the developments all around, Parliament may, or may not, decide to confer such right. If it wishes to confer such a right, it can only be by way of an Act made by Parliament. The Act made should be consistent with the right of free speech of the citizens and must have to contain strict programme and other controls, as has been provided, for example, in the Broadcasting Act, 1991 in the United Kingdom. This is the implicit command of Article 19(1)(*a*) and is essential to preserve and promote plurality and diversity of views, news, opinions and ideas.

(*e*) There is an inseparable interconnection between freedom of speech and the stability of the society, i.e., stability of a nation-State. They contribute to each other. Ours is a nascent republic. We are yet to achieve the goal of a stable society. This country cannot also afford to read into Article 19(1)(*a*) an unrestricted right to licensing (right of broadcasting) as claimed by the petitioners herein.

(*f*) In the case before us, both the petitioners have sold their right to telecast the matches to a foreign agency. They have parted with the right. The right to telecast the matches, including the right to import, install and operate the requisite equipment, is thus really sought by the foreign agencies and not by the petitioners. Hence, the question of violation of their right under Article 19(1)(*a*) resulting from refusal of licence/permission to such foreign agencies does not arise.

2. The Government monopoly of broadcasting media in this country is the result of historical and other factors. This is true of every other country, to start with. That India was not a free country till 1947 and its citizens did not have constitutionally guaranteed fundamental freedoms till 1950 coupled with the fact that our Constitution is just about forty-five years into operation explains the Government monopoly. As pointed out in the body of the judgment, broadcasting media was a monopoly of the Government, to start with, in every country except the United States where a conscious decision was taken at the very beginning not to have State monopoly over the medium. Until recently, the broadcasting media has been in the hands of public/statutory corporations in most of the West European countries. Private broadcasting is comparatively a recent phenomenon. The experience in Italy of allowing private broadcasting at local level (while prohibiting it at national level) has left much to be

desired. It has given rise to powerful media empires which development is certainly not conducive to free speech right of the citizens.

3. (*a*) It has been held by this Court — and rightly — that broadcasting media is affected by the free speech right of the citizens guaranteed by Article 19(1)(*a*). This is also the view expressed by all the constitutional courts whose opinions have been referred to in the body of the judgment. Once this is so, monopoly of this medium (broadcasting media), whether by Government or by an individual, body or organisation is unacceptable. Clause (2) of Article 19 does not permit a monopoly in the matter of freedom of speech and expression as is permitted by clause (6) of Article 19 vis-à-vis the right guaranteed by Article 19(1)(*g*).

(*b*) The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly — whether the monopoly is of the State or any other individual, group or organisation. As a matter of fact, private broadcasting stations may perhaps be more prejudicial to free speech right of the citizens than the government-controlled media, as explained in the body of the judgment. *The broadcasting media should be under the control of the public as distinct from Government.* This is the command implicit in Article 19(1)(*a*). It should be operated by a public statutory corporation or corporations, as the case may be, whose constitution and composition must be such as to ensure its/their impartiality in political, economic and social matters and on all other public issues. It/they must be required by law to present news, views and opinions in a balanced way ensuring pluralism and diversity of opinions and views. It/they must provide equal access to all the citizens and groups to avail of the medium.

4. The Indian Telegraph Act, 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. The Act was intended for an altogether different purpose when it was enacted. This is the result of the law in this country not keeping pace with the technological advances in the field of information and communications. While all the leading democratic countries have enacted laws specifically governing the broadcasting media, the law in this country has stood still, rooted in the Telegraph Act of 1885. Except Section 4(1) and the definition of telegraph, no other provision of the Act is shown to have any relevance to broadcasting media. It is, therefore, imperative that Parliament makes a law placing the

broadcasting media in the hands of a public/statutory corporate or the corporations, as the case may be. This is necessary to safeguard the interests of public and the interests of law as also to avoid uncertainty, confusion and consequent litigation.

5. The CAB did not ever apply for a licence under the first proviso to Section 4 of the Telegraph Act nor did its agents ever make such an application. The permissions, clearances or exemption obtained by it from the several departments (mentioned in judgment) are no substitute for a licence under Section 4(1) proviso. In the absence of such a licence, the CAB had no right in law to have its matches telecast by an agency of its choice. The legality or validity of the orders passed by Shri N. Vithal, Secretary to the Government of India, Telecommunications Department need not be gone into since it has become academic. In the facts and circumstances of the case, the charge of mala fides or of arbitrary and authoritarian conduct attributed to Doordarshan and Ministry of Information and Broadcasting is not acceptable. No opinion need be expressed on the allegations made in the Interlocutory Application filed by BCCI in these matters. Its intervention was confined to legal questions only.

6. Now the question arises, what is the position till the Central Government or Parliament takes steps as contemplated in para 4 of the summary, i.e., if any sporting event or other event is to be telecast from the Indian soil? The obvious answer flowing from the judgment (and paras 1 and 4 of this summary) is that the organiser of such event has to approach the nodal ministry as specified in the decision of the Meeting of the Committee of Secretaries held on 12-11-1993. I have no reason to doubt that such a request would be considered by the nodal ministry and AIR and Doordarshan on its merits, keeping in view the public interest. In case of any difference of opinion or dispute regarding the monetary terms on which such telecast is to be made, matter can always be referred to an arbitrator or a panel of arbitrators. In case, the nodal ministry or AIR or Doordarshan find such broadcast/telecast not feasible, then they may consider the grant of permission to the organisers to engage an agency of their own for the purpose. Of course, it would be equally open to the nodal ministry (Government of India) to permit such foreign agency in addition to AIR/Doordarshan, if they are of the opinion that such a course is called for in the circumstances.

202. For the above reasons, the appeals, writ petition and applications are disposed of in the above terms. No costs.

(1997) 4 Supreme Court Cases 306

(BEFORE A.M. AHMADI, C.J. AND SUJATA V. MANOHAR, J.)

DINESH TRIVEDI, M.P. AND OTHERS .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (C) No. 664 of 1995†, decided on March 20, 1997

Constitution of India — Arts. 19(1)(a), (2) and 32 — Right to know — Basis of the right to know of a citizen about govt. decisions and actions — Derived from freedom of speech, it is a fundamental right which is subject to overriding interest of public security and secrecy — Vohra Committee Report depicting nexus between criminals and politicians, bureaucrats, media persons and some members of judiciary — Report tabled in Parliament — Writ petition by way of PIL filed by a Member of Parliament in conjunction with NGOs praying for direction to Govt. of India to make public the Report along with its annexures, memorials and written evidence that were placed before the Committee, to reveal names of all those against whom there was tangible evidence, to present to the Court an effective package of follow-np measures and to declare the Official Secrets Act as unconstitutional — Held, Report tabled in Parliament genuine, authentic and unabridged and also a public document — Full-scale disclosure of supporting material would be against public interest and need not be directed — Creatiou of an all powerful independent body like Ombudsman or Lokpal suggested for monitoring investigation involving the kind of nexus referred to in the Vohra Committee — Till its creation, a high-level committee be appointed by President of India in consultation with Prime Minister and Speaker of Lok Sabha — Constitutionality of Official Secrets Act need not be examined

Held :

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute. In transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated. (Paras 16 and 17)

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428, *relied on*

To ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. But undue popular pressure brought to bear on decision-makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So there are two conflicting situations almost enigmatic and the answer is to maintain a fine balance which would serve public interest. (Para 19)

S P. Gupta v *Union of India*, 1981 Supp SCC 87, *relied on*

† Under Article 32 of the Constitution of India

There is nothing on record to raise a doubt that the Report, as tabled in Parliament and as presented to the Court is not genuine, authentic and unabridged. The erstwhile Minister of Parliamentary Affairs, in making the statement that the Report was 100 pages long, may have been either misinformed or misled. That apart, there is no other ground for doubting the genuineness of the Report. Since it has been tabled in Parliament, it now enjoys the status of a public document. (Para 20)

Shri N.N. Vohra had himself drafted and signed the Report in the belief that it would be read by a select few high-ranking officials who would then take necessary action. It is doubtful whether the candour exhibited and the liberal mentioning of intelligence reports would have been forthcoming if he had not felt assured of complete confidentiality. Indeed, much of the information contained in the Report, which has now become publicly available, might well have adversely affected the various intelligence agencies involved. (Para 22)

To direct the disclosure of the supporting material which consists of information gathered from the heads of the various intelligence agencies to the general public would cause great harm to the agencies involved and to the conditions of assured secrecy and confidentiality under which they function. Furthermore, not all of the information collected and recorded in intelligence reports is substantiated by hard evidence. Often on the basis of unverified suspicion names are thrown by people to save their own skins. Intelligence agents are not obliged to adhere to the principles of natural justice before they compile reports of possible suspects; quite frequently, individuals are shortlisted based purely on the investigators' hunches and surmises or on account of the past background of the suspects. The disclosure of these reports would lead to a situation where public servants and elected representatives who, though entirely innocent, are compelled by virtue of their offices to associate with individuals whose culpability is beyond doubt, will also find themselves mired in suspicion. Such a situation would, in the long run, prove to be disastrous for the effective functioning of Government. This is because it would make every governmental functionary over-cautious about taking the simplest of decisions. Therefore, the disclosure of the supporting material placed before the Vohra Committee to the public at large would, instead of aiding the interest of the public, be severely and detrimentally injurious to it. In that view of the matter, there is no necessity for the Court to express on the constitutionality of Section 5 of the Official Secrets Act, 1923. (Paras 23 and 26)

The nodal agency set up by the Union Government pursuant to the debates in Parliament upon the Report, conforms to the recommendations contained in the Report. Later, presumably to add greater weight to the body, the Cabinet Secretary was included in the nodal agency as its Chairman. The grave nature of the issue demands deft handling by an all-powerful body which will have the means and the power to fully secure its foundational ends. The nodal agency, in its present form, comprises senior bureaucrats of the highest level. It is, therefore, not suitable for pursuing an investigation of this kind and taking it to the stage of prosecution where there may be nexus between the persons under investigation and powerful persons such as those referred to in the Vohra Committee Report. In view of the seriousness of the charges involved and the clout wielded by those who are likely to become the focus of investigation, it is necessary that the body which is entrusted with the task of following the investigation through to the stage of prosecution, be such that it is capable of enjoying the complete trust and confidence of the people. Moreover, in view of the suspicion that those involved may well be individuals who occupy, or have occupied, high positions in Government, it is necessary that the body be able to obtain the sanctions which are necessarily required before any prosecutions can be launched. In the case of public servants, sanctions are required, for instance, under

Section 197 of the Code of Criminal Procedure and under Section 6 of the Prevention of Corruption Act, 1947. (***Ed.*** : now under Section 18 of the Prevention of Corruption Act, 1988) The nodal agency, in its present form, may not command the confidence of the people in this regard; this is a serious handicap for, in such matters, people's confidence is of the essence. An institution like the Ombudsman or a Lokpal, properly set up, could command such confidence and respect.

(Paras 29 and 30)

The matter needs to be addressed by a body which can function with the highest degree of independence, being completely free from every conceivable influence and pressure. Such a body must possess the necessary powers to be able to direct investigation of all charges thoroughly before it decides, if at all, to launch prosecutions. To this end the facilities and services of trained investigators with distinguished records and impeccable credentials must be made available to it. The Report, the supporting material upon which it is based and the unequivocal assistance of all existing intelligence agencies must be forwarded to this body. In time if the need is so felt, the body may even consider the feasibility of designating Special Courts to try those who are identified by it, which proposal may then be considered by the Union Government. To this end, and in the absence of any existing suitable institution or till its creation, it is recommended that a high-level committee be appointed by the President of India on the advice of the Prime Minister, and after consultation with the Speaker of the Lok Sabha. The Committee shall monitor investigations involving the kind of nexus referred to in the Vohra Committee Report and carry out the objectives described earlier. (Para 31)

Balaji Raghavan v. *Union of India*, (1996) 1 SCC 361, *relied on*

R-M/T/17675/C

Suggested Case Finder Search Text (*inter alia*) :

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Advocates who appeared in this case :

Ram Jethmalani and Dr Rajeev Dhavan, Senior Advocates (Arvind Nigam and Ms Kamini Jaiswal, Advocates, with them) for the Petitioners;

Altaf Ahmed, Additional Solicitor General and P.P. Malhotra, Senior Advocate (P. Parameswaran, Advocate, with them) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (1996) 1 SCC 361, *Balaji Raghavan* v. *Union of India* 318*f*
2. 1981 Supp SCC 87, *S.P. Gupta* v. *Union of India* 314*b*
3. (1975) 4 SCC 428, *State of U.P.* v. *Raj Narain* 313*e-f*

The Judgment of the Court was delivered by

AHMADI, C.J.— Democracy in modern India is on the threshold of completing fifty years of existence. Milestones such as this have traditionally been occasions to embark upon wide-ranging assessments to survey the achievements and failures, highpoints and pitfalls, as well as the future prospects of the institution concerned. In our times, it is widely acknowledged that democracy in India has not risen up to the high expectations which heralded its conception. Many reasons have been advanced to explain the causes for the malaise which seems to have stricken Indian democracy in particular, and Indian society in general. The matter which we are presently concerned with professes to identify one of the primary causes for the present state of affairs.

2. The genesis of the controversy relates to the constitution of a committee by the Union of India on 9-7-1993, by its Order No. S/7937/SS(ISP)/93. An examination of the brief order discloses that the Committee was to be chaired by the Home Secretary and was to comprise the Secretary (Revenue), the Director of the Intelligence Bureau (IB), the Director of the Central Bureau of Intelligence (CBI), and the Joint Secretary (PP), Ministry of Home Affairs. Later, the Special Secretary (Internal Security and Police) was also included as a member. The erstwhile Home Secretary being Shri N.N. Vohra, the Committee came to be popularly described as the "Vohra Committee". The order further reveals that the Committee was set up "to take urgent stock of all available information about the activities and links of all mafia organisations/elements, to enable further action". Based on the findings of the Committee, the Union Government would then determine whether there was a need "to establish a special organ/agency to regularly collect information and pursue cases against such mafia elements". To this end, the Committee was declared to be competent to "invite senior officers of various departments concerned (Customs, Revenue, Intelligence, etc.) to gather the required information". The Committee was also required to submit its report within three months.

3. The Report of the Vohra Committee, authored by its Chairman and containing only his signature, was submitted on 5-10-1993. The Report is essentially a compilation of the responses of its different members and includes the reports of the Secretary, Research and Analysis Wing (RAW), the Director, CBI, the Director, IB, and the views of the Secretary (Revenue). In the main report, these various reports have been analysed and it is noted that the growth and spread of crime syndicates in Indian society has been pervasive. It is further observed that these criminal elements have developed an extensive network of contacts with bureaucrats, government functionaries at lower levels, politicians, media personalities, strategically located persons in the non-governmental sector and members of the judiciary; some of these criminal syndicates have international links, sometimes with foreign intelligence agencies. The Report recommended that an efficient nodal cell be set up with powers to take stringent action against crime syndicates, while ensuring that it would be immune from being exploited or influenced. However, no follow-up action on the findings of the Vohra Committee Report seems to have been initiated over the two years which immediately followed its submission.

4. During July 1995, a young political activist named Naina Sahni was murdered and one of the persons arrested happened to be an active politician who had held important political positions. Newspaper reports published a series of articles on the criminalisation of politics within the country and the growing links between political leaders and mafia members. The attention of the masses was drawn towards the existence of the Vohra Committee Report. It was suspected that the contents of the Report were such that the Union Government was reluctant to make it public. As a consequence of the resulting controversy, the Union Government agreed to place the Report

before Parliament. On 1-8-1995, the Report of the Vohra Committee was tabled in Parliament, where it became the subject of a prolonged, intense debate.

5. Shri Dinesh Trivedi, M.P. (Rajya Sabha), who is the first petitioner in WP (Civil) No. 664 of 1995, actively participated in the debates in Parliament. On 16-8-1995, he made a written representation to the erstwhile Minister for Home Affairs demanding that the Union Government make public the reports which were the basis for the Vohra Committee Report, and that the names of individuals who would become identifiable as a result of studying the various background papers, be released. He also alleged that the Union Government was trying to suppress these background reports and, without them, the Vohra Committee Report was "baseless".

6. Being unsuccessful in securing a satisfactory response to his representation, Shri Dinesh Trivedi, in conjunction with the Public Interest Legal Support and Research Centre (PILSARC) and the Consumer Education and Research Centre (CERC), both of which are non-governmental organisations, filed the present writ petition in public interest. The following were included as respondents: the Union of India, the Ministry of Finance, the Director, RAW, the Director, CBI, the Director, IB, and the Special Secretary to the Ministry of Home Affairs.

7. The petitioners allege that a cursory analysis of the Report reveals the following disturbing aspects: (1) several governmental agencies have, in their written reports, indicated that they are aware of the vast local, national and international links of criminal syndicates; (2) these links are such that they amount to a parallel system of government; (3) the common citizen is unprotected and must live in constant fear of his life and property; (4) even the members of the judicial system have not escaped the embrace of the mafia; and (5) the existing criminal justice system is unable to deal with the activities of the mafia.

8. The petitioners state that since the Report reveals such alarming trends, it is of the utmost importance that it be made the subject of considerable scrutiny. They allege that the document tabled in Parliament is not the complete report but betrays an incomplete substitute prepared hurriedly for the purpose of meeting the demand in Parliament and suppresses vital information regarding the unholy connections between politicians, bureaucrats, criminals and anti-social elements. They base this assertion on the statement made in the Lok Sabha, a day prior to the publication of the Report, by the erstwhile Minister for Parliamentary Affairs that the Report extended to about 100 pages, and the fact that the document placed before the House numbered only 11.5 pages. In this respect, the petitioners have also pointed out that the Report, as it was tabled in Parliament, is not in the form of continuous paragraphs; on the contrary, after reaching paragraph 3.7, the next recorded paragraph is numbered as paragraph 6.1. The petitioners further state that the Report is itself based on a number of reports that had been placed before it and, without this

supporting material, the Report is incomplete. Thus the genuineness of the Report was shrouded in suspicion.

9. The petitioners aver that the people at large have a right to know about the full investigatory details of the Report. Such disclosure is stated to be essential for the maintenance of democracy and for ensuring that transparency in Government is secured and preserved. Towards this end, the petitioners have urged us to direct the Union Government to make public the annexures, memorials and the written evidence that were placed before the Committee. A direction to the Union Government to reveal the names of all bureaucrats, police officials, Parliamentarians and judicial personnel against whom there is tangible evidence, to enable action to be taken in accordance with law, is also being sought. We are also asked to direct the Union Government to present to us an effective package of the follow-up measures taken or that are proposed to be taken with regard to the Report. Lastly, a declaration to the effect that Section 5 of the Official Secrets Act, 1923 is over-broad, unreasonable and unconstitutional and ought to be supplanted by the formulation of a Freedom of Information Policy, is also sought.

10. On 13-10-1996, a Division Bench of this Court, while admitting the present writ petition, issued notice to the Union of India and directed that an authenticated version of the Report of the Vohra Committee be placed before it; the Union of India was also required to apprise the Court of the follow-up measures initiated pursuant to the Report.

11. The case for the Union of India has been made out in a sworn affidavit filed by Shri K. Padmnabhaiah, the Home Secretary in the Ministry of Home Affairs and the successor-in-office of Shri N.N. Vohra. In the affidavit, one of the annexures to which is an authenticated copy of the Report, the Home Secretary has stated that the copy of the Report which was tabled in Parliament was the genuine and authentic document. One of the other annexures to the affidavit is a copy of the correspondence upon this aspect between Shri N.N. Vohra, the author of the Report and the present Home Secretary. In his response, Shri N.N. Vohra clarifies that though he had access to the reports, notes and letters furnished by the Director, IB, Secretary (Revenue) and the Director, CBI, while making his final Report, he did not consider it fit to include them as annexures for the Report was meant to be a summary of discussions held and of the contents of the documents which were already on record. As for the incorrect numbering of the paragraphs, Shri Vohra explained that it arose as a result of a typographical error committed by his stenographer and his own omission to detect and correct the error.

12. While apprising the Court of the follow-up measures initiated pursuant to the Vohra Committee Report, the Home Secretary, in his affidavit, stated that the Vohra Committee was set up with a view to facilitating the establishment of a nodal agency to supervise and coordinate the functioning of enforcement and intelligence agencies towards controlling the crime syndicates existing in the country. After the Report was placed in

Parliament on 1-8-1995, and as a result of the views expressed by the Members of Parliament during the debates, the Union Government set up a nodal agency on 2-8-1995, in conformity with the recommendation of the Vohra Committee Report and was to be chaired by the Home Secretary. The Committee also comprises the Secretary (Revenue), the Director, IB, the Director, CBI and the Secretary (RAW). This nodal agency was assigned the task of coordinating, directing and supervising the activities of the Central and State investigating agencies responsible for controlling the growth of crime syndicates without purporting to be a substitute for them. Thereafter, the nodal agency met and considered issues of inter-agency cooperation and support. At the first meeting of the nodal agency, it was decided to hold a discussion with the leaders of different political parties with a view to evolving a code of conduct for politicians and bureaucrats which would help expose the links developed by the mafia syndicates. In this regard, an All Party Meeting was convened by the erstwhile Home Minister on 15-9-1995 which was attended by Parliamentarians representing the major political parties. From the minutes of this meeting, it appears that several issues of grave importance relating to the findings of the Vohra Committee Report were discussed at length. On 5-1-1996, the Union Government issued a further order appointing the Cabinet Secretary as the Chairman of the nodal group, while retaining the Home Secretary and all the other members in the nodal agency.

13. The affidavit further points out that under our constitutional scheme, the maintenance of law and order is essentially the responsibility of the State Governments. The role of Central Intelligence Agencies, such as the CBI, the IB and of the Revenue Department is, therefore, limited to only about 5% of the total number of criminal cases, consisting of cases transferred by the State Governments to the CBI, cases in Union Territories and the cases being investigated by Central Revenue Agencies. Much of the investigatory work in the country falls within the purview of CID and Intelligence Agencies within State Governments. The task of the nodal group is, therefore, limited to ensuring that the investigative efforts of all these separate agencies are synchronised towards their smooth functioning.

14. During the hearing of this matter, we asked the learned counsel appearing for the parties before us to put forth their suggestions in respect of the options open to this Court. Shri Ram Jethmalani, learned Senior Counsel appearing for the petitioners, contended that the plea of the Home Secretary that 95% of crimes are within the purview of State Governments is an attempt to dilute the findings of the Vohra Committee Report. He averred that the Vohra Committee Report essentially addresses itself to those cases which fall, not within the entry of "Public Order", but, instead, with those cases involving narco-terrorist elements and smuggling of arms and ammunition into the country, which are properly and wholly within the domain of the executive power of the Union. Shri Jethmalani urged us to direct that the details of the reports and events mentioned in the Vohra Committee Report be fully and completely disclosed. In his view, setting up

a nodal agency would serve no purpose for it would be as prone to failure as the agencies it sought to supervise had proven themselves to be. Instead, he urged us to set up a committee consisting of two retired Judges of the Supreme Court with sufficient experience of criminal matters, to probe into the disclosures that would be made consequent to our directions; further legal action could be pursued by this Court once such a committee had submitted its complete report. A similar suggestion, which has been canvassed before us, is for the establishment of a Special Authority, headed by a retired Supreme Court Judge, to get matters involving the aforesaid nexus to be investigated by an independent agency which would be empowered to exercise all the statutory powers of investigation under the Code of Criminal Procedure. Such a Special Authority would be able to launch prosecutions against politicians, bureaucrats, police officers and criminals on the basis of evidence collected in the investigations, for offences under the Indian Penal Code and other penal laws under the Prevention of Corruption Act. Thereafter, it was suggested, Special Courts could be designated to expeditiously try all such cases.

15. We may first deal with the assertion based on the petitioners' right to freedom of information. It has been contended before us that the citizens of India have a right to be informed not only of the contents of the report, but also of the details of the various reports, notes, letters and other forms of written evidence that was placed for the consideration of the Vohra Committee.

16. In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute. This Court has had many an opportunity to express itself upon this issue. In the case of *State of U.P.* v. *Raj Narain*[1], Mathew, J. eloquently expressed this proposition in the following words: (SCC p. 453, para 74)

> "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.* They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, *though not absolute*, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, *have no repercussion on public security.* To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to

1 (1975) 4 SCC 428

justify their acts is the chief safeguard against oppression and corruption." (emphasis added)

17. Implicit in this assertion is the proposition that in transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated.

18. The case of *S.P. Gupta* v. *Union of India*[2], decided by a seven-Judge Constitution Bench of this Court, is generally considered as having broken new ground and having added a fresh, liberal dimension to the need for increased disclosure in matters relating to public affairs. In that case, the consensus that emerged amongst the Judges was that in regard to the functioning of Government, disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest. The Court held that the disclosure of documents relating to the affairs of State involves two competing dimensions of public interest, namely, the right of the citizen to obtain disclosure of information, which competes with the right of the State to protect the information relating to its crucial affairs. It was further held that, in deciding whether or not to disclose the contents of a particular document, a Judge must balance the competing interests and make his final decision depending upon the particular facts involved in each individual case. It is important to note that it was conceded that there are certain classes of documents which are necessarily required to be protected, e.g., Cabinet Minutes, documents concerning the national safety, documents which affect diplomatic relations or relate to some State secrets of the highest importance, and the like in respect of which the Court would ordinarily uphold Government's claim of privilege. However, even these documents have to be tested against the basic guiding principle which is that *wherever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure*. (paras 73 and 74 at pp. 284-286)

19. What then is the test? To ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to maintain a fine balance which would serve public interest.

2 1981 Supp SCC 87

20. This then is the test which we must now apply to the facts of the present case. Having examined the copy of the Report which has been placed before us, the allegations regarding its authenticity, the explanation forwarded in this behalf by the Home Secretary and the copy of the communication with Shri N.N. Vohra in this respect, we find that there is nothing on record to raise a doubt that the Report, as tabled in Parliament and as presented to us, is not genuine, authentic and unabridged. We are of the view that the erstwhile Minister of Parliamentary Affairs, in making the statement that the Report was 100 pages long, may have been either misinformed or misled. That apart, there is no other ground for doubting the genuineness of the Report. Since it has been tabled in Parliament, it now enjoys the status of a public document. We will, however, have to consider whether the supporting material placed before the Vohra Committee can be disclosed for the benefit of the general public.

21. The supporting material consists of reports, notes and letters furnished by the other members of the Vohra Committee to its Chairman who made them the basis of his report. Before taking a decision on this aspect, we must record the perceptions of the author of the Report as to the manner in which it was to be treated. We have already noted Shri Vohra's statement that he had conceived of his Report to serve only as a summary of the discussions and reports before the Committee. In addition, the following paras extracted from the concluding portion of the Report are also relevant for this purpose:

> "15.1 In the normal course, this Report would have been drafted by the Member Secretary and finalised by the Committee. *Considering the nature of the issues involved, I did not consider it desirable to burden the Members of the Committee with any further involvement beyond the views expressed by them.* Accordingly, I decided to personally dictate this Report. (Note that the Report is not signed by the other Committee members.)
>
> 15.2 *I have prepared only three copies of this Report.* One copy each is being submitted to MOS (IS) and HM, the third copy being retained by me. After HM has perused this Report, I request him to consider discussing further action with Finance Minister, MOS (IS) and myself. The emerging approach could thereafter be got approved from the Prime Minister before being implemented. *At that stage other concerned officers would be taken into confidence.*"(emphasis and comments added)

22. It is, therefore, evident that Shri N.N. Vohra had himself drafted and signed the Report in the belief that it would be read by a select few high-ranking officials who would then take necessary action. It is doubtful whether the candour exhibited and the liberal mentioning of intelligence reports would have been forthcoming if he had not felt assured of complete confidentiality. Indeed, much of the information contained in the Report, which has now become publicly available, might well have adversely affected the various intelligence agencies involved.

23. We are reluctant to direct the disclosure of the supporting material which consists of information gathered from the heads of the various intelligence agencies to the general public. To so direct would cause great harm to the agencies involved and to the conditions of assured secrecy and confidentiality under which they function. Furthermore, it must be noted that not all of the information collected and recorded in intelligence reports is substantiated by hard evidence. Often on the basis of unverified suspicion names are thrown by people to save their own skins. Intelligence agents are not obliged to adhere to the principles of natural justice before they compile reports of possible suspects; quite frequently, individuals are shortlisted based purely on the investigators' hunches and surmises or on account of the past background of the suspects. The disclosure of these reports would lead to a situation where public servants and elected representatives who, though entirely innocent, are compelled by virtue of their offices to associate with individuals whose culpability is beyond doubt, will also find themselves mired in suspicion. Such a situation would, in the long run, prove to be disastrous for the effective functioning of Government. This is because it would make every governmental functionary over-cautious about taking the simplest of decisions.

24. We may now cite an illustration to give shape to the afore-mentioned apprehension. In the entire Report, apart from the reference to mafia gangs of Bombay, only one person has been specifically named as being a prominent beneficiary of the nexus which is the focus of the Report. The individual concerned is a certain Iqbal Mirchi whose name is mentioned as having been disclosed by the Director, CBI. Shri Jethmalani has objected to this lone disclosure by stating that when the Government sought to pursue extradition proceedings against Iqbal Mirchi in London, it could not produce even "an iota of evidence" against him. We think that this assertion by the learned Senior Counsel for the petitioners themselves adds great support to our apprehension that the full-scale disclosure of these intelligence reports will, in the absence of properly conducted inquiries, lead to the harassment and victimisation of individuals who might well be entirely innocent of any blame.

25. Alternatively, such full-scale disclosures would undoubtedly act to the advantage of those individuals who are actually the central figures in the nexus mentioned in the Report. Warned in advance of their complicity being suspected, they would initiate rearguard measures to exonerate themselves.

26. We are, therefore, of the view that the disclosure of the supporting material placed before the Vohra Committee to the public at large would, instead of aiding the interest of the public, be severely and detrimentally injurious to it. In that view of the matter, we think there is no necessity for us to express ourselves on the constitutionality of Section 5 of the Official Secrets Act, 1923.

27. We may now turn our focus to the Report and the follow-up measures that need to be implemented. The Report reveals several alarming

and deeply disturbing trends that are prevalent in our present society. For some time now, it has been generally perceived that the nexus between politicians, bureaucrats and criminal elements in our society has been on the rise, the adverse effects of which are increasingly being felt on various aspects of social life in India. Indeed, the situation has worsened to such an extent that the President of our country felt constrained to make references to the phenomenon in his Addresses to the Nation on the eve of the Republic Day in 1996 as well as in 1997. The matter is, therefore, one that needs to be handled with extreme care and circumspection.

28. The Report, while recording the widespread development of crime syndicates within the country, points out that under the existing system, there is no provision by which the various intelligence agencies can coordinate with each other in properly utilising the information relating to the links developed by crime syndicates which comes their way. Sharing of such information is rare, and much of it is discarded without being put to any productive use. The Report, therefore, recommended the setting up of a nodal agency to which all existing intelligence and enforcement agencies (irrespective of the Department under which they are located) shall promptly pass on any information relating to crime syndicates which they may come across. The Report also contains recommendations as to the manner in which the nodal agency should be set up while simultaneously emphasising the need for ensuring that the information available with the nodal set-up is used strictly and purely for taking stringent action against the crime syndicates, without offering any scope whatsoever of its being exploited for political gain. The need for complete confidentiality was also emphasised.

29. The nodal agency set up by the Union Government pursuant to the debates in Parliament upon the Report, conforms to the recommendations contained in the Report. Later, presumably to add greater weight to the body, the Cabinet Secretary was included in the nodal agency as its Chairman. However, as we have already noted, the nodal agency suffers from certain limitations. Being only a supervisory body, without having clearly delineated powers, it cannot effectively control the pace and thrust of investigative efforts.

30. We are of the view that the grave nature of the issue demands deft handling by an all-powerful body which will have the means and the power to fully secure its foundational ends. The nodal agency, in its present form, comprises senior bureaucrats of the highest level. While it is suited to coordinate an exchange of information between different investigating agencies, its composition is such that it may not be viewed by the public as completely independent or immune from pressures of every kind. It is, therefore, not suitable for pursuing an investigation of this kind and taking it to the stage of prosecution where there may be nexus between the persons under investigation and powerful persons such as those referred to in the Vohra Committee Report. In view of the seriousness of the charges involved and the clout wielded by those who are likely to become the focus of investigation, it is necessary that the body which is entrusted with the task of

following the investigation through to the stage of prosecution, be such that it is capable of enjoying the complete trust and confidence of the people. Moreover, in view of the suspicion that those involved may well be individuals who occupy, or have occupied, high positions in Government, it is necessary that the body be able to obtain the sanctions which are necessarily required before any prosecutions can be launched. In the case of public servants, sanctions are required, for instance, under Section 197 of the Code of Criminal Procedure and under Section 6 of the Prevention of Corruption Act, 1947*. The nodal agency, in its present form, may not command the confidence of the people in this regard; this is a serious handicap for, in such matters, people's confidence is of the essence. An institution like the Ombudsman or a Lokpal, properly set up, could command such confidence and respect.

31. We are, therefore, of the view that the matter needs to be addressed by a body which can function with the highest degree of independence, being completely free from every conceivable influence and pressure. Such a body must possess the necessary powers to be able to direct investigation of all charges thoroughly before it decides, if at all, to launch prosecutions. To this end the facilities and services of trained investigators with distinguished records and impeccable credentials must be made available to it. The Report, the supporting material upon which it is based and the unequivocal assistance of all existing intelligence agencies must be forwarded to this body. In time if the need is so felt, the body may even consider the feasibility of designating Special Courts to try those who are identified by it, which proposal may then be considered by the Union Government. To this end, and in the absence of any existing suitable institution or till its creation, we recommend that a high-level committee be appointed by the President of India on the advice of the Prime Minister, and after consultation with the Speaker of the Lok Sabha. The Committee shall monitor investigations involving the kind of nexus referred to in the Vohra Committee Report and carry out the objectives described earlier.

32. Such a direction by us would not be without precedent. In *Balaji Raghavan* v. *Union of India*[3] a Constitution Bench of this Court had recommended the establishment of a high-level committee to examine the guidelines relating to the conferment of the National Awards i.e. the Bharat Ratna and the Padma Awards. (*See* para 33 of the judgment of Ahmadi, CJI speaking for the majority.)

33. We dispose of the writ petition in the above terms with no order as to costs.

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* **Ed.**: Now under S 18 of Prevention of Corruption Act, 1947

3 (1996) 1 SCC 361

(2002) 5 Supreme Court Cases 294

(BEFORE M.B. SHAH, BISHESHWAR PRASAD SINGH AND H.K. SEMA, JJ.)

Civil Appeal No. 7178 of 2001†

UNION OF INDIA .. Appellant;

Versus

ASSOCIATION FOR DEMOCRATIC REFORMS AND ANOTHER .. Respondents.

With

Writ Petition (C) No. 294 of 2001

PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL) AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

Civil Appeal No. 7178 of 2001 with WP (C) No. 294 of 2001, decided on May 2, 2002

A. **Constitution of India — Art. 324 — Election Commission — Powers of — Nature, scope and limitations on — Held, are plenary and include all powers necessary for smooth conduct of election subject only to a valid law enacted by Parliament or State Legislature — In the absence of such a law, Election Commission can exercise its residuary power under Art. 324 to fill the vacuum in order to meet unforeseen contingencies — Hence, where, with a view to enable the voter to make a right choice, High Court directed the Election Commission to secure to the voters information in respect of each of the candidates for Lok Sabha/State Legislature regarding pendency, if any, of criminal cases against the candidate, assets of the candidate or of his/her spouse or dependent relations, and his/her competence, capacity, suitability including educational qualifications, such directions, held, justified and within High Court's jurisdiction — However, considering the parties' submissions, Supreme Court, in modification of High Court's directions, directing the Election Commission to require, in exercise of its powers under Art. 324, each candidate to submit, as a necessary part of his nomination papers, information on affidavit in respect of items specified by Supreme Court — Since the field had remained unoccupied by legislature and executive, Supreme Court could issue such directions under Arts. 32, 141 and 142 — Judicial activism — Words and Phrases — "Conduct of elections", "elections", "direction"— Election — Representation of the People Act, 1951, S. 83(1) — Information to be furnished along with nomination paper**

B. **Constitution of India — Art. 19(1)(a) — Freedom of speech and expression — Scope — Casting of votes by voters, held, covered — Hence, voter's right to know antecedents including criminal past of a candidate to membership of Parliament or Legislative Assembly, held, is a fundamental**

† From the Judgment and Order dated 2-11-2000 of the Delhi High Court in CWP No. 7257 of 1999 : AIR 2001 Del 126

right — Election — Voting right — International Covenant on Civil and Political Rights, Arts. 19(1) & (2)

a C. **Public Functionaries — Who are — MPs and MLAs, held, included**

D. **Election — Generally — MP or MLA — Status of and duty to public owed by, held, is higher than that of a gazetted officer — Service Law — Government servants — Status and duty of — Compared with that of legislators**

E. **Constitution of India — Arts. 32, 136 and 141 — Issue of directions**
b **or guidelines or orders — Powers of Supreme Court — Scope — Held, Supreme Court cannot give any directions for amending an Act or Rules nor can it give any direction contrary to the Act and Rules — However, where the Act and Rules are silent on a subject and the authority implementing the same has constitutional or statutory power to implement it, Court can issue directions to such authority on such a subject to fill the vacuum or void till the enactment of a suitable law**

c F. **Constitution of India — Preamble and Art. 368 — Basic structure of the Constitution — Form of government — Republican and democratic form of government, held, is a part of basic structure of the Constitution**

G. **Election — Generally — Manner of election — Election to House of People and Legislative Assembly, held, is on the basis of adult suffrage — Constitution of India, Art. 326**

d H. **Election — Candidature — Election to House of People or Legislative Assembly — Eligibility criteria — Holding of any asset (movable or immovable) or any educational qualification, held, are not part of the eligibility criteria to contest such elections — Constitution of India, Arts. 84 and 173**

I. **Election — Election Commission — Powers of — Election to**
e **Parliament and State Legislatures — Superintendence, direction and control of the conduct of such elections, held, vests in Election Commission — Constitution of India, Art. 324 — Words and Phrases — "Conduct of elections"**

In CA No. 7178 of 2001, the appellant challenged a decision of the Delhi High Court in which, holding that for making a right choice it was essential that
f the past of the candidates to the Lok Sabha or Legislative Assembly should be disclosed to the voters, the High Court had directed the Election Commission to secure to voters the following information pertaining to each of the candidates and the parties they represent: (*i*) pendency of case, if any, in which the candidate is an accused, (*ii*) assets of the candidate, the candidate's spouse and dependent relations, (*iii*) & (*iv*) facts relating to the competence and suitability of the candidate and the political party fielding him. In WP No. 294 of 2001, the
g petitioners sought issuance of directions similar to those as (*i*) and (*ii*) above and further sought the Supreme Court to frame guidelines under Article 141 of the Constitution by taking into consideration the 170th Report of the Law Commission of India. The appellant contended that it was for the political parties to decide whether such amendments should be brought and carried out in the Act and the Rules. It added that the Representation of the People Act, 1951 (for short "the Act") nowhere disqualified a candidate for non-disclosure of assets or
h pending charge in a criminal case and that, therefore, directions given by the High Court were improper. The Election Commission supported the High

Court's directions. Indian National Congress, whose application for intervention in the appeal was granted by the Supreme Court, contended that the High Court ought to have directed the writ petitioners to approach Parliament for appropriate amendments to the Act instead of directing the Election Commission to implement the same. It further contended that the citizens' right to know about the affairs of the Government did not mean that citizens had a right to know the personal affairs of MPs or MLAs. The Supreme Court formulated two questions: (*i*) whether the Election Commission is empowered to issue directions as ordered by the High Court, and (*ii*) whether a voter has a right to get the relevant information, such as assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA.

Partly allowing the appeal and the writ petition, the Supreme Court

Held :

The Supreme Court cannot give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till a suitable law is enacted. (Paras 19 and 20)

Moreover, (*a*) one of the basis structures of the Constitution is "republican and democratic form of government"; (*b*) the election to the House of People and the Legislative Assembly is on the basis of adult suffrage (Article 326); (*c*) holding of any asset (immovable or movable) or any educational qualification is not the eligibility criteria to contest election; and (*d*) under Article 324, the superintendence, direction and control of the "conduct of all elections" to Parliament and to the legislature of every State vests in the Election Commission. The phrase "conduct of elections" is held to be of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections. (Para 21)

Whether the Election Commission is empowered to issue directions as ordered by the High Court

In a democratic form of government, voters are of utmost importance. They have right to elect or re-elect on the basis of the antecedents and past performance of the candidate. The voter has the choice of deciding whether holding of educational qualification or holding of property is relevant for electing or re-electing a person to be his representative. The voter has to decide whether he should cast vote in favour of a candidate who is involved in a criminal case. For maintaining purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates. Such information would include assets held by the candidate, his qualification including educational qualification and antecedents of his life including whether he was involved in a criminal case and if the case is decided — its result, if pending — whether charge has been framed or cognizance has been taken by the court. There is no necessity of suppressing the relevant facts from the voters. (Para 22)

The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word "elections" is

used in a wide sense to include the entire process of election which consists of several stages and embraces many steps. [Paras 46(1), (3) and 27]

Kanhiya Lal Omar v. *R.K. Trivedi*, (1985) 4 SCC 628; *Common Cause (A Registered Society)* v. *Union of India*, (1996) 2 SCC 752, *relied on*

A.C. Jose v. *Sivan Pillai*, (1984) 2 SCC 656, *referred to*

The limitation on plenary character of power is when Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair elections. The Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, the Commission can fill the vacuum till there is legislation on the subject. In *Kanhiya Lal Omar case* the Court construed the expression "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which many may have to follow and it may be a specific or a general order and such a phrase should be construed liberally empowering the Election Commission to issue such orders. [Paras 46(2), 25, 24, 26 & 27]

Mohinder Singh Gill v. *Chief Election Commr.*, (1978) 1 SCC 405; *Kanhiya Lal Omar* v. *R.K. Trivedi*, (1985) 4 SCC 628, *relied on*

Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion. If on an affidavit a candidate is required to disclose the assets held by him at the time of election, the voter can decide whether he could be re-elected even in case where he has collected tons of black money. (Para 46)

Even if this condition may not be much effective for breaking a vicious circle which has polluted the basic democracy in the country as the amount would be unaccounted, still this would have its own effect as a step-in-aid and voters may not elect law-breakers as law-makers and some flowers of democracy may blossom. [Paras 46(3) and 28]

Common Cause (A Registered Society) v. *Union of India*, (1996) 2 SCC 752, *relied on*

To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. [Para 46(4)]

Common Cause (A Registered Society) v. *Union of India*, (1996) 2 SCC 752, *relied on*

Therefore, it is not possible to accept the contention raised by the appellant and the intervenor that if there is no provision in the Act or the Rules, the High Court ought not to have issued such directions to the Election Commission. It is settled that the power of the Commission is plenary in character in exercise thereof. In statutory provisions or rules, every contingency could not be foreseen or anticipated with precision, therefore, the Commission can cope with a situation, where the field is unoccupied, by issuing necessary orders. (Para 26)

Right to know about the candidates contesting elections

The people of the country have a right to know every public act, everything that is done in a public way by the public functionaries. MPs or MLAs are undoubtedly public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in the decision-making process. The decision-making process of a voter would include his right to know about public functionaries who are required to be elected by him. (Para 30)

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428; *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *Dinesh Trivedi, M.P.* v. *Union of India*, (1997) 4 SCC 306, *relied on*

Romesh Thappar v. *State of Madras*, AIR 1950 SC 124 : 1950 SCR 594 : 1950 Cri LJ 1514; *Attorney-General* v. *Times Newspapers Ltd.*, (1973) 3 All ER 54 : 1974 AC 273 (HL), *referred to*

In a democracy, the electoral process has a strategic role. The little man of the country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted. [Para 46(4)]

The right to get information in a democracy is recognised all throughout and it is a natural right flowing from the concept of democracy. A reference to Articles 19(1) and (2) of the International Covenant of Civil and Political Rights can be made in this regard. Moreover, Article 19(1)(*a*) of the Constitution of India provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Voter's (little man — citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law-breakers as law-makers. [Paras 46(5), (7) and 23]

Mohinder Singh Gill v. *Chief Election Commr.*, (1978) 1 SCC 405, *relied on*

The intervenor's contention that the citizens have no right to know the personal affairs of MPs or MLAs, is totally misconceived. There is no question of knowing the personal affairs of MPs or MLAs. The limited information is — whether the person who is contesting election is involved in any criminal case and if involved, what is the result? Further, there are widespread allegations of corruption against the persons holding post and power. In such a situation, the question is not of knowing personal affairs but to have openness in a democracy for attempting to cure the cancerous growth of corruption by a few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not misconducted himself in collecting wealth after being elected. This information could be easily gathered only if prior to election, the assets of such person are disclosed. Moreover, even the gazetted officers in all government services are required to disclose their assets and thereafter to furnish details of any acquisition of property annually, while in a democratic form of government, MP or MLA is having higher status and duty to the public. (Paras 41 and 44)

P.V. Narasimha Rao v. *State (CBI/SPE)*, (1998) 4 SCC 626 : 1998 SCC (Cri) 1108, *referred to*

Therefore, it cannot be said that the directions issued by the High Court were unjustified or beyond its jurisdiction. However, considering the submissions made by the parties at the time of hearing of this matter, the said directions are modified as stated below:

> The Election Commission is directed to call for an affidavit by issuing necessary order in exercise of its power under Article 324 from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:
>
> (*1*) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.
>
> (*2*) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.
>
> (*3*) The assets (immovable, movable, bank balance etc.) of a candidate and of his/her spouse and that of dependants.
>
> (*4*) Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues.
>
> (*5*) The educational qualifications of the candidate.
>
> (Paras 47 and 48)

The norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible and in any case, within two months. (Para 49)

Vineet Narain v. *Union of India*, (1998) 1 SCC 226 : 1998 SCC (Cri) 307; *Erach Sam Kanga* v. *Union of India*, WP No. 2632 of 1978, decided on 20-3-1979; *Lakshmi Kant Pandey* v. *Union of India*, (1984) 2 SCC 244; *State of W.B.* v. *Sampat Lal*, (1985) 1 SCC 317 : 1985 SCC (Cri) 62; *K. Veeraswami* v. *Union of India*, (1991) 3 SCC 655 : 1991 SCC (Cri) 734; *Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584; *Delhi Judicial Service Assn.* v. *State of Gujarat (Nadiad case)*, (1991) 4 SCC 406; *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622; *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441; *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932; *Kihoto Hollohan* v. *Zachillhu*, 1992 Supp (2) SCC 651, *referred to*

H-M/25705/C

Advocates who appeared in this case :

Harish N. Salve, Solicitor-General, Rajinder Sachar, Ashwani Kumar and K.K. Venugopal, Senior Advocates (Sanjay R. Hegde, Satya Mitra, Ms Aparajita Singh, S.N. Terdal, Sanjay Parikh, R.R. Chandrachud, Ranji Thomas, Javed M. Rao, S. Muralidhar, S.K. Mendiratta, S. Vallinayagam, Shreyes Jayesinha, Ms Kamini Jaiswal and Ms Aishwarya Rao, Advocates, with them) for the appearing parties.

Chronological list of cases cited ***on page(s)***

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3. (1997) 6 SCC 241 : 1997 SCC (Cri) 932, *Vishaka* v. *State of Rajasthan* 307*e*, 307*e-f*, 320*b*
4. (1997) 4 SCC 306, *Dinesh Trivedi, M.P.* v. *Union of India* 307*d*, 317*f-g*
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6. (1996) 2 SCC 752, *Common Cause (A Registered Society)* v. *Union of India* 313*e*, 321*b*
7. (1995) 2 SCC 161, *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal* 316*b*
8. (1993) 4 SCC 441, *Supreme Court Advocates-on-Record Assn.* v. *Union of India* 307*d*
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13. (1985) 4 SCC 628, *Kanhiya Lal Omar* v. *R.K. Trivedi* 312*d*, 320*g*
14. (1985) 1 SCC 641 : 1985 SCC (Tax) 121, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* 315*b-c*
15. (1985) 1 SCC 317 : 1985 SCC (Cri) 62, *State of W.B.* v. *Sampat Lal* 307*c-d*
16. (1984) 2 SCC 656, *A.C. Jose* v. *Sivan Pillai* 313*b*
17. (1984) 2 SCC 244, *Lakshmi Kant Pandey* v. *Union of India* 307*c*
18. (1978) 1 SCC 405, *Mohinder Singh Gill* v. *Chief Election Commr.* 310*a-b*, 313*a-b*
19. WP No. 2632 of 1978, decided on 20-3-1979, *Erach Sam Kanga* v. *Union of India* 307*b-c*
20. (1975) 4 SCC 428, *State of U.P.* v. *Raj Narain* 314*g*
21. (1973) 3 All ER 54 : 1974 AC 273 (HL), *Attorney-General* v. *Times Newspapers Ltd.* 315*f*
22. AIR 1950 SC 124 : 1950 SCR 594 : 1950 Cri LJ 1514, *Romesh Thappar* v. *State of Madras* 315*c-d*

The Judgment of the Court was delivered by

SHAH, J.— Short but important question involved in these matters is — in a nation wedded to republican and democratic form of government, where election as a Member of Parliament or as a Member of Legislative Assembly is of utmost importance for governance of the country, whether, before casting votes, voters have a right to know relevant particulars of their candidates? Further connected question is — whether the High Court had jurisdiction to issue directions, as stated below, in a writ petition filed under Article 226 of the Constitution of India?

2. Before dealing with the aforesaid questions, we would refer to the brief facts as alleged by the petitioner Association for Democratic Reforms in Writ Petition No. 7257 of 1999 filed before the High Court of Delhi for direction to implement the recommendations made by the Law Commission in its 170th Report and to make necessary changes under Rule 4 of the Conduct of Elections Rules, 1961. It has been pointed out that the Law Commission of India had, at the request of the Government of India, undertaken comprehensive study of the measures required to expedite hearing of election petitions and to have a thorough review of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") so as to make the electoral process more fair, transparent and equitable and to reduce the distortions and evils that have crept into the Indian electoral system and to identify the areas where the legal provisions required strengthening and improvement. It is pointed out that the Law Commission

has made recommendation for debarring a candidate from contesting an election if charges have been framed against him by a court in respect of certain offences and necessity for a candidate seeking to contest election to furnish details regarding criminal cases, if any, pending against him. It has also suggested that true and correct statement of assets owned by the candidate, his/her spouse and dependent relations should also be disclosed. The petitioner has also referred para 6.2 of the report of the Vohra Committee of the Government of India, Ministry of Home Affairs, which reads as follows:

> "6.2. Like the Director CBI, DIB has also stated that there has been a rapid spread and growth of criminal gangs, armed senas, drug mafias, smuggling gangs, drug peddlers and economic lobbies in the country which have, over the years, developed an extensive network of contacts with the bureaucrats/government functionaries at the local levels, politicians, media persons and strategically located individuals in the non-State sector. Some of these syndicates also have international linkages, including the foreign intelligence agencies. In this context DIB has given the following examples:
>
> (*i*) In certain States like Bihar, Haryana and U.P., these gangs enjoy the patronage of local-level politicians, cutting across party lines and the protection of governmental functionaries. Some political leaders become the leaders of these gangs, armed senas and *over the years get themselves elected to local bodies, State Assemblies and the national Parliament. Resultantly, such elements have acquired considerable political clout seriously jeopardising the smooth functioning of the administration and the safety of life and property of the common man causing a sense of despair and alienation among the people.*
>
> (*ii*) The big smuggling syndicates having international linkages have spread into and infected the various economic and financial activities, including hawala transactions, circulation of black money and operations of a vicious parallel economy causing serious damage to the economic fibre of the country. *These syndicates have acquired substantial financial and muscle power and social respectability and have successfully corrupted the government machinery at all levels and yield enough influence to make the task of investigating and prosecuting agencies extremely difficult; even the members of the judicial system have not escaped the embrace of the mafia.*
>
> (*iii*) Certain elements of the mafia have shifted to narcotics, drugs and weapon-smuggling and established narco-terrorism networks specially in the States of J&K, Punjab, Gujarat and Maharashtra. The cost of contesting elections has thrown the politician into the lap of these elements and led to a grave compromise by officials of the preventive/detective systems. The

virus has spread to almost all the centres in the country, the coastal and the border States have been particularly affected.

(*iv*) The Bombay bomb blast case and the communal riots in Surat and Ahmedabad have demonstrated how the Indian underworld has been exploited by the Pak ISI and the latter's network in UAE to cause sabotage, subversion and communal tension in various parts of the country. The investigations into the Bombay bomb blast cases have revealed extensive linkages of the underworld in the various governmental agencies, political circles, business sector and the film world."

3. It is also contended that despite the reports of the Law Commission and the Vohra Committee, successive Governments have failed to take any action and, therefore, petition was filed for implementation of the said reports and for a direction to the Election Commission to make mandatory for every candidate to provide information by amending Forms 2-A to 2-E prescribed under the Conduct of Elections Rules, 1961. After hearing the parties, the High Court by judgment and order dated 2-11-2000, held that it is the function of Parliament to make necessary amendments in the Representation of the People Act, 1951 or the Elections Rules and, therefore, the Court cannot pass any order, as prayed, for amending the Act or the Rules.

4. However, the Court considered — whether or not an elector, a citizen of the country has a fundamental right to receive information regarding the criminal activities of a candidate to the Lok Sabha or the Legislative Assembly for making an estimate for himself — as to whether the person who is contesting the election has a background making him worthy of his vote, by peeping into the past of the candidate. After considering the relevant submissions and the reports as well as the say of the Election Commission, the High Court held that for making a right choice, it is essential that the past of the candidate should not be kept in the dark as it is not in the interest of the democracy and well being of the country. The Court directed the Election Commission to secure to voters the following information pertaining to each of the candidates contesting election to Parliament and to the State Legislatures and the parties they represent:

1. Whether the candidate is accused of any offence(s) punishable with imprisonment. If so, the details thereof.

2. Assets possessed by a candidate, his or her spouse and dependent relations.

3. Facts giving insight into the candidate's competence, capacity and suitability for acting as a parliamentarian or a legislator including details of his/her educational qualifications.

4. Information which the Election Commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

That order is challenged by the Union of India by filing the present appeal.

5. On behalf of Indian National Congress IA No. 2 of 2001 is also filed for impleadment/intervention in the appeal filed by the Union of India by *inter alia* contending that the High Court ought to have directed the writ petitioners to approach Parliament for appropriate amendments to the Act instead of directing the Election Commission of India to implement the same. IA for intervention is granted.

6. Further, People's Union for Civil Liberties (PUCL) has filed Writ Petition No. 294 of 2001 under Article 32 of the Constitution praying that writ, order or direction be issued to the respondents — (*a*) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP/MLA; (*b*) to bring in such measures which provide for declaration by the candidate contesting election, whether any charge in respect of any offence has been framed against him/her; and (*c*) to frame such guidelines under Article 141 of the Constitution by taking into consideration the 170th Report of the Law Commission of India.

Submissions

7. We have heard the learned counsel for the parties at length. Mr Harish N. Salve, learned Solicitor-General appearing for the Union of India submitted that till suitable amendments are made in the Act and the Rules thereunder, the High Court should not have given any direction to the Election Commission. He referred to various sections of the Act and submitted that Section 8 provides for disqualification on conviction for certain offences and Section 8-A provides for disqualification on the ground of corrupt practices. Section 32 provides nomination of candidate for election if he is qualified to be chosen to fill that seat under the provisions of the Constitution and the Act or under the provisions of the Government of Union Territories Act, 1963. Thereafter, elaborate procedure is prescribed for presentation of nomination paper and requirements for a valid nomination. Finally, Section 36 provides for scrutiny of nominations and empowers the returning officer to reject any nomination on the following grounds:

> "36. (2)(*a*) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely—
>
> Articles 84, 102, 173 and 191,
>
> Part II of this Act and Sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or
>
> (*b*) that there has been a failure to comply with any of the provisions of Section 33 or Section 34; or
>
> (*c*) that the signature of the candidate or the proposer on the nomination paper is not genuine."

8. It is his submission that it is for the political parties to decide whether such amendments should be brought and carried out in the Act and the Rules. He further submitted that as the Act or the Rules nowhere disqualify a candidate for non-disclosure of the assets or pending charge in a criminal

case, therefore, directions given by the High Court would be of no consequence and such directions ought not to have been issued.

9. Supplementing the aforesaid submission, Mr Ashwani Kumar, learned Senior Counsel appearing on behalf of intervenor Indian National Congress submitted that the Constituent Assembly had discussed and negatived requirement of educational qualification and possession of assets to contest election. For that purpose, he referred to the debates in the Constituent Assembly. He submitted that 3/4th of the population is illiterate and providing education as a qualification for contesting election was not accepted by the Constituent Assembly. Similarly, prescribing of property qualification for the candidates to contest election was also negatived by the Constituent Assembly. He, therefore, submitted that furnishing of information regarding assets and educational qualification of a candidate is not at all relevant for contesting election and even for casting votes. Voters are not influenced by the educational qualification or by possession of wealth by a contesting candidate. It is his say that the party whom he represents is interested in purity of election and wants to stop entry of criminals in politics or its criminalisation but it is for Parliament to decide the said question. It is submitted that a delicate balance is required to be maintained with regard to the jurisdiction of Parliament and that of courts and once Parliament has not amended the Act or the Rules despite the recommendation made by the Law Commission or the report submitted by the Vohra Committee, there was no question of giving any direction by the High Court to the Election Commission.

10. Mr K.K. Venugopal, learned Senior Counsel appearing on behalf of the Election Commission exhaustively referred to the counter-affidavit filed on behalf of the Election Commission. At this stage, we would refer to some part from the said affidavit. It is stated that the issue of "persons with criminal background" contesting election has been engaging the attention of the Election Commission of India for quite some time; even Parliament in the debates on 50 years of independence and the resolution passed in its special session in August 1997 had shown great concern about the increasing criminalisation of politics; it is widely believed that there is criminal nexus between the political parties and anti-social elements which is leading to criminalisation of politics; the criminals themselves are now joining the election fray and often even getting elected in the process. Some of them have even adorned ministerial berths and, thus, **law-breakers have become law-makers**. The Commission has suggested that a candidate should be required to furnish information in respect of—

(*a*) all cases in which he has been convicted of any offence and punished with any kind of imprisonment or amount of fine, and whether any appeal or application for review is pending in respect of any such cases of conviction; and

(*b*) all pending cases in which he is involved before any court of law in any offence, punishable with imprisonment for two years or more, and

where the appropriate court has on prima facie satisfaction framed the charges against him for proceeding with the trial.

11. For declaration of assets, it has been suggested by the Election Commission that the candidate should be asked to disclose his assets, all immovable and movable properties which would include cash, bank balances, fixed deposits and other savings such as shares, stocks, debentures etc. The candidate also should be directed to disclose for voters' information, not only his assets but his liabilities like overdues to public financial institutions and government dues and charges on his/her properties.

12. For other directions issued by the High Court, it has been pointed out that it is for the political parties to project the capacity and capability of a candidate and that directions issued by the High Court are required to be set aside. Finally, the Election Commission has suggested as under:

"*I.* Each candidate for election to Parliament or a State Legislature should submit, along with his nomination paper, a duly sworn affidavit, for the truth of which he is liable, as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his candidature:

(*i*) whether the candidate is convicted of any offence in any case in the past, and punished with imprisonment or fine; if so, the details thereof, together with the details of any pending appeals or applications for revision in any such cases of conviction;

(*ii*) whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charges have been framed against him by the competent court of law; if so, the details thereof, together with the details of any pending appeals or applications for revision in respect of the charges framed in any such cases;

(*iii*) whether the candidate is an income tax and/or wealth tax assessee and has been paying his tax(es) and filing his returns regularly, wherever he is liable, and if so, the financial year for which the last income tax/wealth tax returns have been filed;

(*iv*) the liabilities of the candidate, his/her spouse and minor children; that is to say, overdues to any public financial institutions, any government dues, and charges on his/her properties;

(*v*) the educational qualifications of the candidate.

II. The information by each candidate in respect of all the foregoing aspects shall be furnished by the candidate in a format to be prescribed by the Election Commission and shall be supported by a duly sworn affidavit, making him responsible for the correctness of the information so furnished and liable for any false statement.

III. The information so furnished by each candidate in the prescribed format and supported by a duly sworn affidavit shall be disseminated by the Election Commission, through the respective Returning Officers, by displaying the same on the notice board of the Returning Officer and

making the copies thereof available freely and liberally to all other contesting candidates and the representatives of the print and electronic media.

If any rival candidate furnishes information to the contrary, by means of a duly sworn affidavit, then such affidavit of the rival candidate may also be disseminated along with the affidavit of the candidate concerned.

The court may lay down that it would be mandatory for each candidate for election to Parliament or State Legislature, to file along with his nomination paper, the aforesaid duly sworn affidavit, furnishing therein the information on the aspects detailed above and that the nomination paper of such a candidate who fails or refuses to file the required affidavit or files an incomplete affidavit shall be deemed to be an incomplete nomination paper within the meaning of Section 33(1) of the Representation of the People Act, 1951 and shall suffer consequences according to law."

13. The aforesaid suggestions made by the Election Commission would certainly mean that except certain modifications, the Election Commission virtually supports the directions issued by the High Court and that candidates must be directed to furnish necessary information with regard to pending criminal cases as well as assets and educational qualification.

14. Mr Rajinder Sachar, learned Senior Counsel appearing on behalf of the petitioners relied upon the decision rendered by this Court in *Vineet Narain* v. *Union of India*[1] and submitted that considering the widespread illiteracy of the voters, and at the same time their overall culture and character, if they are well informed about the candidates contesting election as MP or MLA, they would be in a position to decide independently to cast their votes in favour of a candidate who, according to them, is much more efficient to discharge his functions as MP or MLA. He, therefore, submitted that presuming that the High Court has no jurisdiction to pass orders to fill in the gaps, this Court can do so by exercising its powers under Article 142 which have the effect of law.

15. In *Vineet Narain case*[1] this Court dealt with the writ petitions under Article 32 of the Constitution of India brought in public interest wherein allegation was against the Central Bureau of Investigation (CBI) of inertia in matters where accusation made was against high dignitaries. Primary question considered was — whether it was within the domain of judicial review and it could be an effective instrument for activating the investigating process which is under the control of the executive? While discussing the powers of this Court, it was observed: (SCC p. 264, paras 48-49)

"The powers conferred on this Court by the Constitution are *ample to remedy this defect and to ensure enforcement of the concept of equality*.

There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141

1 (1998) 1 SCC 226 : 1998 SCC (Cri) 307

and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, *by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role*." (emphasis supplied)

16. In paragraph 51, the Court pointed out previous precedents for exercise of such power: (SCC pp. 265-66, para 51)

"*51.* In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In *Erach Sam Kanga* v. *Union of India*[2] the Constitution Bench laid down certain guidelines relating to the Emigration Act. In *Lakshmi Kant Pandey* v. *Union of India*[3] (In re, Foreign Adoption), guidelines for adoption of minor children by foreigners were laid down. Similarly in *State of W.B.* v. *Sampat Lal*[4], *K. Veeraswami* v. *Union of India*[5], *Union Carbide Corpn.* v. *Union of India*[6], *Delhi Judicial Service Assn.* v. *State of Gujarat (Nadiad case)*[7], *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd.*[8] and *Dinesh Trivedi, M.P.* v. *Union of India*[9] guidelines were laid down having the effect of law, requiring rigid compliance. In *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[10] *(IInd Judges case)* a nine-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in *Vishaka* v. *State of Rajasthan*[11] elaborate guidelines have been laid down for observance in workplaces relating to sexual harassment of working women. In *Vishaka*[11] it was said (SCC pp. 249-50, para 11)

> '*11.* The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 (As amended at Manila, 28th August, 1997) as those representing the

2 WP No. 2632 of 1978, decided on 20-3-1979
3 (1984) 2 SCC 244
4 (1985) 1 SCC 317 : 1985 SCC (Cri) 62
5 (1991) 3 SCC 655 : 1991 SCC (Cri) 734
6 (1991) 4 SCC 584
7 (1991) 4 SCC 406
8 (1996) 4 SCC 622
9 (1997) 4 SCC 306
10 (1993) 4 SCC 441
11 (1997) 6 SCC 241 : 1997 SCC (Cri) 932

minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

"*Objectives of the Judiciary*:

10. The objectives and functions of the judiciary include the following:

(*a*) to ensure that all persons are able to live securely under the rule of law;

(*b*) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(*c*) to administer the law impartially among persons and between persons and the State."

Thus, an exercise of this kind by the court is now a well-settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field.' "

17. Ms Kamini Jaiswal, learned counsel appearing on behalf of the respondents in support of the decision rendered by the High Court referred to the decision in *Kihoto Hollohan* v. *Zachillhu*[12] wherein while considering the validity of the Tenth Schedule of the Constitution, the Court observed: (SCC p. 741, para 179)

"*179*. Democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy. One of the postulates of free and fair elections is provision for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority."

She, therefore, contended that for free and fair elections and for survival of democracy, entire history, background and the antecedents of the candidate are required to be disclosed to the voters so that they can judiciously decide in whose favour they should vote; otherwise, there would not be true reflection of electoral mandate. For interpreting Article 324, she submitted that this provision outlines broad and general principles giving power to the Election Commission and it should be interpreted in a broad perspective as held by this Court in various decisions.

18. In these matters, questions requiring consideration are:

1. Whether the Election Commission is empowered to issue directions as ordered by the High Court?

2. Whether a voter — a citizen of this country — has right to get relevant information, such as assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?

For deciding the aforesaid questions, we would proceed on the following accepted legal position.

12 1992 Supp (2) SCC 651

19. At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

20. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

21. Further, it is to be stated that: (*a*) one of the basic structures of our Constitution is "republican and democratic form of government"; (*b*) the election to the House of People and the Legislative Assembly is on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under the Constitution or any law on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election (Article 326); (*c*) holding of any asset (immovable or movable) or any educational qualification is not the eligibility criteria to contest election; and (*d*) under Article 324, the superintendence, direction and control of the "conduct of all elections" to Parliament and to the legislature of every State vests in the Election Commission. The phrase "conduct of elections" is held to be of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections.

Question 1

Whether the Election Commission is empowered to issue directions as ordered by the High Court

22. For health of democracy and fair election, whether the disclosure of assets by a candidate, his/her qualification and particulars regarding involvement in criminal cases are necessary for informing voters, maybe illiterate, so that they can decide intelligently, whom to vote for. In our opinion, the decision of even an illiterate voter, if properly educated and informed about the contesting candidate, would be based on his own relevant criteria of selecting a candidate. In democracy, periodical elections are conducted for having efficient governance for the country and for the benefit of citizens — voters. In a democratic form of government, voters are of utmost importance. They have right to elect or re-elect on the basis of the antecedents and past performance of the candidate. The voter has the choice of deciding whether holding of educational qualification or holding of property is relevant for electing or re-electing a person to be his representative. Voter has to decide whether he should cast vote in favour of a candidate who is involved in a criminal case. For maintaining purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates. Such information would include assets held by the candidate, his qualification including educational

qualification and antecedents of his life including whether he was involved in a criminal case and if the case is decided — its result, if pending — whether charge is framed or cognizance is taken by the court. There is no necessity of suppressing the relevant facts from the voters.

23. The Constitution Bench of this Court in *Mohinder Singh Gill* v. *Chief Election Commr.*[13] while dealing with a contention that the Election Commission has no power to cancel the election and direct re-poll, referred to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless words: (SCC p. 413, paras 2-3)

> " 'At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper — no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.'
>
> If we may add, the little, large Indian shall not be hijacked from the course of free and fair elections by *mob muscle methods, or subtle perversion of discretion by men 'dressed in little, brief authority'*. For 'be you ever so high, the law is above you'.
>
> The moral may be stated with telling terseness in the words of William Pitt: '*Where laws end, tyranny begins.*' Embracing both these mandates and emphasizing their combined effect is the elemental law and politics of power best expressed by Benjamin Disraeli (*Vivian Grey*, Bk VI Ch 7):
>
> > 'I repeat ... that all power is a trust — that we are accountable for its exercise — that, from the people and for the people, all springs, and all must exist.' " (emphasis supplied)

Further, the Court (in para 23) observed thus: (SCC p. 424)

> "*23. Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy.* Although the full flower of participative government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. 'The right of election is the very essence of the Constitution' (Junius). It needs little argument to hold that the heart of the parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more." (emphasis supplied)

Thereafter, the Court dealt with the scope of Article 324 and observed (in para 39) thus: (SCC p. 431)

> "Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control', as well as 'conduct of all elections', are the broadest terms."

13 (1978) 1 SCC 405

The Court further held: (SCC p. 432, para 41)

"*41*. Our conclusion on this limb of the contention is that Article 324 is wide enough to supplement the powers under the Act, as here, but subject to the several conditions on its exercise we have set out."

The Court also held (in para 77) thus: (SCC pp. 446-47)

"*77*. We have been told that wherever Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specificated it is otiose. There is no such sequitur. *The silence of a statute has no exclusionary effect except where it flows from necessary implication*. Article 324 vests a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation." (emphasis supplied)

24. In the concluding portion of paragraph 92, the Court *inter alia* observed thus: (SCC p. 452)

"(1)(*a*) * * *

(*b*) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

(2)(*a*) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. *This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending* on the circumstances.

(*b*) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions *but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition*." (emphasis supplied)

25. In concurring judgment, Goswami, J. with regard to Article 324 observed (in para 113) thus: (SCC pp. 459-60)

"Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324(1) in the Election Commission, *the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right*, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules." (emphasis supplied)

26. The aforesaid decision of the Constitution Bench unreservedly lays down that in democracy the little man — voter — has overwhelming importance on the point and the little-large Indian (voter) should not be hijacked from the course of free and fair elections by subtle perversion of discretion of casting votes. In a continual participative operation of periodical election, the voter does a social audit of his candidate and for such audit he must be well informed about the past of his candidate. Further, Article 324 operates in areas left unoccupied by legislation and the words "superintendence, direction and control" as well as "conduct of all elections" are the broadest terms. The silence of statute has no exclusionary effect except where it flows from necessary implication. Therefore, in our view, it would be difficult to accept the contention raised by Mr Salve, learned Solicitor-General and Mr Ashwani Kumar, learned Senior Counsel appearing on behalf of the intervenor that if there is no provision in the Act or the Rules, the High Court ought not to have issued such directions to the Election Commission. It is settled that the power of the Commission is plenary in character in exercise thereof. In statutory provisions or rules, it is known that every contingency could not be foreseen or anticipated with precision, therefore, the Commission can cope with a situation where the field is unoccupied by issuing necessary orders.

27. Further, this Court in *Kanhiya Lal Omar* v. *R.K. Trivedi*[14] dealt with the constitutional validity of the Election Symbols (Reservation and Allotment) Order, 1968 which was issued by the Election Commission in its plenary exercise of power under Article 324 of the Constitution read with Rules 5 and 10 of the Conduct of Elections Rules, 1961. The challenge was on the ground that the Symbols Order which is legislative in character could not be issued by the Commission because the Commission is not entrusted by law the power to issue such an Order regarding the specification, reservation and allotment of symbols that may be chosen by the candidates at elections in parliamentary and assembly constituencies. It was urged that Article 324 of the Constitution which vests the power of superintendence, direction and control of all elections to Parliament and to the legislature of a State in the Commission cannot be construed as conferring the power on the Commission to issue the symbols. The Court negatived the said contention and pertinently observed that: (SCC p. 635, para 9)

> "The word 'elections' in Article 324 is used in a wide sense so as to include *the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process*. India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a large percentage of them are still illiterate."
>
> (emphasis supplied)

The Court in paragraph 16 held: (SCC pp. 639-40)

> "*16.* Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules,

14 (1985) 4 SCC 628

the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections' are the broadest terms which would include the power to make all such provisions. (See *Mohinder Singh Gill* v. *Chief Election Commr.*[13] and *A.C. Jose* v. *Sivan Pillai*[15].)" (emphasis supplied)

The Court further observed: (SCC p. 640, para 17)

"While construing the expression 'superintendence, direction and control' in Article 324(1), one has to remember that every norm which lays down a rule of conduct cannot possibly be elevated to the position of legislation or delegated legislation. *There are some authorities or persons in certain grey areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons* who can make law, in the strict sense in which it is understood in jurisprudence. A direction may mean an order issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has also to remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved. Viewed from this angle it cannot be said that any of the provisions of the Symbols Order suffers from want of authority on the part of the Commission, which has issued it." (emphasis supplied)

28. Thereafter, this Court in *Common Cause (A Registered Society)* v. *Union of India*[16] dealt with election expenses incurred by political parties and submission of return and the scope of Article 324 of the Constitution, where it was contended that cumulative effect of the three statutory provisions, namely, Section 293-A of the Companies Act, 1956, Section 13-A of the Income Tax Act, 1961 and Section 77 of the Representation of the People Act, 1951, is to bring transparency in the election funding and the people of India must know the source of expenditure incurred by the political parties and by the candidates in the process of election. It was contended that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election and that this vicious circle has totally polluted the basic democracy in the country. The Court held that purity of election is fundamental to democracy and the Commission can ask the candidates about the expenditure incurred by the candidates and by a political party for this purpose. The Court also held: (SCC p. 761, para 18)

13 (1978) 1 SCC 405
15 (1984) 2 SCC 656
16 (1996) 2 SCC 752

"The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come nobody knows. In a democracy where rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted."

Thereafter, the Court observed that under Article 324, the Commission can issue suitable directions to maintain the purity of election and in particular to bring transparency in the process of election. The Court also held (paragraph 26) thus: (SCC p. 767)

"*26.* Superintendence and control over the conduct of elections by the Election Commission include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression 'Conduct of election' is wide enough to include in its sweep, the power to issue directions — in the process of the conduct of an election — to the effect that the political parties shall submit to the Election Commission, for its scrutiny, the details of the expenditure incurred or authorised by the parties in connection with the election of their respective candidates."

29. The Court further observed that the Constitution has made comprehensive provision under Article 324 to take care of surprise situations and it operates in areas left unoccupied by legislation.

Question 2

Right to know about the candidates contesting elections

30. Now we would refer to various decisions of this Court dealing with citizens' right to know, which is derived from the concept of "freedom of speech and expression". The people of the country have a right to know every public act, everything that is done in a public way by the public functionaries. MPs or MLAs are undoubtedly public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in the decision-making process. The decision-making process of a voter would include his right to know about public functionaries who are required to be elected by him.

31. In *State of U.P.* v. *Raj Narain*[17] the Constitution Bench considered a question — whether privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareli, Uttar Pradesh? The Court observed that: (SCC p. 453, para 74)

"The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary,

17 (1975) 4 SCC 428

when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security."

The Court pertinently observed as under: (SCC p. 453, para 74)

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

32. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[18] this Court dealt with the validity of customs duty on the newsprint in context of Article 19(1)(*a*). The Court observed (in para 32) thus: (SCC p. 664)

"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."

33. The Court further referred (in SCC p. 665, para 35) the following observations made by this Court in *Romesh Thappar* v. *State of Madras*[19]: (SCR p. 602)

"(The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But ... 'it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits'."

Again in SCC pp. 685-86, paragraph 68, the Court observed:

" '*The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves*.' (Per Lord Simon of Glaisdale in *Attorney-General* v. *Times Newspapers Ltd.*[20]) Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (*i*) it helps an individual to attain self-fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) it strengthens the capacity of an individual in participating in decision-making and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration."

18 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
19 AIR 1950 SC 124 : 1950 SCR 594 : 1950 Cri LJ 1514
20 (1973) 3 All ER 54 : 1974 AC 273 (HL)

34. From the aforequoted paragraph, it can be deduced that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes.

35. In *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[21] this Court considered the question of right to telecast sports event and after considering various decisions, the Court referred to Article 10 of the European Convention on Human Rights which inter alia states as follows (para 36): (SCC p. 208)

> "*10.1.* 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."

36. Thereafter, the Court summarised the law on the freedom of speech and expression under Article 19(1)(*a*) as restricted by Article 19(2) thus: (SCC p. 213, para 43)

> "The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts."

37. The Court dealt with the right of telecast and (in paragraph 75) held thus: (SCC p. 224)

> "In a team event such as cricket, football, hockey etc., there is both individual and collective expression. It may be true that what is protected by Article 19(1)(*a*) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. However, *the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained.* The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right." (emphasis supplied)

21 (1995) 2 SCC 161

The Court thereafter (in paragraph 82) held: (SCC p. 229)

> "*True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country*. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 1/2 per cent of the population has an access to the print media which is not subject to pre-censorship." (emphasis supplied)

The Court also observed: [SCC p. 300 para 201(3)(*b*)] "A successful democracy posits an 'aware' citizenry".

38. If right to telecast and right to view sport games and the right to impart such information is considered to be part and parcel of Article 19(1)(*a*), we fail to understand why the right of a citizen/voter — a little man — to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(*a*). In our view, democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of *X* or *Y* candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce. Therefore, casting of a vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions. Entertainment is implied in freedom of "speech and expression" and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy.

39. In *Dinesh Trivedi, M.P.* v. *Union of India*[9] the Court dealt with a petition for disclosure of a report submitted by a Committee established by the Union of India on 9-7-1993 which was chaired by the erstwhile Home Secretary Shri N.N. Vohra which subsequently came to be popularly known as the Vohra Committee. During July 1995, a known political activist Naina Sahni was murdered and one of the persons arrested happened to be an active politician who had held important political posts and a newspaper report published a series of articles on the criminalisation of politics within the country and the growing links between political leaders and mafia members. The attention of the masses was drawn towards the existence of the Vohra Committee Report. It was suspected that the contents of the report were such that the Union Government was reluctant to make it public.

9 (1997) 4 SCC 306

40. In the said case, the Court dealt with citizens' right to freedom of information and observed: (SCC p. 313, para 16)

> "*16.* In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare."

The Court also observed: (SCC p. 314, para 19)

> "Democracy ... expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant."

41. Mr Ashwani Kumar, learned Senior Counsel appearing on behalf of the intervenor submitted that the aforesaid observations are with regard to citizens' right to know about the affairs of the Government, but this would not mean that citizens have a right to know the personal affairs of MPs or MLAs. In our view, this submission is totally misconceived. There is no question of knowing the personal affairs of MPs or MLAs. The limited information is — whether the person who is contesting election is involved in any criminal case and if involved, what is the result? Further, there are widespread allegations of corruption against the persons holding post and power. In such a situation, question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruption by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not misconducted himself in collecting wealth after being elected. This information could be easily gathered only if prior to election, the assets of such person are disclosed. For this purpose, learned counsel Mr Muralidhar referred to the practice followed in the United States and the form which is required to be filled in by a candidate for the Senate, which provides that such candidate is required to disclose all his assets and that of his spouse and dependants. The form is required to be refilled every year. Penalties are also prescribed which include removal from ballot.

42. Learned counsel Ms Kamini Jaiswal referred to the All India Service (Conduct) Rules, 1968 and pointed out that a member of all-India service is required to disclose his/her assets including that of spouse and dependent children. She referred to Rule 16 of the said Rules, which provides for declaration of movable, immovable and valuable property by a person who becomes a member of the service. Relevant part of Rule 16 is as under:

> "16. (1) Every person shall, where such person is a member of the service at the commencement of these Rules, before such date after such commencement as may be specified by the Government in this behalf, or, where such person becomes a member of the service after such commencement, on his first appointment to the service, submit a return of his assets and liabilities in such form as may be prescribed by the Government giving the full particulars regarding—
>
> (*a*) the immovable property owned by him, or inherited or acquired by him or held by him on lease or mortgage, either in his own name or

in the name of any member of his family or in the name of any other person;

(*b*) shares, debentures, postal cumulative time deposits and cash including bank deposits inherited by him or similarly owned, acquired or held by him;

(*c*) other movable property inherited by him or similarly owned, acquired or held by him; and

(*d*) debts and other liabilities incurred by him directly or indirectly."

43. Such officer is also required to submit an annual return giving full particulars regarding the immovable and movable property inherited by him or owned or acquired or held by him on lease or mortgage either in his own name or in the name of any member of his family or in the name of any other person.

44. It is also submitted that even the gazetted officers in all government services are required to disclose their assets and thereafter to furnish details of any acquisition of property annually. In our view, it is rightly submitted that in a democratic form of government, MP or MLA is having higher status and duty to the public. In *P.V. Narasimha Rao* v. *State (CBI/SPE)*[22] the Court inter alia considered whether Member of Parliament is a public servant. The Court (in para 162) held thus: (SCC p. 747)

"*162*. A public servant is 'any person who holds an office by virtue of which he is authorised or required to perform any public duty'. Not only, therefore, must the person hold an office but he must be authorised or required by virtue of that office to perform a public duty. Public duty is defined by Section 2(*b*) of the said Act to mean 'a duty in the discharge of which the State, the public or that community at large has an interest'. *In a democratic form of government it is the Member of Parliament or a State Legislature who represents the people of his constituency in the highest law-making bodies at the Centre and the State respectively.* Not only is he the representative of the people in the process of making the laws that will regulate their society, he is their representative in deciding how the funds of the Centre and the States shall be spent and in exercising control over the executive. It is difficult to conceive of a duty more public than this or of a duty in which the State, the public and the community at large would have greater interest." (emphasis supplied)

The aforesaid underlined portion highlights the important status of an MP or an MLA.

45. Finally, in our view this Court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation covering the field and the voters are required to be well informed and educated about contesting candidates so that they can elect a proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must

22 (1998) 4 SCC 626 : 1998 SCC (Cri) 1108

step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets — immovable, movable and valuable articles — it would have its own effect. This Court in *Vishaka* v. *State of Rajasthan*[11] dealt with the incident of sexual harassment of a woman at work place which resulted in violation of fundamental right of gender equality and the right to life and liberty and laid down that in the absence of legislation, it must be viewed along with the role of the judiciary envisaged in the Beijing Statement of Principles of Independence of Judiciary in the LAWASIA region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters. As stated earlier, this case was relied upon in *Vineet Narain case*[1] where the Court has issued necessary guidelines to CBI and the Central Vigilance Commission (CVC) as there was no legislation covering the said field to ensure proper implementation of the rule of law.

46. To sum up the legal and constitutional position which emerges from the aforesaid discussion, it can be stated that:

1. The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word "elections" is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps.

2. The limitation on plenary character of power is when Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. The Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, the Commission can fill the vacuum till there is legislation on the subject. In *Kanhiya Lal Omar case*[14] the Court construed the expression "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which many may have to follow and it may be a specific or a general order and such phrase should be construed liberally empowering the Election Commission to issue such orders.

11 (1997) 6 SCC 241 : 1997 SCC (Cri) 932

1 *Vineet Narain* v. *Union of India*, (1998) 1 SCC 226 : 1998 SCC (Cri) 307

14 *Kanhiya Lal Omar* v. *R.K. Trivedi*, (1985) 4 SCC 628

3. The word "elections" includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate. Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion. As stated earlier, in *Common Cause case*[16] the Court dealt with a contention that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election. If on an affidavit a candidate is required to disclose the assets held by him at the time of election, the voter can decide whether he could be re-elected even in case where he has collected tons of money.

Presuming, as contended by the learned Senior Counsel Mr Ashwani Kumar, that this condition may not be much effective for breaking a vicious circle which has polluted the basic democracy in the country as the amount would be unaccounted. Maybe true, still this would have its own effect as a step-in-aid and voters may not elect law-breakers as law-makers and some flowers of democracy may blossom.

4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.

5. The right to get information in democracy is recognised all throughout and it is a natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant on Civil and Political Rights, which is as under:

> "(*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 in print, in the form of art, or through any other media of his choice."

6. On cumulative reading of a plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142

16 *Common Cause (A Registered Society)* v. *Union of India*, (1996) 2 SCC 752

of the Constitution to issue necessary directions to the executive to subserve public interest.

7. Under our Constitution, Article 19(1)(*a*) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, **voter speaks out or expresses by casting vote**. For this purpose, information about the candidate to be selected is a must. Voter's (little man — citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. **The little man may think over before making his choice of electing law-breakers as law-makers**.

47. In this view of the matter, it cannot be said that the directions issued by the High Court are unjustified or beyond its jurisdiction. However, considering the submissions made by the learned counsel for the parties at the time of hearing of this matter, the said directions are modified as stated below.

48. The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:

(*1*) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.

(*2*) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.

(*3*) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants.

(*4*) Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues.

(*5*) The educational qualifications of the candidate.

49. It is to be stated that the Election Commission has from time to time issued instructions/orders to meet with the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible and in any case within two months.

50. In the result, Civil Appeal No. 7178 of 2001 is partly allowed and the directions issued by the High Court are modified as stated above. Appeal stands disposed of accordingly.

51. Writ Petition (C) No. 294 of 2001 is allowed to the aforesaid extent.

52. There shall be no order as to costs.

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(BEFORE M.B. SHAH, P. VENKATARAMA REDDI AND D.M. DHARMADHIKARI, JJ.)

Writ Petition (C) No. 490 of 2002†

PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL) AND ANOTHER . . Petitioners;

Versus

UNION OF INDIA AND ANOTHER . . Respondents.

With

Writ Petition (C) No. 509 of 2002

LOK SATTA AND OTHERS . . Petitioners;

Versus

UNION OF INDIA . . Respondent.

And

Writ Petition (C) No. 515 of 2002

ASSOCIATION FOR DEMOCRATIC REFORMS . . Petitioner;

Versus

UNION OF INDIA AND ANOTHER . . Respondents.

Writ Petitions (C) No. 490 of 2002 with Nos. 509 and 515 of 2002, decided on March 13, 2003

A. **Election — Representation of the People Act, 1951 — S. 33-B [as inserted by Representation of the People (Third Amendment) Act, 2002] — Held, invalid**

The Supreme Court in *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294 at para 48 gave the following directions:

> "*48.* The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:
>
> (*1*) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.
>
> (*2*) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.
>
> (*3*) The assets (immovable, movable, bank balance etc.) of a candidate and of his/her spouse and that of dependants.
>
> (*4*) Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues.

† Under Article 32 of the Constitution of India

(*5*) The educational qualifications of the candidate."

Subsequently, the Representation of the People (Amendment) Ordinance, 2002 (4 of 2002)‡ was promulgated on 24-8-2002. The Ordinance was later replaced by the Representation of the People (Third Amendment) Act, 2002 (72 of 2002)‡‡ which received the assent of the President on Dec. 28, 2002. Sections 33-A and 33-B as inserted by the said Amending Act read as under:

"33-A. *Right to information.*—(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of Section 33, also furnish the information as to whether—

(*i*) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(*ii*) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of Section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the Returning Officer the nomination paper under sub-section (1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The Returning Officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

33-B. *Candidate to furnish information only under the Act and the rules.*—Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

Thus a candidate is not required to disclose (*a*) the cases in which he is acquitted or discharged of criminal offence(s); (*b*) his assets and liabilities; and (*c*) his educational qualification. In the present writ petitions, the validity of Section 33-B has been challenged. It was submitted by the petitioners that Section 33-B on the face of it is arbitrary, unjustifiable and void being violative of the fundamental right of the citizens/voters to know the antecedents of the candidates. Without exercise of that right it would not be possible to have free and fair elections and therefore, the impugned section violates the very basic features of the Constitution, namely, republic democracy. For having free and fair elections, anywhere in the territory of India, it is necessary to give effect to the voters' fundamental right as declared by the Supreme Court in the above judgment. It was contended that by issuing the Ordinance the Government has arrogated to itself the power to decide unilaterally for nullifying the decision rendered by the Supreme Court without considering whether it can pass

‡ **Ed.**: See full text at 2003 Current Central Legislation, Pt. II, at p. 3

‡‡ **Ed.**: See full text at 2003 Current Central Legislation, Pt. II, at p. 131

legislation which abridges fundamental right guaranteed under Article 19(1)(*a*). On the other hand it was submitted on behalf of the respondents that the aforesaid Ordinance/Amended Act is in consonance with the judgment rendered by the Supreme Court and the vacuum pointed out by the said judgment is filled in by the enactment. It was also contended that voters' right to know the antecedents of the candidate is not part of the fundamental rights, but it is a derivative fundamental right on the basis of interpretation of Article 19(1)(*a*) given by the Supreme Court. It was submitted that the Ordinance/Amended Act is in public interest and, therefore, it cannot be held to be illegal or void.

Disposing of the writ petitions, the Supreme Court

Held :

Per Shah, J. *(Dharmadhikari, J. concurring)*

Section 33-B of the amended Act is held to be illegal, null and void. However, this judgment would not have any retrospective effect but would be prospective. (Para 79)

Per Reddi, J. *(concurring)*

Section 33-B of the Representation of the People Act, 1951 does not pass the test of constitutionality. (Para 80)

B. **Election — Representation of the People Act, 1951 — S. 33-B [as inserted by Representation of the People (Third Amendment) Act, 2002] — Held, per curiam, invalid — Supreme Court in *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294 directing Election Commission to call for from the prospective candidates for election information relating to criminal background of the candidate and initiation or pendency of criminal cases or proceedings against him, his assets and liabilities and his educational qualification — But by virtue of the Amendment Act, a candidate is not required to disclose the cases in which he is acquitted and discharged of criminal offences, his assets and liabilities and his educational qualification — Held, per Shah, J., once Supreme Court in *Assn. for Democratic Reforms case* has held that a voter has right under Art. 19(1)(a) to know the antecedents of the candidate, that right can be restricted by passing such legislation only as covered by Art. 19(2) — But S. 33-B cannot be justified or saved under Art. 19(2) — It is also not open to the legislature to nullify the decision of Supreme Court on ground that right to know antecedents of voters is only a derivative right and not a specific fundamental right — Hence, S. 33-B is ultra vires Art. 19(1)(a) — Directives of Supreme Court do not impinge upon right to privacy of the candidates — Held, per Reddi, J. (concurring), directives issued to Election Commission by Supreme Court in *Assn. for Democratic Reforms case* regarding disclosure of certain information about a candidate's antecedents in view of voters' right under Art. 19(1)(a) to have such information were pro tempore or tentative in nature, intended to operate till law made in that regard by legislature considering those directives as broad indicators or parameters — While making the law legislature should have given due weight to those directions and a substantial departure therefrom was not permissible — Court in exercise of power of judicial review has to take a holistic view and adopt a balanced approach in ascertaining whether the information required by the legislation to be disclosed by the candidate are reasonably adequate — Amendment Act has not provided for disclosure of information**

in respect of certain crucial aspects as pointed out by Supreme Court in *Assn. for Democratic Reforms case* and S. 33-B imposed a blanket ban on disclosure of information other than those required by the Amendment Act — S. 33-B thus nullified substantially the said directives of the Supreme Court and hence violative of Art. 19(1)(a) — Held, per Dharmadhikari, J. (concurring), S. 33-B is deficient in ensuring free and fair elections which is basic structure of the Constitution and hence liable to be struck down so as to revive the law declared by Supreme Court in *Assn. for Democratic Reforms case* — Constitution of India, Arts. 19(1)(a) & (2) and 21 — Citizen's right to know or right to information versus right to privacy of candidates

C. **Election — Representation of the People Act, 1951 — S. 75-A [as inserted by Representation of the People (Third Amendment) Act, 2002] — Whether failed to effectuate the right to information and freedom of expression of voters/citizens in respect of assets and liabilities of candidates**

D. **Constitution of India — Art. 19(1)(a) — "Freedom of expression" — Nature and scope of — Voting at an election is a form of expression — Words and phrases — "Freedom of expression"**

E. **Constitution of India — Pt. III — Generally — Fundamental rights discovered by Supreme Court by expansive interpretation whether can be ignored as derivative rights — Fundamental rights are dynamic concepts having no fixed contents and Court expands them in the changing context so as to make them vibrant and lively — Therefore, expansive meaning given to these rights by Court are equally enforceable and cannot be ignored by the legislature on ground of being derivative rights — Expansive interpretation of Art. 19(1)(a) noticed — Right to information is an integral part of Art. 19(1)(a)**

F. **Statute Law — Overriding effect — Validating law — Legislature cannot override decision of court by empowering instrumentalities of the State to disobey the same — But legislature can change the basis of the decision prospectively or retrospectively or remove the defect pointed out by the court so as to render the decision ineffective**

It was submitted that by the impugned legislation, most of the directions issued by the Supreme Court in *Assn. for Democratic Reforms case* are complied with and vacuum pointed out is filled in by the legislation and that the legislature did not think it fit that the remaining information as directed by the Court is required to be given by a contesting candidate.

Held :

Per Shah, J.

Section 33-B, which provides that notwithstanding anything contained in the judgment of any court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as the Supreme Court has held that the voter has a fundamental right under Article 19(1)(*a*) to know the antecedents of a candidate for various reasons recorded in the earlier judgment as well as in this judgment. The amended Act does not wholly cover the directions issued by the Supreme Court. On the contrary, it provides that a candidate would not be bound to furnish certain

information as directed by the Supreme Court. Once the Supreme Court held that a voter has a fundamental right to know the antecedents of his candidate, that fundamental right under Article 19(1)(*a*) could be abridged by passing such legislation only as provided under Article 19(2). So legislative competence to interfere with a fundamental right enshrined in Article 19(1)(*a*) is limited as provided under Article 19(2). It has not been pointed out how the impugned legislation could be justified or saved under Article 19(2). (Paras 78, 38 to 40)

The legislature has no power to review the decision of the Supreme Court and set it at naught. The legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the court. A declaration that an order made by a court of law is void is normally a part of the judicial function. The legislature cannot declare that decision rendered by the court is not binding, void or is of no effect. The legislature can with retrospective effect change the basis on which a decision is rendered by a court and change the law in general. However, this power can be exercised subject to constitutional provision, particularly, legislative competence and if it is violative of fundamental rights enshrined in Part III of the Constitution, such law would be void as provided under Article 13 of the Constitution. (Paras 34, 78 and 37)

Municipal Corpn. of the City of Ahmedabad v. *New Shrock Spg. and Wvg. Co. Ltd.*, (1970) 2 SCC 280; *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1; *P. Sambamurthy* v. *State of A.P.*, (1987) 1 SCC 362 : (1987) 2 ATC 502; *Cauvery Water Disputes Tribunal, In re*, 1993 Supp (1) SCC 96 (2); *Mahal Chand Sethia* v. *State of W.B.*, 1969 UJ (SC) 616, *relied on*

Shri Prithvi Cotton Mills Ltd. v. *Broach Borough Municipality*, (1969) 2 SCC 283, *cited*

It is not possible to accept the submission that as there is no specific fundamental right of the voter to know the antecedents of a candidate, the declaration by the Supreme Court of such fundamental right can be held to be derivative and therefore, it was open to the legislature to nullify it by appropriate legislation. There is no such concept of derivative fundamental rights. It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. The Constitution is required to be kept young, energetic and alive. Therefore, as the phrase "freedom of speech and expression" is given the meaning to include citizens' right to know the antecedents of the candidates contesting election of MP or MLA, such rights could not be set at naught by the legislature.

(Paras 41, 42, 78 and 55)

Unni Krishnan, J.P. v. *State of A.P.*, (1993) 1 SCC 645; *P.V. Narasimha Rao* v. *State (CBI/SPE)*, (1998) 4 SCC 626 : 1998 SCC (Cri) 1108; *C. Narayanaswamy* v. *C.K. Jaffer Sharief*, 1994 Supp (3) SCC 170; *T.N. Seshan, CEC of India* v. *Union of India*, (1995) 4 SCC 611, *relied on*

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225; *Pathumma* v. *State of Kerala*, (1978) 2 SCC 1; *Missouri* v. *Holland*, 252 US 416, 433 : 64 L Ed 641 (1919); *Satwant Singh Sawhney* v. *D. Ramarathnam, A.P.O.*, AIR 1967 SC 1836 : (1967) 3 SCR 525; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *Griswold* v. *Connecticut*, 381 US 479 : 14 L Ed 2d 510 (1965); *Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Charles Sobraj* v. *Supdt., Central Jail*, (1978) 4 SCC 104 : 1978 SCC (Cri) 542; *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544 : 1978 SCC (Cri) 468; *Hussainara Khatoon (I)* v. *Home Secy., State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23; *Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3

SCC 526 : 1980 SCC (Cri) 815; *T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342; *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96 : 1983 SCC (Cri) 353; *Attorney General of India* v. *Lachma Devi*, 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413; *Parmanand Katara* v. *Union of India*, (1989) 4 SCC 286 : 1989 SCC (Cri) 721; *Shantistar Builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520; *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129 : (1950) 51 Cri LJ 1525; *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554 : 1960 Cri LJ 735; *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305; *Bennett Coleman and Co.* v. *Union of India*, (1972) 2 SCC 788; *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana*, (1988) 3 SCC 410; *S. Rangarajan* v. *P. Jagjivan Ram*, (1989) 2 SCC 574; *LIC of India* v. *Manubhai D. Shah*, (1992) 3 SCC 637; *Dinesh Trivedi, MP* v. *Union of India*, (1997) 4 SCC 306; *Sub-Committee on Judicial Accountability* v. *Union of India*, (1991) 4 SCC 699, *referred to*

By declaration of a fact, which is a matter of public record, that a candidate was involved in various criminal cases, there is no question of infringement of any right of privacy. Similarly, with regard to the declaration of assets also, a person having assets or income is normally required to disclose the same under the Income Tax Act or such similar fiscal legislation. Not only this, once a person becomes a candidate to acquire public office, such declaration would not affect his right of privacy. This is the necessity of the day because of statutory provisions of controlling widespread corrupt practices as repeatedly pointed out by all concerned including various reports of the Law Commission and other committees. (Para 47)

R. Rajagopal v. *State of T.N.*, (1994) 6 SCC 632, *explained* and *distinguished*

Kharak Singh v. *State of U.P.*, AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468, *referred to*

B.R. Kapur v. *State of T.N.*, (2001) 7 SCC 231; *Common Cause* v. *Union of India*, (1996) 2 SCC 752, *relied on*

Per Reddi, J. *(concurring and partly dissenting)*

The directives given by the Supreme Court in *Union of India* v. *Assn. for Democratic Reforms* were intended to operate only till the law was made by the legislature and in that sense "pro tempore" in nature. Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by the Supreme Court, even if they be tentative or ad hoc in nature, should be given due weight and substantial departure therefrom cannot be countenanced. If the legislature in utter disregard of the indicators enunciated by the Supreme Court proceeds to make a legislation providing only for a semblance or pittance of information or omits to provide for disclosure on certain essential points, the law would then fail to pass muster of Article 19(1)(*a*). Though certain amount of deviation from the aspects of disclosure spelt out by the Supreme Court is not impermissible, a substantial departure cannot be countenanced. The legislative provision should be such as to promote the right to information to a reasonable extent, if not to the fullest extent on details of concern to the voters and citizens at large. While enacting the legislation, the legislature has to ensure that the fundamental right to know about the candidate is reasonably secured and information which is crucial, by any objective standards, is not denied. It is for the constitutional court in exercise of its judicial review power to judge whether the areas of disclosure carved out by the legislature are reasonably adequate to safeguard the citizens' right to information. (Paras 123 and 109)

The Court has to take a holistic view and adopt a balanced approach in examining the legislation providing for right to information and laying down the parameters of that right. The Court has to keep in view the twin principles that the citizens' right to information to know about the personal details of a candidate is not an unlimited right and that at any rate, it has no fixed concept and the legislature has freedom to choose between two reasonable alternatives. It is not a proper approach to test the validity of legislation only from the standpoint whether the legislation implicitly and word to word gives effect to the directives issued by the Court as an ad hoc measure when the field was unoccupied by legislation. (Paras 123 and 109)

Section 33-B inserted by the Representation of the People (Third Amendment) Act, 2002 does not pass the test of constitutionality, firstly, for the reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients. The concept of freedom of speech and expression does not remain static. The felt necessities of the times coupled with experiences drawn from the past may give rise to the need to insist on additional information on the aspects not provided for by law. New situations and the march of events may demand the flow of additional facets of information. The right to information should be allowed to grow rather than being frozen and stagnant; but the mandate of Section 33-B prefaced by the non obstante clause impedes the flow of such information conducive to the freedom of expression. In the face of the prohibition under Section 33-B, the Election Commission which is entrusted with the function of monitoring and supervising the election process will have to sit back with a sense of helplessness in spite of the pressing need for insisting on additional information. Even the Court may at times feel handicapped in taking necessary remedial steps to enforce the right to information. The legislative injunction curtailing the nature of information to be furnished by the contesting candidates only to the specific matters provided for by the legislation and nothing more would emasculate the fundamental right to freedom of expression of which the right to information is a part. The very objective of recognizing the right to information as part of the fundamental right under Article 19(1)(*a*) in order to ensure free and fair elections would be frustrated if the ban prescribed by Section 33-B is taken to its logical effect. The second reason is that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate by blocking the ambit of disclosures only to what has been specifically provided for by the amendment, Parliament failed to give effect to one of the vital aspects of information viz. disclosure of assets and liabilities and thus failed in substantial measure to give effect to the right to information as a part of the freedom of expression. Parliament has unduly restricted the ambit of information which the citizens should have and thereby impinged on the guarantee enshrined in Article 19(1)(*a*). (Paras 123, 110 and 111)

It is a settled principle of constitutional jurisprudence that the only way to render a judicial decision ineffective is to enact a valid law by way of amendment or otherwise fundamentally altering the basis of the judgment either prospectively or retrospectively. The legislature cannot overrule or supersede a judgment of the Court without lawfully removing the defect or infirmity pointed out by the Court because it is obvious that the legislature cannot trench on the judicial power vested in the courts. Parliament did not by law provide for disclosure of information on certain crucial points such as assets and liabilities

and at the same time, placed an embargo on calling for further informations by enacting Section 33-B. That is where Section 33-B of the impugned amendment Act does not pass the muster of Article 19(1)(*a*), as interpreted by the Supreme Court. (Paras 112 and 113)

The right to information provided for by Parliament under Section 33-A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure. (Para 123)

The provision made in Section 75-A regarding declaration of assets and liabilities of the elected candidates to the Speaker or the Chairman of the House has failed to effectuate the right to information and the freedom of expression of the voters/citizens. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of the spouse or dependent children, Parliament ought to have made a provision for furnishing this information at the time of filing the nomination. Failure to do so has resulted in the violation of guarantee under Article 19(1)(*a*). By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of the law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse *benami* is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well. That is one way of looking at the problem. More important, it is to be noted that Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure; but, the hitch lies in the fact that the disclosure has to be made to the Speaker or Chairman of the House after he or she is elected. No provision has been made for giving access to the details filed with the presiding officer of the House. By doing so, Parliament has omitted to give effect to the principle, which it rightly accepted as a step in aid to promote integrity in public life. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of other family members, Parliament refrained from making a provision for furnishing the information at the time of filing the nomination. This has resulted in jeopardizing the right to information implicitly guaranteed by Article 19(1)(*a*). Therefore, the provision made in Section 75-A regarding declaration of assets and liabilities of the elected

candidates to the presiding officer has failed to effectuate the right to information and the freedom of expression of the voters/citizens. (Paras 123 and 121)

The failure to provide for disclosure of educational qualification does not, however, in practical terms, infringe the freedom of expression. Consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being Member of the House of the People or Legislative Assembly. That apart, the information relating to educational qualifications of contesting candidates does not serve any useful purpose in the present context and scenario. The information regarding educational qualifications is not a vital and useful piece of information to the voter, in the ultimate analysis. At any rate, two views are reasonably possible. Therefore, it is not possible to hold that Parliament should have necessarily made the provision for disclosure of information regarding educational qualifications of the candidates. (Paras 123 and 122)

The Election Commission has to issue revised instructions to ensure implementation of Section 33-A subject to what is laid down in this judgment regarding the cases in which cognizance has been taken. The Election Commission's orders relating to disclosure of assets and liabilities will still hold good and continue to be operative. However, Direction 4 of para 14 insofar as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information, should not be enforced. (Para 123)

Per Dharmadhikari, J. *(concurring)*

Making of law for election reform is undoubtedly a subject exclusively for the legislature. Based on the decision of the Supreme Court in the case of *Assn. for Democratic Reforms* and the directions made therein to the Election Commission, the Amendment Act under consideration has made an attempt to fill the void in law but the void has not been filled fully and does not satisfy the requirements for exercise of fundamental freedom of the citizen to participate in election as a well-informed voter. Democracy based on "free and fair elections" is considered as a basic feature of the Constitution. Lack of adequate legislative will to fill the vacuum in law for reforming the election process in accordance with the law declared by the Supreme Court in the case of *Assn. for Democratic Reforms* obligates the Supreme Court as an important organ in constitutional process to intervene. The Supreme Court is obliged by the Constitution to intervene because the legislative field, even after the passing of the Ordinance and the Amendment Act, leaves a vacuum. The Supreme Court in the case of *Assn. for Democratic Reforms* has determined the ambit of fundamental "right of information" to a voter. The law, as it stands today after amendment, is deficient in ensuring "free and fair elections". The Supreme Court has, therefore, found it necessary to strike down Section 33-B of the Amendment Act so as to revive the law declared by the Supreme Court in the case of *Assn. for Democratic Reforms*. (Paras 128 to 130)

Union of India v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294, *referred to*

I agree with all the conclusions drawn by Shah, J. Though I agree with the conclusions of Reddi, J., I am unable to agree with his conclusions that the directives given in *Assn. for Democratic Reforms case* were pro tempore in nature and also that the failure to provide for disclosure of educational qualification does not, in practical terms, infringe the freedom of expression. (Paras 123, 131 and 132)

G. **Constitution of India — Art. 19(1)(a) — Freedom of information — Voters' right to know antecedents/assets of candidates contesting election to Parliament or Legislative Assembly — Held, per curiam, is a facet of Art. 19(1)(a) — Basis of such right, explained — Per Reddi, J., this right is different from right to information about public affairs or right to receive information through press or electronic media**

Per Shah, J.

All citizens of this country have the fundamental right to "freedom of speech and expression" and this phrase is construed to include fundamental right to know relevant antecedents of the candidate contesting the elections. Democratic republic is part of the basic structure of the Constitution. For this, free and fair periodical elections based on adult franchise are a must. For having unpolluted healthy democracy, citizen-voters should be well informed. The foundation of a healthy democracy is to have well-informed citizen-voters. The reason to have right of information with regard to the antecedents of the candidate is that the voter can judge and decide in whose favour he should cast his vote. It is the voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. For assets or liability, the voter may exercise his discretion in favour of a candidate whose liability is minimum and/or there are no overdues of public financial institution or government dues. From this information, it would be, to some extent, easy to verify whether unaccounted money is utilized for contesting election and whether a candidate is contesting election for getting rich or after being elected to what extent he became richer. Exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. The little man — a citizen, a voter — is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as an MP or MLA. On occasions, it is stated that we are not having such intelligent voters. This is no excuse. This would be belittling the little citizen/voter. He himself may be illiterate but still he would have the guts to decide in whose favour he should cast his vote. In any case, for having free and fair election and not to convert democracy into a mobocracy and mockery or a farce, information to voters is a necessity. (Paras 16 to 18)

Right to participate by casting vote at the time of election would be meaningless unless the voters are well informed about all sides of the issues, in respect of which they are called upon to express their views by casting their votes. Disinformation, misinformation, non-information, all equally create an uninformed citizenry which would finally make democracy a mobocracy and a farce. The primary duty of the judiciary is to uphold the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory. Interpretation should be in consonance with the constitutional provisions, which envisage a republic democracy. Survival of democracy depends upon free and fair election. It is true that the elections are fought by political parties, yet election would be a farce if the voters are unaware of the antecedents of candidates contesting elections. Their decision to vote either in favour of *A* or *B* candidate would be without any basis. Such election would be

neither free nor fair since for survival of true democracy the voter must be aware of the antecedents of his candidate. Voter has to cast intelligent and rational vote according to his own criteria. A well-informed voter is the foundation of democratic structure. That information to a voter, who is the citizen of this country, is one facet of the fundamental right under Article 19(1)(*a*).

(Paras 26, 9 and 27)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225; *State of U.P.* v. *Raj Narain*, (1975) 4 SCC 428; *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 : 1950 SCR 594 : 1950 Cri LJ 1514; *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87, *relied on*

Attorney General v. *Times Newspapers Ltd.*, (1973) 3 All ER 54 : 1974 AC 273 : (1973) 3 WLR 298 (HL), *cited*

Law Commission Report, 1999, paras 5.1, 6.3; *Report of the National Commission to Review the Working of the Constitution*, 2002, paras 4.4, 4.12, 4.14, 4.23; *Ethics Manual for Members, Officers and Employees of the U.S. House of Representatives*; *Report of the Committee on State Funding of Elections* (headed by Shri Indrajit Gupta), 1998, *relied on*

Per Reddi, J. *(concurring)*

Freedom of speech and expression, just as equality clause and the guarantee of life and liberty has been very broadly construed by the Supreme Court right from the 1950s. It has been variously described as a "basic human right", "a natural right" and the like. It embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help formation of one's opinion and viewpoint and debates on matters of public concern. The importance which our Constitution-makers wanted to attach to this freedom is evident from the fact that reasonable restrictions on that right could be placed by law only on the limited grounds specified in Article 19(2), not to speak of inherent limitations of the right. In due course of time, several species of rights unenumerated in Article 19(1)(*a*) have branched off from the genus of the article through the process of interpretation by the Apex Court. One such right is the "right to information". The right of the citizens to obtain information on matters relating to public acts flows from the fundamental right enshrined in Article 19(1)(*a*). Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(*a*). (Paras 82, 83, 86 and 123)

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87; *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *Dinesh Trivedi, MP* v. *Union of India*, (1997) 4 SCC 306, *relied on*

The citizens of the country are enabled to take part in the government through their chosen representatives. In a parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of the Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large. The moment they put in papers for contesting the election, they are subjected to public gaze and public scrutiny. The character, strength and weakness of the candidate is widely debated. Nothing is

therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus twofold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. To scuttle the flow of information — relevant and essential — would affect the electorate's ability to evaluate the candidate. Not only that, the information relating to the candidates will pave the way for public debate on the merits and demerits of the candidates. When once there is public disclosure of the relevant details concerning the candidates, the press, as a media of mass communication and voluntary organizations vigilant enough to channel the public opinion on right lines will be able to disseminate the information and thereby enlighten and alert the public at large regarding the adverse antecedents of a candidate. It will go a long way in promoting the freedom of speech and expression. That goal would be accomplished in two ways. It will help the voter who is interested in seeking and receiving information about the candidate to form an opinion according to his or her conscience and best of judgment and secondly, it will facilitate the press and voluntary organizations in imparting information on a matter of vital public concern. An informed voter — whether he acquires information directly by keeping track of disclosures or through the press and other channels of communication — will be able to fulfil his responsibility in a more satisfactory manner. An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus, the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. In turn, it would lead to the preservation of the integrity of electoral process which is so essential for the growth of democracy. Such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicized and openly debated. (Para 94)

Lily Thomas v. *Speaker, Lok Sabha*, (1993) 4 SCC 234, *relied on*

A voter "speaks out or expresses by casting vote". Freedom of expression, as contemplated by Article 19(1)(*a*) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. The act of manifesting by action or language is one of the meanings. Even a manifestation of an emotion, feeling etc. without words would amount to expression. Communication of emotion and display of talent through music, painting etc. is also a sort of expression. Having regard to the comprehensive meaning of the phrase "expression", voting can be legitimately regarded as a form of expression. Ballot is the instrument by which the voter expresses his choice between candidates or in respect to propositions; and his "vote" is his choice or election,

as expressed by his ballot. "Opinion expressed, resolution or decision carried, by voting" is one of the meanings given to the expression "vote". The fundamental right of freedom of speech and expression should be broadly construed and it has been so construed all these years. In the light of this, the dictum of the Court that the voter "speaks out or expresses by casting a vote" is apt and well founded. Freedom of voting by expressing preference for a candidate is nothing but freedom of expressing oneself in relation to a matter of prime concern to the country and the voter himself. (Para 95)

Ramanatha Aiyar's Law Lexicon; *Collin's Dictionary of English Language* (1983 Reprint); *A Dictionary of Modern Legal Usage*, 2nd Edn., by A. Garner Bryan; *New Oxford Illustrated Dictionary*, *relied on*

For the first time in *Assn. for Democratic Reforms case* which is the forerunner to the present controversy, the right to know about the candidate standing for election has been brought within the sweep of Article 19(1)(*a*). By doing so, a new dimension has been given to the right embodied in Article 19(1)(*a*) through a creative approach dictated by the need to improve and refine the political process of election. In carving out this right, the Court had not traversed a beaten track but took a fresh path. The right to information evolved by the Supreme Court in the said case is qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though to a certain extent, there may be overlapping. The right to information of the voter/citizen is sought to be enforced against an individual who intends to become a public figure and the information relates to his personal matters. Secondly, that right cannot materialize without the State's intervention. The State or its instrumentality has to compel a subject to make the information available to the public, by means of legislation or orders having the force of law. It does not stand on the same footing as right to telecast and the right to view sports and games or other items of entertainment through television. (Para 92)

Till a candidate gets elected and enters the House, it would not be appropriate to refer to him as a public functionary. Therefore, the right to know about a public act done by a public functionary is not the same thing as the right to know about the antecedents of the candidate contesting for election. Nevertheless, the conclusion reached by the Court that the voter has such a right and that the right falls within the realm of freedom of speech and expression guaranteed by Article 19(1)(*a*) can be justified on good and substantial grounds. (Para 92)

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428, *relied on*

Per Dharmadhikari, J. *(concurring)*

To control the ill-effects of money power and muscle power the Commissions recommend that election system should be overhauled and drastically changed lest democracy would become a teasing illusion to common citizens of this country. Not only a half-hearted attempt in the direction of reform of the election system is to be taken, as has been done by the present legislation by amending some provisions of the Act here and there, but a much improved election system is required to be evolved to make the election process both transparent and accountable so that influence of tainted money and physical force of criminals do not make democracy a farce — the citizen's fundamental "right to information" should be recognised and fully effectuated. (Para 127)

H. **Constitution of India — Art. 19(1)(a) — Right to vote and contest in elections to Parliament or Legislative Assembly — Held, per Shah, J., it is a statutory right — But it does not affect or abridge voter's right to know antecedents of candidates contesting the election which forms part of Art. 19(1)(a) and is an independent right — Therefore S. 33-B, RPA which abridges this right is unconstitutional — Per Reddi, J., right to vote is a constitutional right and not merely a statutory right — Freedom of voting, as distinct from right to vote, is a facet of Art. 19(1)(a) and it is accomplished by casting the vote — Election — Representation of the People Act, 1951 — S. 33-B (as inserted in 2002) — Constitutionality of**

It was submitted that right to elect or to be elected is a pure and simple statutory right and in the absence of statutory provision neither has the citizen a right to elect nor has he a right to be elected because such right is neither a fundamental right nor a common law right. It is, therefore, submitted that it cannot be held that a voter has any fundamental right of knowing the antecedents/assets of a candidate contesting the election. It was also submitted that on the basis of the decision rendered by the Supreme Court, the Act is amended by the impugned Ordinance/Amendment Act. However, for the directions which are left out, the presumption would be — it is a deliberate omission on the part of the legislature and, therefore, there is no question of it being violative of Article 19(1)(*a*).

Held :

Per Shah, J.

The right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right but is a creature of statute or special law and would be subject to the limitations envisaged therein. (Para 57)

In an election petition challenging the validity of election, rights of the parties are governed by the statutory provisions for setting aside the election but this would not mean that a citizen who has right to be a voter and elect his representative in the Lok Sabha or Legislative Assembly has no fundamental right. Such a voter who is otherwise eligible to cast vote to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter III. Merely because a citizen is a voter or has a right to elect his representative as per the Act, his fundamental rights could not be abridged, controlled or restricted by statutory provisions except as permissible under the Constitution. If any statutory provision abridges the fundamental right, that statutory provision would be void. It also requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution. The right of an adult to take part in election process either as a voter or a candidate could be restricted by a valid law which does not offend constitutional provisions. It cannot be held that as there is deliberate omission in law, the right of the voter to know the antecedents of the candidates, which is his fundamental right under Article 19(1)(*a*), is taken away. (Para 62)

C. Narayanaswamy v. *C.K. Jaffer Sharief*, 1994 Supp (3) SCC 170; *N.P. Ponnuswami* v. *Returning Officer*, AIR 1952 SC 64 : 1952 SCR 218; *G. Narayanaswami* v. *G. Pannerselvam*, (1972) 3 SCC 717; *Jyoti Basu* v. *Debi Ghosal*, (1982) 1 SCC 691 : (1982) 3 SCR 318, *distinguished*

The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by the Supreme Court are against the statutory provisions is, on

the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern respective rights of the parties. However, voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them. Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures. (Para 78)

The freedom of speech and expression is basic to and indivisible from a democratic polity. It includes right to impart and receive information. Restriction to the said right could be only as provided in Article 19(2). Right of a voter to know the biodata of a candidate is the foundation of democracy. The old dictum — let the people have the truth and the freedom to discuss it and all will go well with the Government — should prevail. The true test for deciding the validity of the Act is — whether it takes away or abridges fundamental rights of the citizens. If there is direct abridgment of the fundamental right of freedom of speech and expression, the law would be invalid. If the provisions of the law violate the constitutional provisions, they have to be struck down and that is what is required to be done in the present case. It is made clear that no provision is nullified on the ground that the Court does not approve the underlying policy of the enactment. (Paras 69 to 71 and 66)

The contention that Members of Parliament or the Legislature are representatives of the people and are supposed to know and be aware of what is good and bad for the people and that the Court cannot sit in judgment over their wisdom cannot be accepted. (Para 63)

P. Nalla Thampy Terah (Dr) v. *Union of India*, 1985 Supp SCC 189, *distinguished*

Per Reddi, J.

The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely the RP Act. That is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple.

(Paras 96 and 97)

Lily Thomas v. *Speaker, Lok Sabha*, (1993) 4 SCC 234, *doubted*

A distinction has to be drawn between the conferment of the right to vote on fulfilment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression

of the voter. That is where Article 19(1)(*a*) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. (Para 97)

Jamuna Prasad Mukhariya v. *Lachhi Ram*, AIR 1954 SC 686 : (1955) 1 SCR 608, *distinguished*

The contention that if the right to information is culled out from Article 19(1)(*a*) and read as an integral part of that right, it is fraught with dangerous consequences inasmuch as the grounds of reasonable restrictions which could be imposed are by far limited and therefore, the Government may be constrained to part with certain sensitive informations which would not be in public interest to disclose, raises the larger question whether apart from the heads of restriction envisaged by sub-article (2) of Article 19, certain inherent limitations should not be read into the article, if it becomes necessary to do so in national or societal interest. Whenever rare situations of the kind anticipated by the counsel arise, the Constitution and the courts are not helpless in checking the misuse and abuse of the freedom. Such a check need not necessarily be found strictly within the confines of Article 19(2). (Paras 99 and 101)

Gitlow v. *New York*, 69 L Ed 1138 : 268 US 652 (1925), *relied on*

Per Dharmadhikari, J.

This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act. (Para 127)

I. **Constitution of India — Art. 145(3) — Question regarding interpretation of Art. 19(1)(a) finally decided by Supreme Court in *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294 by taking the view that right of voters to know antecedents/assets of candidates contesting election is part of Art. 19(1)(a) — No other substantial question of law requiring interpretation of the Constitution surviving — Held, matter not required to be referred to a five-Judge Bench of the Supreme Court**

Per Shah, J. *(Dharmadhikari, J. concurring)*

The submission that the question involved in these petitions is a substantial question of law as to the interpretation of the Constitution and, therefore, the matter may be referred to a Bench consisting of five Judges is totally misconceived. No such contention was raised before the Supreme Court in *Assn. for Democratic Reforms case* in which it arrived at the conclusion that for survival of the democracy, right of the voter to know antecedents of a candidate would be part and parcel of his fundamental right. It would be the basis for free and fair election which is a basic structure of the Constitution. Therefore, the question relating to interpretation of Article 19(1)(*a*) is concluded and there is no other question which requires interpretation of the Constitution. The question raised before the present Bench has been finally decided and no other substantial question of law regarding the interpretation of the Constitution survives. Hence, the matter is not required to be referred to a five-Judge Bench. [Paras 28, 32 and 78(c)]

Union of India v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294, *referred to*

State of J&K v. *Thakur Ganga Singh*, AIR 1960 SC 356 : (1960) 2 SCR 346; *Sardar Sardul Singh Caveeshar* v. *State of Maharashtra* sub nom *Bhagwan Swarup Lal Bishan Lal* v. *State of Maharashtra*, AIR 1965 SC 682 : (1964) 2 SCR 378 : (1965) 1 Cri LJ 608, *relied on*

Per Reddi, J. *(concurring)*

It would have been in the fitness of things if the case (*UOI* v. *Assn. for Democratic Reforms*) was referred to the Constitution Bench as per the mandate of Article 145(3) for the reason that a new dimension has been added to the concept of freedom of expression so as to bring within its ambit a new species of right to information. Apparently, no such request was made at the hearing and all parties invited the decision of the three-Judge Bench. The law has been laid down therein elevating the right to secure information about a contesting candidate to the position of a fundamental right. That decision has been duly taken note of by Parliament and acted upon by the Election Commission. It has attained finality. No decision of the Supreme Court goes counter to the accepted proposition that the fundamental right of freedom of expression sets in when a voter actually casts his vote. At this stage, it would not be appropriate to set the clock back and refer the matter to the Constitution Bench to test the correctness of the view taken in that case. (Paras 92 and 97)

Union of India v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294, *referred to*

J. **Constitution of India — Art. 19(1)(a) — Voters' right to know antecedents/assets of candidates contesting election — Directions given to Election Commission by Supreme Court in *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294 requiring the candidates to disclose certain information relating to their antecedents/assets — Pursuant thereto, Election Commission issuing direction to reject nomination paper on furnishing wrong or incomplete information or suppression of material information by any candidate and to hold a summary enquiry at the time of scrutiny of nomination — Held, such direction unjustified**

Held :

Per Shah, J.

While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in *Assn. for Democratic Reforms case* the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets and liabilities, it would be very difficult for the Returning Officer to consider the truth or otherwise of the details furnished with reference to the "documentary proof". Very often, in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. If sufficient time is provided, he may be able to produce proof to contradict the objector's version. It is true that the aforesaid directions issued by the Election Commission are not under challenge but at the same time *prima facie* it appears that the Election Commission is required to revise its instructions in the light of directions issued in *Assn. for Democratic Reforms case* and as provided under the Representation of the People Act and its Third Amendment. (Para 73)

K. **Constitution of India — Art. 32 — Notice — Vires of an Act challenged — Union of India made party-respondent and Solicitor-General appearing on its behalf before the Court — Held, per Shah, J., service of notice to Attorney-General would only be an empty formality (Para 75)**

L. **Constitution of India — Arts. 32, 136 & 226 — Political question — Court should not shirk from its duty of performing its function merely because it has political thicket [Para 9(c)]**

State of Rajasthan v. *Union of India*, (1977) 3 SCC 592; *B.R. Kapur* v. *State of T.N.*, (2001) 7 SCC 231, *relied on*

R-M/TZ/27923/C

Advocates who appeared in this case :

K.N. Raval, Additional Solicitor-General, Rajinder Sachar, P.P. Rao and Ranjit Kumar, Senior Advocates (Sanjay Parikh, A.N. Singh, R. Chandrachud, Ms Vandana Sudan, Abinash K. Misra, Prashant Bhushan, Sanjeev K. Kapoor, T.K. Naveen, Vishal Gupta, Anil Kr. Mittal, G. Balaji, Ms Kamini Jaiswal, Ms Bina Gupta, Ms Divya Roy, Prateek Jalan, Preetesh Kapur, S.N. Terdal and S. Muralidhar, Advocates, with them) for the appearing parties.

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The Judgments of the Court were delivered by

SHAH, J.— These writ petitions under Article 32 of the Constitution of India have been filed challenging the validity of the Representation of the People (Amendment) Ordinance, 2002 (4 of 2002) ("the Ordinance" for short) promulgated by the President of India on 24-8-2002†.

2. There was an era when a powerful or a rich or a strong or a dacoit aged more than 60 years married a beautiful young girl despite her resistance. Except to weep, she had no choice of selecting her mate. To a large extent, such situation does not prevail today. Now, young persons are selecting mates of their choice after verifying full details thereof. Should we not have such a situation in selecting a candidate contesting elections? In a vibrant democracy — is it not required that a little voter should know the biodata of his/her would-be rulers, law-makers or destiny-makers of the nation?

3. Is there any necessity of keeping in the dark the voters that their candidate was involved in criminal cases of murder, dacoity or rape *or* has acquired the wealth by unjustified means? Maybe, that he is acquitted because the investigating officer failed to unearth the truth or because the witnesses turned hostile. In some cases, apprehending danger to their life, witnesses fail to reveal what was seen by them.

4. Is there any necessity of permitting candidates or their supporters to use unaccounted money during elections? If assets are declared, would it not amount to having some control on unaccounted election expenditure?

5. It is equally true that right step in that direction is taken by amending the Representation of the People Act, 1951 (hereinafter referred to as "the Act") on the basis of judgment rendered by this Court in *Union of India* v. *Assn. for Democratic Reforms*[1]. Still however, question to be decided is — whether it is in accordance with what has been declared in the said judgment.

6. After concluding hearing of the arguments on 23-10-2002, the matter was reserved for pronouncement of judgment. Before the judgment could be pronounced, the Ordinance was repealed and on 28-12-2002, the Representation of the People (Third Amendment) Act, 2002†† ("the Amended Act" for short) was notified to come into force with retrospective effect. Thereafter, an amendment application was moved before us challenging the validity of Section 33-B of the Amendment Act which was granted because there is no change in the cause of action nor in the wording of Section 33-B of the Amended Act, validity of which is under challenge. At the request of learned counsel for the respondent Union of India, time to file additional counter was granted and the matter was further heard on 31-1-2003.

† **Ed.**: For text of this Ordinance see 2003 Current Central Legislation, Part II, at p. 3

1 (2002) 5 SCC 294 [**Ed.**: Coram : M.B. Shah, B.P. Singh and H.K. Sema, JJ.]

†† **Ed.**: For text of this Act see 2003 Current Central Legislation, Part II, at p. 131

7. It is apparent that there is no change in the wording (even fullstop or comma) of Sections 33-A and 33-B of the Ordinance and Sections 33-A and 33-B of the Amended Act. The said sections read as under:

"33-A. *Right to information.*—(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of Section 33, also furnish the information as to whether—

(*i*) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(*ii*) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of Section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the Returning Officer the nomination paper under sub-section (1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The Returning Officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

33-B. *Candidate to furnish information only under the Act and the rules.*—Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

8. For the directions, which were issued in *Assn. for Democratic Reforms*[1] it is contended that some of them are incorporated by the statutory provisions but with regard to the remaining directions it has been provided therein that no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act or the rules made thereunder, despite the directions issued by this Court. Therefore, the aforesaid Section 33-B is under challenge.

9. At the outset, we would state that such exercise of power by the legislature giving similar directions was undertaken in the past and this Court in unequivocal words declared that the legislature in this country has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts. For this, we would quote some observations on the settled legal position having direct bearing on the question involved in these matters:

(*A*) Dealing with the validity of the Bombay Provincial Municipal Corporation (Gujarat Amendment and Validating Provisions) Ordinance,

1969, this Court in *Municipal Corpn. of the City of Ahmedabad* v. *New Shrock Spg. and Wvg. Co. Ltd.*[2] observed thus: (SCC p. 285, para 7)

> "*7. This is a strange provision*. Prima facie that provision appears to command the Corporation to refuse to refund the amount illegally collected despite the orders of this Court and the High Court. The State of Gujarat was not well advised in introducing this provision. That provision attempts to make a direct inroad into the judicial powers of the State. The Legislatures under our Constitution have within the prescribed limits, powers to make laws prospectively as well as retrospectively. *By exercise of those powers, the Legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective. But no Legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by courts.*" (emphasis supplied)

Further, Khanna, J. in *Indira Nehru Gandhi* v. *Raj Narain*[3] succinctly and without any ambiguity observed thus: (SCC p. 84, para 190)

> "*190*. A declaration that an order made by a court of *law is void is normally part of the judicial function and is not a legislative function*. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and *legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the court to be void or not binding....*" (emphasis supplied)

It is also settled law that the legislature may remove the defect which is the cause for invalidating the law by the Court by appropriate legislation if it has power over the subject-matter and competence to do so under the Constitution.

(*B*) Secondly, we would reiterate that the primary duty of the judiciary is to uphold the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory. Interpretation should be in consonance with the constitutional provisions, which envisage a republic democracy. Survival of democracy depends upon free and fair election. It is true that the elections are fought by political parties, yet election would be a farce if the voters are unaware of the antecedents of candidates contesting elections. Their decision to vote either in favour of *A* or *B* candidate would be without any basis. Such election would be neither free nor fair.

2 (1970) 2 SCC 280
3 1975 Supp SCC 1

For this purpose, we would refer to the observations made by Khanna, J. in *Kesavananda Bharati* v. *State of Kerala*[4] which read thus: (SCC p. 821, para 1535)

> "That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the courtroom, that Judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. *Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision.*" (emphasis supplied)

(*C*) It is also equally settled law that the court should not shirk its duty of performing its function merely because it has political thicket. Following observations (of Bhagwati, J., as he then was) made in *State of Rajasthan* v. *Union of India*[5] (at SCC pp. 660-61, para 149) were referred to and relied upon by this Court in *B.R. Kapur* v. *State of T.N.*[6]: (SCC p. 302, para 53)

> "*53.* ... 'But merely because the question has a political complexion, that by itself is no ground why the court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. ... *So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so*. It is necessary to assert in the clearest possible terms, particularly in the context of recent history, that the Constitution is *suprema lex*, the paramount law of the land, and there is no department or branch of Government above or beyond it.' " (emphasis supplied)

Submissions

10. It is contended by learned Senior Counsel Mr Rajinder Sachar and Mr P.P. Rao for the petitioners that Section 33-B is, on the face of it, arbitrary and unjustifiable. It is their contention that the aforesaid section is on the face of it void as a law cannot be passed which violates/abridges the fundamental rights of the citizens/voters, declared and recognised by this Court. It is submitted that without exercise of the right to know the relevant antecedents of the candidate, it will not be possible to have free and fair elections. Therefore, the impugned section violates the very basic features of the

4 (1973) 4 SCC 225
5 (1977) 3 SCC 592
6 (2001) 7 SCC 231

Constitution, namely, republic democracy. For having free and fair elections, anywhere in the territory of this country, it is necessary to give effect to the voters' fundamental right as declared by this Court in the above judgment.

11. It has been contended that, in our country, at present about 700 legislators and twenty-five to thirty Members of Parliament are having criminal record. It is also contended that almost all political parties declare that persons having criminal record should not be given tickets, yet for one or the other reason, political parties under some compulsion give tickets to some persons having criminal records and some persons having no criminal records get support from criminals. It is contended by learned Senior Counsel Mr Sachar that by issuing the Ordinance, the Government has arrogated to itself the power to decide unilaterally for nullifying the decision rendered by this Court without considering whether it can pass legislation which abridges fundamental right guaranteed under Article 19(1)(*a*). It is his submission that the Ordinance is issued and thereafter the Act is amended because it appears that the Government is interested in having uninformed ignorant voters.

12. Contra, learned Solicitor-General Mr Kirit N. Raval and learned Senior Counsel Mr Arun Jaitley appearing on behalf of the intervener, with vehemence, submitted that the aforesaid Ordinance/Amended Act is in consonance with the judgment rendered by this Court and the vacuum pointed out by the said judgment is filled in by the enactment. It is also contended by learned Senior Counsel Mr Jaitley that voters' right to know the antecedents of the candidate is not part of the fundamental rights, but it is a derivative fundamental right on the basis of interpretation of Article 19(1)(*a*) given by this Court. It is submitted that the Ordinance/Amended Act is in public interest and, therefore, it cannot be held to be illegal or void. In support of their contentions, learned counsel for the parties have referred to various decisions rendered by this Court.

Whether Ordinance/Amended Act covers the directions issued by this Court

13. Before dealing with the rival submissions, we would refer to the following directions (SCC p. 322, para 48) given by this Court in *Assn. for Democratic Reforms case*[1]:

> "*48*. The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:
>
> (*1*) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.
>
> (*2*) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is

framed or cognizance is taken by the court of law. If so, the details thereof.

(*3*) The assets (immovable, movable, bank balance etc.) of a candidate and of his/her spouse and that of dependants.

(*4*) Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues.

(*5*) The educational qualifications of the candidate."

14. The learned counsel for the respondent submitted that the directions issued by this Court are, to a large extent, implemented by the aforesaid Amended Act. It is true that some part of the directions issued by this Court are implemented. Comparative chart on the basis of judgment and Ordinance would make the position clear:

Subject	***Discussion in judgment dated 2-5-2002***	***Provisions under the impugned Ordinance/Amended Act***
Past criminal record	*Para 48(1)* All past convictions/ acquittals/discharges, whether punished with imprisonment or fine.	*Section 33-A(1)(ii)* Conviction of any offence (except Section 8 offence) and sentenced to imprisonment of one year or more. No such declaration in case of acquittals or discharge. (Section 8 offences to be disclosed in nomination paper itself)
Pending criminal cases	*Para 48(2)* Prior to six months of filing of nomination, whether the candidate has been accused of any criminal offence punishable with imprisonment of two years or more, and charge framed or cognizance taken.	*Section 33-A(1)(i)* Any case in which the candidate has been accused of any criminal offence punishable with imprisonment of two years or more, and charge framed.
Assets and liabilities	*Para 48(3)* Assets of candidate (contesting the elections), spouse and dependants.	*Section 75-A* *No such declaration by a candidate who is contesting election.* After election, elected candidate is required to furnish information relating to him as well as his spouse and dependent children's assets to the Speaker of the House of the People.

	Para 48(4)	
	Liabilities, particularly to Government and public financial institutions.	No provision is made for the candidate contesting election. However, after election, Sections 75-A(1)(*ii*) and (*iii*) provide for elected candidate.
Educational qualifications	*Para 48(5)* To be declared	No provision.
Breach of provisions	No direction regarding consequences of non-compliance.	*Section 125-A* Creates an offence punishable by imprisonment for six months or fine for failure to furnish affidavit in accordance with Section 33-A, as well as for falsity or concealment in affidavit or nomination paper. *Section 75-A(5)* Wilful contravention of rules regarding asset disclosure may be treated as breach of privilege of the House.

15. From the aforesaid chart, it is clear that a candidate is not required to disclose (*a*) the cases in which he is acquitted or discharged of criminal offence(s); (*b*) his assets and liabilities; and (*c*) his educational qualification. With regard to assets, it is sought to be contended that under the Act the candidate would be required to disclose the same to the Speaker after being elected. It is also contended that once the person is acquitted or discharged of any criminal offence, there is no necessity of disclosing the same to the voters.

Finality of the judgment

16. Firstly, it is to be made clear that the judgment rendered by this Court in *Assn. for Democratic Reforms*[1] has attained finality. The voters' right to know the antecedents of the candidates is based on interpretation of Article 19(1)(*a*) which provides that all citizens of this country would have fundamental right to "freedom of speech and expression" and this phrase is construed to include fundamental right to know relevant antecedents of the candidate contesting the elections.

17. Further, even though we are not required to justify the directions issued in the aforesaid judgment, to make it abundantly clear that it is not *ipse dixit* and is based on sound foundation, it can be stated thus:

— Democratic republic is part of the basic structure of the Constitution.

— For this, free and fair periodical elections based on adult franchise are a must.

— For having unpolluted healthy democracy, citizens-voters should be well informed.

18. So, the foundation of a healthy democracy is to have well-informed citizens-voters. The reason to have right of information with regard to the antecedents of the candidate is that voter can judge and decide in whose favour he should cast his vote. It is the voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. For assets or liability, the voter may exercise his discretion in favour of a candidate whose liability is minimum and/or there are no overdues of public financial institution or government dues. From this information, it would be, to some extent, easy to verify whether unaccounted money is utilized for contesting election and whether a candidate is contesting election for getting rich or after being elected to what extent he became richer. Exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. A little man — a citizen — a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as an MP or MLA. On occasions, it is stated that we are not having such intelligent voters. This is no excuse. This would be belittling a little citizen/voter. He himself may be illiterate but still he would have the guts to decide in whose favour he should cast his vote. In any case, for having free and fair election and not to convert democracy into a mobocracy and mockery or a farce, information to voters is a necessity.

19. Further, in context of Section 8 of the Act, the Law Commission in its Report submitted in 1999 observed as under:

> "5.1. The Law Commission had proposed that in respect of offences provided in sub-section (1) [except the offence mentioned in clause (*b*) of sub-section (1)], a mere framing of charge should serve as a disqualification. This provision was sought to be made in addition to existing provision which provides for disqualification arising on account of conviction. *The reason for this proposal was that most of the offences mentioned in sub-section (1) are either election offences or serious offences affecting the society and that the persons committing these offences are mostly persons having political clout and influence.* Very often these elements are supported by unsocial persons or group of persons, with the result that no independent witness is prepared to come forward to depose against such persons. In such a situation, it is proving extremely difficult to obtain conviction of these persons. *It was suggested that inasmuch as charges were framed by a court* on the basis of the material placed before it by the *prosecution including the material disclosed by the charge-sheet, providing for disqualification on the ground of framing of the charge-sheet would be neither unjust nor unreasonable or arbitrary.*"

The Law Commission also observed:

"6.3.1. There has been mounting corruption in all walks of public life. *People are generally lured to enter politics or contest elections for getting rich overnight. Before allowing people to enter public life the public has a right to know the antecedents of such persons.* The existing conditions in which people can freely enter the political arena without demur, especially without the electorate knowing about any details of the assets possessed by the candidate are far from satisfactory. *It is essential by law to provide that a candidate seeking election shall furnish the details of all his assets (movable/immovable) possessed by him/her, wife/husband, dependent relations, duly supported by an affidavit.*

6.3.2. Further, in view of recommendations of the Law Commission for debarring a candidate from contesting an election if charges have been framed against him by a court in respect of offences mentioned in the proposed Section 8-B of the Act, it is also necessary for a candidate seeking to contest election to furnish details regarding criminal case, if any, pending against him, including a copy of the FIR/complaint and any order made by the court concerned.

6.3.3. In order to achieve the aforesaid objectives, it is essential to insert a new Section 4-A after the existing Section 4 of the Representation of the People Act, 1951, as follows:

'4-A. *Qualification for membership of the House of the People, the Council of States, Legislature Assembly of a State or Legislative Council.*—A person shall not be qualified to file his nomination for contesting any election for a seat in the House of the People, the Council of States, Legislature Assembly or Legislative Council of a State unless he or she files—

(*a*) a declaration of all his assets (movable/immovable) possessed by him/her, his/her spouse and dependent relations, duly supported by an affidavit, and

(*b*) a declaration as to whether any charge in respect of any offence referred to in Section 8-B has been framed against him by any criminal court.' "

20. It is to be stated that similar views are expressed in the Report submitted in March 2002 by the *National Commission to Review the Working of the Constitution* appointed by the Union Government for reviewing the working of the Constitution. Relevant recommendations are as under:

"*Successes and failures*

4.4. During the last half-a-century, there have been thirteen general elections to the Lok Sabha and a much large number to various State Legislative Assemblies. We can take legitimate pride in that these have been successful and generally acknowledged to be free and fair. *But, the experience has also brought to the fore many distortions, some very serious, generating a deep concern in many quarters. There are constant*

references to the unhealthy role of money power, muscle power and mafia power and to criminalisation, corruption, communalism and casteism.

4.12. *Criminalisation*

4.12.2. The Commission recommends that the Representation of the People Act be amended to provide that *any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a Member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence and unless cleared during that one year period*, he shall continue to remain so disqualified till the conclusion of the trial for that offence. In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. If any candidate violates this provision, he should be disqualified. Also, if a party puts up such a candidate with knowledge of his antecedents, it should be derecognised and deregistered.

4.12.3. Any person convicted for any heinous crime like murder, rape, smuggling, dacoity etc. should be permanently debarred from contesting for any political office.

4.12.8. The Commission feels that the proposed provision laying down that a person charged with an offence punishable with imprisonment which may extend to five years or more should be disqualified from contesting elections after the expiry of a period of one year from the date the charges were framed in a court of law should equally be applicable to sitting Members of Parliament and State Legislatures as to any other such person.

4.14. *High cost of elections and abuse of money power*

4.14.1. One of the most critical problems in the matter of electoral reforms is the hard reality that for contesting an election one needs large amounts of money. The limits of expenditure prescribed are meaningless and almost never adhered to. *As a result, it becomes difficult for the good and the honest to enter legislatures. It also creates a high degree of compulsion for corruption in the political arena.* This has progressively polluted the entire system. Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. *The sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc.* No matter how we look at it, citizens are directly affected because apart from compromised governance, the huge money spent on elections pushes up the cost of everything in the country. It also leads to unbridled

corruption and the consequences of widespread corruption are even more serious than many imagine. Electoral compulsions for funds become the foundation of the whole superstructure of corruption.

4.14.3. Transparency in the context of election means both the sources of finance as well as their utilization as are listed out in an audited statement. If the candidates are required to list the sources of their income, this can be checked back by the Income Tax Authorities. *The Commission recommends that the political parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend. These accounts should be monitored through a system of checking and cross-checking through the income tax returns filed by the candidates, parties and their well-wishers. At the end of the election each candidate should submit an audited statement of expenses under specific heads.* EC should devise specific formats for filing such statements so that fudging of accounts becomes difficult. Also, the audit should not only be mandatory but it should be enforced by the Election Commission.

Any violation or misreporting should be dealt with strongly.

4.14.4. *The Commission recommends that every candidate at the time of election must declare his assets and liabilities along with those of his close relatives. Every holder of a political position must declare his assets and liabilities along with those of his close relations annually. Law should define the term 'close relatives'.*

4.14.6. *All candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public.* Further, as a follow-up action, the particulars of the assets and liabilities so given should be audited by a special authority created specifically under law for the purpose. *Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office.*

Candidates owing government dues

4.23. *It is recommended that all candidates should be required to clear government dues before their candidatures are accepted.* This pertains to payment of taxes and bills and unauthorised occupation of accommodation and availing of telephones and other government facilities to which they are no longer entitled. The fact that matters regarding government dues in respect of the candidate are pending before a court of law should be no excuse."

21. Mr P.P. Rao, learned Senior Counsel has drawn our attention to the "*Ethics Manual for Members, Officers and Employees of the U.S. House of Representatives*", which *inter alia* provides as under:

"*Financial interests and investments of Members and employees, as well as those of candidates for the House of Representatives, may present*

conflicts of interest with official duties. Members and employees need not, however, divest themselves of assets upon assuming their positions, nor must Members disqualify themselves from voting on issues that generally affect their personal financial interests. Instead, public financial disclosure provides a means of monitoring and deterring conflicts.

All Members, officers, and employees are prohibited from improperly using their official positions for personal gain. Members, officers, candidates, and certain employees must file annual financial disclosure statements, summarizing financial information concerning themselves, their spouses, and dependent children. Such statements must indicate outside compensation, holdings and business transactions, generally for the calendar year preceding the filing date.

Who must file

The following individuals must file financial disclosure statements:

— Members of the House of Representatives;

— candidates for the House of Representatives;

When to file

Candidates who raise or spend more than $ 5000 for their campaigns must file within 30 days of doing so, or by May 15, whichever is later, but in any event at least 30 days prior to the elections in which they run.

Termination reports must be filed within 30 days of leaving government employment by Members, officers, and employees who file financial disclosure statements.

POLICIES UNDERLYING DISCLOSURE

Members, officers, and certain employees must annually disclose personal financial interests, including investments, income, and liabilities. *Financial disclosure provisions were enacted to monitor and to deter possible conflicts of interest due to outside financial holdings*. Proposals for divestiture of potentially conflicting assets and mandatory disqualification of Members from voting rejected as impractical or unreasonable. *Such disqualification could result in the disenfranchisement of a Member's entire constituency on particular issues*. A Member may often have a community of interests with his constituency, may arguably have been elected because of and to serve these common interests, and thus would be ineffective in representing the real interests of his constituents if he were disqualified from voting on issues touching those matters of mutual concern. In rare instances, the House rule on abstaining from voting may apply where a direct personal interest in a matter exists.

At the other extreme, a conflict of interest becomes corruption when an official uses his position of influence to enhance his personal financial interests. Between these extremes are those ambiguous circumstances which may create a real or potential conflict of interest. The problem is identifying those instances in which an official allows his personal

economic interests to impair his independence of judgment in the conduct of his public duties.

The House has required public financial disclosure by rule since 1968 and by statute since 1978.

SPECIFIC DISCLOSURE REQUIREMENTS

The Ethics in Government Act of 1978 mandated annual financial disclosure by all senior Federal personnel, including all Members and some employees of the House. The Ethics Reform Act of 1989 totally revamped these provisions and condensed what had been different requirements for each branch into one uniform title covering the entire Federal Government. Financial disclosure statements must indicate outside compensation, holdings, and business transactions, generally for the calendar year preceding the filing date. In all instances, filers may disclose additional information or explanation at their discretion."

22. At this stage, it would be worthwhile to note some observations made by the Committee on State Funding of Elections headed by Shri Indrajit Gupta as Chairman and others, which submitted its Report in 1998. In the concluding portion, it has mentioned as under:

"*Conclusion*

1. Before concluding, the Committee cannot help expressing its considered view that its recommendations being limited in nature and confined to only one of the aspects of the electoral reforms may bring about only some cosmetic changes in the electoral sphere. *What is needed, however, is an immediate overhauling of the electoral process whereby elections are freed from evil influence of all vitiating factors, particularly, criminalisation of politics. It goes without saying that money power and muscle power go together to vitiate the electoral process and it is their combined effect which is sullying the purity of electoral contests and affecting free and fair elections.* Meaningful electoral reforms in other spheres of electoral activity are also urgently needed if the present recommendations of the Committee are to serve the intended useful purpose."

23. From the aforesaid Reports of the Law Commission, National Commission to Review the Working of the Constitution, conclusion drawn in the Report of Shri Indrajit Gupta and the Ethics Manual applicable in an advance democratic country, it is apparent that for saving the democracy from the evil influence of criminalisation of politics, for saving the election from muscle and money power, for having true democracy and for controlling corruption in politics, the candidate contesting the election should be asked to disclose his antecedents including assets and liabilities. Thereafter, it is for the voters to decide in whose favour he should cast his vote.

24. Further, we would state that this Court has construed "freedom of speech and expression" in various decisions and on the basis of tests laid therein, directions were issued. In short, this aspect is discussed in paras 31, 32 and 33 of our earlier judgment which read as under: (SCC pp. 314-15)

"*31*. In *State of U.P.* v. *Raj Narain*[7] the Constitution Bench considered a question — whether privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareli, Uttar Pradesh? The Court observed that: (SCC p. 453, para 74)

> 'The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.'

The Court pertinently observed as under: (SCC p. 453, para 74)

> '*74*. In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries*. They are entitled to know the particulars of every public transaction in all its bearing.'

32. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[8] this Court dealt with the validity of customs duty on the newsprint in context of Article 19(1)(*a*). The Court observed (in para 32) thus: (SCC p. 664)

> '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.'

33. The Court further referred (in SCC p. 665, para 35) the following observations made by this Court in *Romesh Thappar* v. *State of Madras*[9]: (SCR p. 602)

> '(The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But ... "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".'

Again in SCC pp. 685-86, para 68, the Court observed:

> ' "*The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves*." (Per Lord Simon of Glaisdale in *Attorney General* v.

7 (1975) 4 SCC 428
8 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
9 AIR 1950 SC 124 : 1950 SCR 594 : 1950 Cri LJ 1514

Times Newspapers Ltd.[10] Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (*i*) it helps an individual to attain self-fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) *it strengthens the capacity of an individual in participating in decision-making* and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. *All members of society should be able to form their own beliefs* and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. *Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.*' " (emphasis supplied)

25. Even with regard to telecasting of events such as cricket, football and hockey etc. this Court in *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[11] held (at SCC p. 224, para 75) that "the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained". The Court further held as under: (SCC p. 229, para 82)

> "82. ... *True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations.* This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 1/2 per cent of the population has an access to the print media which is not subject to pre-censorship." (emphasis supplied)

26. The aforesaid passage leaves no doubt that right to participate by casting vote at the time of election would be meaningless unless the voters are well informed about all sides of the issues, in respect of which they are called upon to express their views by casting their votes. Disinformation, misinformation, non-information, all equally create an uninformed citizenry which would finally make democracy a mobocracy and farce. On this aspect, no further discussion is required. However, we would narrate some observations made by Bhagwati, J. (as he then was) in *S.P. Gupta* v. *Union of India*[12] while dealing with the contention of right to secrecy that: (SCC p. 274, para 66) "*There can be little doubt that exposure to public gaze and*

10 (1973) 3 All ER 54 : 1974 AC 273 : (1973) 3 WLR 298 (HL)
11 (1995) 2 SCC 161
12 1981 Supp SCC 87

scrutiny is one of the surest means of achieving a clean and healthy administration." (emphasis supplied) Further, it has been explicitly and lucidly held thus: (SCC p. 273, paras 64-65)

> "*64*. Now it is obvious from the Constitution that we have adopted a democratic form of government. Where a society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their Government is doing. *The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government*. It is only if people know how Government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. 'Knowledge' said James Madison, 'will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular Government without popular information or the means of obtaining it, is but a prologue to a farce or tragedy or perhaps both'. The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the Government is increasingly growing in different parts of the world.
>
> *65*. The demand for openness in the Government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the Government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. *This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the Government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of Government — an attitude and habit of mind. But this important role people can fulfil in a democracy only if it is an open Government where there is full access to information in regard to the functioning of the Government*."
>
> (emphasis supplied)

It was further observed: (SCC p. 275, para 67)

> "*67*. ... The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(*a*). ... The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public

interest. It is in the context of this background that we must proceed to interpret Section 123 of the Indian Evidence Act."

27. From the aforesaid discussion it can be held that it is expected by all concerned and as has been laid down by various decisions of this Court that for survival of true democracy, the voter must be aware of the antecedents of his candidate. Voter has to cast intelligent and rational vote according to his own criteria. A well-informed voter is the foundation of democratic structure. That information to a voter, who is the citizen of this country, is one facet of the fundamental right under Article 19(1)(*a*).

Article 145(3) of the Constitution of India

28. Mr Arun Jaitley, learned Senior Counsel and Mr Kirit N. Raval, learned Solicitor-General submitted that the question involved in these petitions is a substantial question of law as to the interpretation of the Constitution and, therefore, the matter may be referred to a Bench consisting of five Judges.

29. In our view, this contention is totally misconceived. Article 19(1)(*a*) is interpreted in numerous judgments rendered by this Court. After considering various decisions and following tests laid therein, this Court in *Assn. for Democratic Reforms*[1] arrived at the conclusion that for survival of the democracy, right of the voter to know antecedents of a candidate would be part and parcel of his fundamental right. It would be the basis for free and fair election which is a basic structure of the Constitution. Therefore, the question relating to interpretation of Article 19(1)(*a*) is concluded and there is no other question which requires interpretation of the Constitution.

30. Dealing with a similar contention, a five-Judge Bench of this Court in *State of J&K* v. *Thakur Ganga Singh*[13] succinctly held thus: (AIR p. 359, para 7)

> "7. What does interpretation of a provision mean? Interpretation is the method by which the true sense or the meaning of the word is understood. The question of interpretation can arise only if two or more possible constructions are sought to be placed on a provision — one party suggesting one construction and the other a different one. But where the parties agree on the true interpretation of a provision or do not raise any question in respect thereof, it is not possible to hold that the case involves any question of law as to the interpretation of the Constitution. On an interpretation of Article 14, a series of decisions of this Court evolved the doctrine of classification. As we have pointed out, at no stage of the proceedings either the correctness of the interpretation of Article 14 or the principles governing the doctrine of classification have been questioned by either of the parties. Indeed accepting the said doctrine, the appellants contended that there was a valid classification under the rule while the respondents argued contra. The learned Additional Solicitor-General contended, for the first time, before us that the appeal raised a new facet of the doctrine of equality, namely, whether

13 AIR 1960 SC 356 : (1960) 2 SCR 346

an artificial person and a natural person have equal attributes within the meaning of the equality clause, and, therefore, the case involves a question of interpretation of the Constitution. This argument, if we may say so, involves the same contention in a different garb. If analysed, the argument only comes to this: as an artificial person and a natural person have different attributes, the classification made between them is valid. *This argument does not suggest a new interpretation of Article 14 of the Constitution, but only attempts to bring the rule within the doctrine of classification*. We, therefore, hold that the question raised in this case does not involve any question of law as to the interpretation of the Constitution." (emphasis supplied)

31. The aforesaid judgment is referred to and relied upon in *Sardar Sardul Singh Caveeshar* v. *State of Maharashtra*[14].

32. From the judgment rendered by this Court in *Assn. for Democratic Reforms*[1] it is apparent that no such contention was raised by the learned Solicitor-General, who appeared in appeal filed on behalf of the Union of India that question involved in that matter was required to be decided by a five-Judge Bench, as provided under Article 145(3) of the Constitution. The question raised before us has been finally decided and no other substantial question of law regarding the interpretation of the Constitution survives. Hence, the matter is not required to be referred to a five-Judge Bench.

Whether impugned Section 33-B can be considered as validating provision

33. The learned counsel for the respondent submitted that by the impugned legislation, most of the directions issued by the Court are complied with and vacuum pointed out is filled in by the legislation. It is their contention that the legislature did not think it fit that the remaining information as directed by this Court is required to be given by a contesting candidate.

34. This submission is, on the face of it, against well-settled legal position. In a number of decisions rendered by this Court, similar submission is negatived. The legislature has no power to review the decision and set it at naught except by removing the defect which is the cause pointed out by the decision rendered by the Court. If this is permitted it would sound the death knell of the rule of law as observed by this Court in various decisions. In *P. Sambamurthy* v. *State of A.P.*[15] this Court observed: (SCC p. 369, para 4)

"*4*. ... It is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent

14 AIR 1965 SC 682 : (1964) 2 SCR 378 : (1965) 1 Cri LJ 608 sub nom *Bhagwan Swarup Lal Bishan Lal* v. *State of Maharashtra*

15 (1987) 1 SCC 362 : (1987) 2 ATC 502

institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. *Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet to get away with it. The proviso to clause (5) of Article 371-D is therefore clearly violative of the basic structure doctrine.*" (emphasis supplied)

35. In *Cauvery Water Disputes Tribunal, In re*[16] the Court referred to and relied upon the decision in *P. Sambamurthy*[15]. In that case, the Court dealt with the validity of the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 issued by the Government of Karnataka giving overriding effect that notwithstanding anything contained in any order, report or decision of any court or tribunal except the final decision under the provisions of sub-section (2) of Section 5 read with Section 6 of the Inter-State Water Disputes Act, 1956 shall have any effect and held that the Ordinance in question which seeks directly to nullify the order of the Tribunal impinges on the judicial power of the State and is, therefore, ultra vires. After referring to the earlier decisions, the Court observed thus: (SCC pp. 141-42, paras 74 & 76)

"*74.* … it would be unfair to adopt legislative procedure to undo a settlement which had become the basis of a decision of the High Court. *Even if legislation can remove the basis of a decision, it has to do it by alteration of general rights of a class but not by simply excluding the specific settlement which had been held to be valid and enforceable* by a High Court. *The object of the Act was in effect to take away the force of the judgment* of the High Court. The rights under the judgment would be said to arise independently of Article 19 of the Constitution.

* * *

76. The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. *Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.*" (emphasis supplied)

36. Further, in *Municipal Corpn. of the City of Ahmedabad* v. *New Shrock Spg. and Wvg. Co. Ltd.*[2] this Court (in SCC pp. 285-86, para 7) held thus:

"But no Legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by courts. The limits of the power of Legislatures to interfere with the directions issued by courts were considered by several decisions of this

16 1993 Supp (1) SCC 96 (2)

Court. In *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality*[17] our present Chief Justice speaking for the Constitution Bench of the Court observed:

> 'Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. *Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.* Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law.' (emphasis supplied)

In *Mahal Chand Sethia* v. *State of W.B.*[18] Mitter, J., speaking for the Court stated the legal position in these words:

> 'The argument of counsel for the appellant was that *although it was open to the State* Legislature by an Act and the Governor by an ordinance *to amend* the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, *it was incompetent for either of them to validate an order of transfer which had already been quashed* by the issue of a writ of certiorari by the High Court and the order of transfer being virtually dead, could not be resuscitated by the Governor or the Legislature and the validating measures could not touch any adjudication by the Court.
>
> *... A court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the Legislature or if it infringed the rights enshrined in Part III of the Constitution. Needless to add it can strike down or declare invalid any Act or direction of a State Government*

17 (1969) 2 SCC 283
18 1969 UJ (SC) 616

which is not authorised by law. The position of a Legislature is however different. It cannot declare any decision of a court of law to be void or of no effect.' " (emphasis supplied)

37. For the purpose of deciding these petitions, the principles emerging from various decisions rendered by this Court from time to time can *inter alia* be summarised thus:

— the Legislature can change the basis on which a decision is rendered by this Court and change the law in general. However, this power can be exercised subject to constitutional provision, particularly, legislative competence and if it is violative of fundamental rights enshrined in Part III of the Constitution, such law would be void as provided under Article 13 of the Constitution. The legislature also cannot declare any decision of a court of law to be void or of no effect.

38. As stated above, this Court has held that Article 19(1)(*a*) which provides for freedom of speech and expression would cover in its fold right of the voter to know specified antecedents of a candidate, who is contesting election. Once it is held that a voter has a fundamental right to know the antecedents of his candidate, that fundamental right under Article 19(1)(*a*) could be abridged by passing such legislation only as provided under Article 19(2) which provides as under:

"19. *Protection of certain rights regarding freedom of speech, etc.*—(1)

* * *

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

39. So legislative competence to interfere with a fundamental right enshrined in Article 19(1)(*a*) is limited as provided under Article 19(2).

40. Learned counsel for the respondents have not pointed out how the impugned legislation could be justified or saved under Article 19(2).

Derivative fundamental right

41. Learned Senior Counsel Mr Jaitley developed an ingenious submission that as there is no specific fundamental right of the voter to know the antecedents of a candidate, the declaration by this Court of such fundamental right can be held to be derivative, therefore, it is open to the legislature to nullify it by appropriate legislation.

42. In our view, this submission requires to be rejected as there is no such concept of derivative fundamental rights. Firstly, it should be properly understood that the fundamental rights enshrined in the Constitution such as, right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since the last more than 50 years, this Court has interpreted Articles 14, 19

and 21 and given meaning and colour so that the nation can have a truly republic democratic society. This cannot be undone by such an Ordinance/Amended Act. For this, we would refer to the discussion by Mohan, J. in *Unni Krishnan, J.P.* v. *State of A.P.*[19] while considering the ambit of Article 21, he succinctly placed it thus: (SCC pp. 668-69, paras 25-27)

> "*25.* In *Kesavananda Bharati* v. *State of Kerala*[4] Mathew, J. stated therein that the *fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience.* It is relevant in this context to remember that in building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles.
>
> *26.* In *Pathumma* v. *State of Kerala*[20] it has been stated:
>
> '*The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than accentuate their meaning and content by process of judicial construction.... Personal liberty in Article 21 is of the widest amplitude.*'
>
> *27.* In this connection, it is worthwhile to recall what was said of the American Constitution in *Missouri* v. *Holland*[21]:
>
> '[W]hen we are dealing with words that also are constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.' "
>
> (emphasis supplied)

43. Thereafter, the Court pointed out that several unenumerated rights fall within the ambit of Article 21 since personal liberty is of the widest amplitude and categorized them (in SCC pp. 669-70, para 30) thus:

> "(*1*) The right to go abroad. *Satwant Singh Sawhney* v. *D. Ramarathnam, A.P.O.*[22]
>
> (*2*) The right to privacy. *Gobind* v. *State of M.P.*[23] In this case reliance was placed on the American decision in *Griswold* v. *Connecticut*[24] (US at p. 510).
>
> (*3*) The right against solitary confinement. *Sunil Batra* v. *Delhi Admn.*[25] (SCC at p. 545).
>
> (*4*) The right against bar fetters. *Charles Sobraj* v. *Supdt., Central Jail*[26].

19 (1993) 1 SCC 645
20 (1978) 2 SCC 1
21 252 US 416, 433 : 64 L Ed 641 (1919)
22 AIR 1967 SC 1836 : (1967) 3 SCR 525
23 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
24 381 US 479 : 14 L Ed 2d 510 (1965)
25 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
26 (1978) 4 SCC 104 : 1978 SCC (Cri) 542

(*5*) The right to legal aid. *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra*[27].

(*6*) The right to speedy trial. *Hussainara Khatoon (I)* v. *Home Secy., State of Bihar*[28].

(*7*) The right against handcuffing. *Prem Shankar Shukla* v. *Delhi Admn.*[29]

(*8*) The right against delayed execution. *T.V. Vatheeswaran* v. *State of T.N.*[30]

(*9*) The right against custodial violence. *Sheela Barse* v. *State of Maharashtra*[31].

(*10*) The right against public hanging. *Attorney General of India* v. *Lachma Devi*[32].

(*11*) Doctor's assistance. *Parmanand Katara* v. *Union of India*[33].

(*12*) Shelter. *Shantistar Builders* v. *Narayan Khimalal Totame*[34]."

44. Further, learned Senior Counsel Mr Sachar referred to the following decisions of this Court giving meaning to the phrase "freedom of speech and expression":

(*1*) *Romesh Thappar* v. *State of Madras*[9]

Freedom of speech and expression includes freedom of propagation of ideas which is ensured by freedom of circulation.

[AIR Headnote (*ii*)]

(*2*) *Brij Bhushan* v. *State of Delhi*[35]

Pre-censorship of a journal is restriction on the liberty of press.

(AIR para 9)

(*3*) *Hamdard Dawakhana* v. *Union of India*[36]

Advertisements meant for propagation of ideas or furtherance of literature or human thought is a part of freedom of speech and expression. (AIR p. 563, para 17)

(*4*) *Sakal Papers (P) Ltd.* v. *Union of India*[37]

Freedom of speech and expression carries with it the right *to publish* and circulate one's ideas, opinions and views.

(AIR p. 311, para 29)

27 (1978) 3 SCC 544 : 1978 SCC (Cri) 468
28 (1980) 1 SCC 81 : 1980 SCC (Cri) 23
29 (1980) 3 SCC 526 : 1980 SCC (Cri) 815
30 (1983) 2 SCC 68 : 1983 SCC (Cri) 342
31 (1983) 2 SCC 96 : 1983 SCC (Cri) 353
32 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413
33 (1989) 4 SCC 286 : 1989 SCC (Cri) 721
34 (1990) 1 SCC 520
35 AIR 1950 SC 129 : (1950) 51 Cri LJ 1525
36 AIR 1960 SC 554 : 1960 Cri LJ 735
37 AIR 1962 SC 305

(*5*) *Bennett Coleman and Co.* v. *Union of India*[38]

Freedom of press means right of citizens *to speak, publish and express their views as well as right of people to read.* (SCC p. 813, para 45)

(*6*) *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[8]

"Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (*i*) it helps an individual to attain self-fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) it strengthens the capacity of an individual in participating in decision-making and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change." (SCC p. 686, para 68)

(*7*) *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana*[39]

Freedom of speech and expression includes right of *citizens to exhibit films on Doordarshan.* (SCC p. 414, para 5)

(*8*) *S. Rangarajan* v. *P. Jagjivan Ram*[40]

Freedom of speech and expression means the right to express one's opinion by words of mouth, writing, printing, picture *or in any other manner*. It would thus include the freedom of communication and the right to propagate or publish opinion. (SCC p. 582, para 8)

(*9*) *LIC of India* v. *Manubhai D. Shah*[41]

Freedom of speech and expression is a natural right which a human being acquires by birth. It is, therefore, a basic human right (Article 19 of Universal Declaration of Human Rights relied on.) Every citizen, therefore, has a right to air his or her views through the printing and/or electronic media or through any communication method. (SCC pp. 648 & 650, paras 5 & 8)

(*10*) *Secy., Ministry of Information and Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[11]

"*3*. (*b*) The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. *A successful democracy posits an 'aware' citizenry*. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them." (emphasis supplied) (SCC p. 300, para 201)

(*11*) *S.P. Gupta* v. *Union of India*[12]

Right to know is implicit in the right of free speech and expression. *Disclosure of information regarding functioning of the Government must be the rule.* (SCC p. 275, para 67)

38 (1972) 2 SCC 788
39 (1988) 3 SCC 410
40 (1989) 2 SCC 574
41 (1992) 3 SCC 637

(*12*) *State of U.P.* v. *Raj Narain*[7]

Freedom of speech and expression includes the right to know every public act, everything that is done in a public way, by their public functionaries. (SCC p. 453, para 74)

(*13*) *Dinesh Trivedi, MP* v. *Union of India*[42]

Freedom of speech and expression *includes right of the citizens to know about the affairs of the Government*. (SCC p. 313, para 16)

45. There are many other judgments which are not required to be reiterated in this judgment. All these developments of law giving meaning to freedom of speech and expression or personal liberty are not required to be reconsidered nor could there be legislation so as to nullify such interpretation except as provided under the exceptions to fundamental rights.

46. Learned counsel for the respondents relied upon *R. Rajagopal* v. *State of T.N.*[43] and submitted that in the said case the Court observed that right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. In that case, reliance was placed on *Kharak Singh* v. *State of U.P.*[44], *Gobind* v. *State of M.P.*[23] and other decisions of English and American courts and thereafter, the Court held that the petitioners have a right to publish what they alleged to be a life story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy for the consequences in accordance with law. For this purpose, the Court held that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy. The Court also pointed out an exception namely: [SCC p. 650, para 26(2)]

> "This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media."

47. From the aforesaid observations learned Solicitor-General Mr Raval and learned Senior Counsel Mr Jaitley contended that rights which are derivatives would be subject to reasonable restriction. Secondly, it was sought to be contended that by insisting for declaration of assets of a candidate, right

42 (1997) 4 SCC 306
43 (1994) 6 SCC 632
44 AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329

to privacy is affected. In our view, the aforesaid decision nowhere supports the said contention. This Court only considered — to what extent a citizen would have right to privacy under Article 21. The Court itself has carved out the exceptions and restrictions on absolute right of privacy. Further, by declaration of a fact, which is a matter of public record that a candidate was involved in various criminal cases, there is no question of infringement of any right of privacy. Similarly, with regard to the declaration of assets also, a person having assets or income is normally required to disclose the same under the Income Tax Act or such similar fiscal legislation. Not only this, but once a person becomes a candidate to acquire public office, such declaration would not affect his right of privacy. This is the necessity of the day because of statutory provisions of controlling widespread corrupt practices as repeatedly pointed out by all concerned including various reports of the Law Commission and other committees as stated above.

48. Even the Prime Minister of India in one of his speeches has observed to the same effect. This has been reproduced in *B.R. Kapur case*[6] by Pattanaik, J. (as he then was) (in SCC p. 314, para 74) as under:

> "Mr Divan in course of his arguments, had raised some submissions on the subject — '*Criminalisation of Politics*' and participation of criminals in the electoral process as candidates and in that connection, he had brought to our notice the order of the Election Commission of India dated 28-8-1997. … — 'Whither Accountability', published in *The Pioneer*, Shri Atal Behari Vajpayee had called for a national debate on all the possible alternatives for systematic changes to cleanse our democratic governing system of its present mess. He has expressed his dissatisfaction that neither Parliament nor the State Vidhan Sabhas are doing, with any degree of competence or commitment, what they are primarily meant to do: legislative function. According to him, barring exceptions, those who get elected to these democratic institutions are neither trained, formally or informally, in law-making nor do they seem to have an inclination to develop the necessary knowledge and competence in their profession. He has further indicated that those individuals in society who are generally interested in serving the electorate and performing legislative functions are finding it increasingly difficult to succeed in today's electoral system and the *electoral system has been almost totally subverted by money power, muscle power, and vote bank considerations of castes and communities.* Shri Vajpayee also had indicated that the corruption in the governing structures has, therefore, corroded the very core of elective democracy. According to him, the certainty of scope of corruption in the governing structure has heightened opportunism and unscrupulousness among political parties, causing them to marry and divorce one another at will, seek opportunistic alliances and coalitions often without the popular mandate. *Yet they capture and survive in power due to inherent systematic flows.* He further stated that casteism, corruption and politicisation have eroded the integrity and efficacy of our civil service structure also. *The manifestos,*

policies, programmes of the political parties have lost meaning in the present system of governance due to lack of accountability."
(emphasis supplied)

49. Further, this Court while dealing with the election expenses observed in *Common Cause* v. *Union of India*[45] thus: (SCC p. 761, para 18)

"*18.* … Flags go up, walls are painted, and hundreds of thousands of loudspeakers play out the loud exhortations and extravagant promises. VIPs and VVIPs come and go, some of them in helicopters and air taxis. *The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come nobody knows.* In a democracy where rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted." (emphasis supplied)

50. To combat this naked display of unaccounted/black money by the candidate, declaration of assets is likely to have a check on violation of the provisions of the Act and other relevant Acts including the Income Tax Act.

51. Further, the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent and in the fields provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a republic and the democratic way of life by parliamentary institutions based on free and fair elections.

52. In *P.V. Narasimha Rao* v. *State (CBI/SPE)*[46] this Court observed thus: (SCC p. 673, para 47)

"*47.* … Parliamentary democracy is a part of the basic structure of the Constitution. … It is settled law that in interpreting the constitutional provisions the court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution. (See: *Sub-Committee on Judicial Accountability* v. *Union of India*[47], SCC at p. 719.)"

53. In *C. Narayanaswamy* v. *C.K. Jaffer Sharief*[48] the Court observed (in SCC p. 186, para 22) thus:

"If the call for 'purity of elections' is not to be reduced to a lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to plead ignorance about the persons who have made contributions and investments for the success of

45 (1996) 2 SCC 752
46 (1998) 4 SCC 626 : 1998 SCC (Cri) 1108
47 (1991) 4 SCC 699
48 1994 Supp (3) SCC 170

the candidate concerned at the election. But this has to be taken care of by Parliament."

54. In *T.N. Seshan, CEC of India* v. *Union of India*[49] this Court observed thus: (SCC p. 623, para 10)

> "*10.* The preamble of our Constitution proclaims that we are a Democratic Republic Democracy being the basic feature of our constitutional set-up, there can be no two opinions that free and fair elections to our legislative bodies alone would guarantee the growth of a healthy democracy in the country."

55. As observed in *Kesavananda Bharati case*[4] the fundamental rights themselves have no fixed content and it is also to be stated that the attempt of the Court should be to expand the reach and ambit of the fundamental rights. The Constitution is required to be kept young, energetic and alive. In this view of the matter, the contention raised by the learned counsel for the respondents, that as the phrase "freedom of speech and expression" is given the meaning to include citizens' right to know the antecedents of the candidates contesting election of MP or MLA, such rights could be set at naught by the legislature, requires to be rejected.

Right to vote is a statutory right

56. Learned counsel for the respondents vehemently submitted that right to elect or to be elected is a pure and simple statutory right and in the absence of statutory provision neither has the citizen a right to elect nor has he a right to be elected because such right is neither a fundamental right nor a common law right. It is, therefore, submitted that it cannot be held that a voter has any fundamental right of knowing the antecedents/assets of a candidate contesting the election. Learned Solicitor-General Mr Raval also submitted that on the basis of the decision rendered by this Court, the Act is amended by the impugned Ordinance/Amendment Act. However, for the directions which are left out, the presumption would be — it is deliberate omission on the part of the legislature and, therefore, there is no question of it being violative of Article 19(1)(*a*). He submitted that law pertaining to election depends upon statutory provisions. Right to vote, elect or to be elected depends upon statutory rights. For this purpose, he referred to the decision in *N.P. Ponnuswami* v. *Returning Officer*[50], *G. Narayanaswami* v. *G. Pannerselvam*[51] and *C. Narayanaswamy* v. *C.K. Jaffer Sharief*[48].

57. There cannot be any dispute that the right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right but is a creature of statute or special law and would be subject to the limitations envisaged therein. It is for the legislature to examine and provide provisions relating to validity of election and the jurisdiction of the Court would be limited in accordance with such law which creates such Election Tribunal.

49 (1995) 4 SCC 611
50 AIR 1952 SC 64 : 1952 SCR 218
51 (1972) 3 SCC 717

58. In the case of *N.P. Ponnuswami*[50] a person whose nomination paper was rejected, filed a writ of certiorari, which was dismissed on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of Article 329(*b*) of the Constitution.

59. In the case of *G. Narayanaswami*[51] this Court was dealing with an election petition wherein the issue which was required to be decided was whether the respondent was not qualified to stand for election to the graduates' constituency on all or any of the grounds set out by the petitioner in paras 7 to 9 of the election petition. The Court referred to Article 171 and thereafter observed that the term "electorate" used in Articles 171(3)(*a*), (*b*) and (*c*) has neither been defined by the Constitution nor in any enactment by Parliament. The Court thereafter referred to the definition of "elector" given in Section 2(1)(*a*) of the RP Act and held that considering the language as well as the legislative history of Articles 171 and 173 of the Constitution and Section 6 of the RP Act, there could be a presumption of deliberate omission of the qualification that the representative of the graduates should also be a graduate.

60. Similarly, in *C. Narayanaswamy case*[48] the Court was dealing with the validity of an election of a candidate on the ground of alleged corrupt practice as provided under Section 123(1)(*A*) of the Act and in that context the Court held that right of a person to question the validity of an election is dependent on conditions prescribed in the different sections of the Act and the rules framed thereunder. The Court thereafter held that as the Act does not provide that any expenditure incurred by a political party or by any other association or body of persons or any individual other than the candidate or his election agent, it shall not be deemed to be expenditure in connection with the election or authorised by a candidate or his election agent for the purpose of sub-section (1) of Section 77 read with Rule 90.

61. Learned counsel further referred to the decision in *Jyoti Basu* v. *Debi Ghosal*[52] wherein similar observations are made by this Court while deciding election petition: (SCC p. 696, para 8)

> "*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. … Concepts familiar 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. … 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

52 (1982) 1 SCC 691 : (1982) 3 SCR 318

equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?"

62. It has to be stated that in an election petition challenging the validity of election, rights of the parties are governed by the statutory provisions for setting aside the election but this would not mean that a citizen who has right to be a voter and elect his representative in the Lok Sabha or Legislative Assembly has no fundamental right. Such a voter who is otherwise eligible to cast vote to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter III. Merely because a citizen is a voter or has a right to elect his representative as per the Act, his fundamental rights could not be abridged, controlled or restricted by statutory provisions except as permissible under the Constitution. If any statutory provision abridges fundamental right, that statutory provision would be void. It also requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution. The right of an adult to take part in election process either as a voter or a candidate could be restricted by a valid law which does not offend constitutional provisions. Hence, the aforesaid judgments have no bearing on the question whether a citizen who is a voter has fundamental right to know the antecedents of his candidate. It cannot be held that as there is deliberate omission in law, the right of the voter to know the antecedents of the candidates, which is his fundamental right under Article 19(1)(*a*), is taken away.

63. Mr Raval, learned Solicitor-General submitted that an enactment cannot be struck down on the ground that the Court thinks it unjustified. Members of Parliament or the Legislature are representatives of the people and are supposed to know and be aware of what is good and bad for the people. The Court cannot sit in judgment over their wisdom. He relied upon the decision rendered by this Court in *P. Nalla Thampy Terah (Dr)* v. *Union of India*[53] wherein the Court considered the validity of Section 77(1) of the Act and referred to *Report of the Santhanam Committee on Prevention of Corruption*, which says: (SCC p. 198, para 10)

> "The public belief in the prevalence of corruption at high political levels has been strengthened by the manner in which funds are collected by political parties, especially at the time of elections. Such suspicions attach not only to the ruling party but to all parties, as often the opposition can also support private vested interests as well as members of the government party. It is, therefore, essential that the conduct of political parties should be regulated in this matter by strict principles in relation to collection of funds and electioneering. It has to be frankly recognised that political parties cannot be run and elections cannot be fought without large funds. But these funds should come openly from the supporters or sympathisers of the parties concerned."

53 1985 Supp SCC 189

64. The Court also referred to various decisions and thereafter held thus: (SCC pp. 199-200, para 13)

> "*13*. We have referred to this large data in order to show that the influence of big money on the election process is regarded universally as an evil of great magnitude. *But then, the question which we, as Judges, have to consider is whether the provision contained in Explanation 1 suffers from any constitutional infirmity and, particularly, whether it violates Article 14.* On that question we find it difficult, reluctantly though, to accept the contention that Explanation 1 offends against the right to equality. Under that provision, (*i*) a political party or (*ii*) any other association or body of persons or (*iii*) any individual, other than the candidate or his election agent, can incur expenses, without any limitation whatsoever, in connection with the election of a candidate. Such expenses are not deemed to be expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purposes of Section 77(1)." (emphasis supplied)

65. Learned Solicitor-General heavily relied upon para 19, wherein the Court observed thus: (SCC p. 204)

> "*19*. The petitioner is not unjustified in criticising the provision contained in Explanation 1 as diluting the principle of free and fair elections, which is the cornerstone of any democratic polity. *But, it is not for us to lay down policies in matters pertaining to elections. If the provisions of the law violate the Constitution, they have to be struck down.* We cannot, however, negate a law on the ground that we do not approve of the policy which underlies it." (emphasis supplied)

66. From the aforesaid discussion it is apparent that the Court in that case was dealing with the validity of Explanation 1 and was deciding whether it suffered from any constitutional infirmity, particularly, whether it was violative of Article 14. The question of Article 19(1)(*a*) was not required to be considered and the Court had not even touched it. At the same time, there cannot be any dispute that if the provisions of the law violate the constitutional provisions, they have to be struck down and that is what is required to be done in the present case. It is made clear that no provision is nullified on the ground that the Court does not approve the underlying policy of the enactment.

67. As against this, Mr Sachar, learned Senior Counsel rightly referred to a decision rendered by this Court in *Bennett Coleman & Co.* v. *Union of India*[38] where similar contentions were raised and negatived while imposing restrictions by the Newspaper Control Order. The Court's relevant discussion is as under: (SCC pp. 809-10, paras 31-33)

> "*31*. Article 19(1)(*a*) provides that all citizens shall have the right to freedom of speech and expression, Article 19(2) states that nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said

sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. *Although Article 19(1)(a) does not mention the freedom of the press, it is the settled view of this Court that freedom of speech and expression includes freedom of the press and circulation.*

32. In the *Express Newspapers case*[8] it is said that there can be no doubt that liberty of the press is an essential part of the freedom of speech and expression guaranteed by Article 19(1)(*a*). The press has the right of free propagation and free circulation without any previous restraint on publication. *If a law were to single out the press for laying down prohibitive burdens on it that would restrict the circulation, penalise its freedom of choice as to personnel, prevent newspapers from being started and compel the press to government aid. This would violate Article 19(1)(a) and would fall outside the protection afforded by Article 19(2).*

33. In *Sakal Papers case*[37] it is said that the freedom of speech and expression guaranteed by Article 19(1) gives a citizen the right to propagate and publish his ideas to disseminate them, to circulate them either by words of mouth or by writing. This right extends not merely to the matter it is entitled to circulate but also to the volume of circulation. In *Sakal Papers case*[37] the Newspaper (Price and Page) Act, 1956 empowered the Government to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertisement matter. The Government fixed the maximum number of pages that might be published by a newspaper according to the price charged. The Government prescribed the number of supplements that would be issued. This Court held that the Act and the Order placed restraints on the freedom of the press to circulate. *This Court also held that the freedom of speech could not be restricted for the purpose of regulating the commercial aspects of activities of the newspapers*."

(emphasis supplied)

68. The Court also dealt with the contention that newsprint policy does not directly deal with the fundamental right mentioned in Article 19(1)(*a*). It was also contended that regulatory statutes which do not control the content of speech but incidentally limit the ventured exercise are not regarded as a type of law. Any incidental limitation or incidental restriction on freedom of speech is permissible as the same is essential to the furtherance of important governmental interest in regulating speech and freedom. The Court negatived the said contention and in para 39 held thus: (SCC p. 812)

"*39*. Mr Palkhivala said that the tests of pith and substance of the subject-matter and of direct and of incidental effect of the legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and correct approach to interpretation of legislative measures and State action in relation to fundamental rights. *The true test is whether the*

effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgement of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject-matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject-matter may be different." (emphasis supplied)

The Court observed in SCC para 80 at p. 823:

"The faith in the popular Government rests on the old dictum, 'let the people have the truth and the freedom to discuss it and all will go well'. The liberty of the press remains an 'Art of the Covenant' in every democracy."

69. Further, the freedom of speech and expression, as has been held repeatedly, is basic to and indivisible from a democratic polity. It includes right to impart and receive information. (*Secy., Min. of Information & Broadcasting*[11].) Restriction to the said right could be only as provided in Article 19(2). This aspect is also discussed in SCC para 151 (p. 270) thus:

"*151.* Article 19(1)(*a*) declares that all citizens shall have the right of freedom of speech and expression. Clause (2) of Article 19, at the same time, provides that nothing in sub-clause (*i*) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with the foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence. The grounds upon which reasonable restrictions can be placed upon the freedom of speech and expression are designed firstly to ensure that the said right is not exercised in such a manner as to threaten the sovereignty and integrity of India, security of the State, friendly relations with the foreign States, public order, decency or morality. Similarly, the said right cannot be so exercised as to amount to contempt of court, defamation or incitement of an offence. Existing laws providing such restrictions are saved and the State is free to make laws in future imposing such restrictions. The grounds aforesaid are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully and peacefully be exercised by the citizens of this country."

70. Hence, in our view, right of a voter to know the biodata of a candidate is the foundation of democracy. The old dictum — let the people have the truth and the freedom to discuss it and all will go well with the Government — should prevail.

71. The true test for deciding the validity of the Act is — whether it takes away or abridges fundamental rights of the citizens. If there is direct abridgement of the fundamental right of freedom of speech and expression, the law would be invalid.

72. Before parting with the case, there is one aspect which is to be dealt with. After the judgment in *Assn. for Democratic Reforms case*[1] the Election Commission gave certain directions in implementation of the judgment by its Order No. 3/ER/2002/JS-II/Vo1-III, dated 28-6-2002. In the course of arguments, learned Solicitor-General as well as learned Senior Counsel appearing for the intervener (BJP) pointed out that Direction 4 is beyond the competence of the Election Commission and moreover, it is not necessary to give effect to the judgment of this Court. The said direction reads as follows:

> "Furnishing of any wrong or incomplete information or suppression of any material information by any candidate in or from the said affidavit may also result in the rejection of his nomination paper where such wrong or incomplete information or suppression of material information is considered by the Returning Officer to be a defect of substantial character, apart from inviting penal consequences under the Indian Penal Code for furnishing wrong information to a public servant or suppression of material facts before him:
>
> Provided that only such information shall be considered to be wrong or incomplete or amounting to suppression of material information as is capable of easy verification by the Returning Officer by reference to documentary proof adduced before him in the summary inquiry conducted by him at the time of scrutiny of nominations under Section 36(2) of the Representation of the People Act, 1951, and only the information so verified shall be taken into account by him for further consideration of the question whether the same is a defect of substantial character."

73. While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in *Assn. for Democratic Reforms case*[1] the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets and liabilities, it would be very difficult for the Returning Officer to consider the truth or otherwise of the details furnished with reference to the "documentary proof". Very often, in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. If sufficient time is provided, he may be able to produce proof to contradict the objector's version. It is true that the aforesaid directions issued by the Election Commission are not under challenge but at the same time *prima facie* it appears that the Election Commission is required to revise its instructions in the light of directions issued in *Assn. for Democratic Reforms case*[1] and as provided under the Representation of the People Act and its Third Amendment.

74. Finally, after the amendment application was granted, the following additional contentions were raised:

> *1*. Notice should be issued to the Attorney-General as vires of the Act is challenged.

2. Parliament in its wisdom and after due deliberation has amended the Act and has also incorporated the directions issued by this Court in its earlier judgment in *Assn. for Democratic Reforms*[1] including the direction for declaration of assets and liabilities of every elected candidate for a House of Parliament. They are also required to declare assets of their spouse and dependent children.

75. The contention that notice is required to be issued to the Attorney-General as vires of the Act is challenged, is of no substance because "Union of India" is the party-respondent and on its behalf learned Solicitor-General is appearing before the Court. He has forcefully raised the contentions which were required to be raised at the time of hearing of the matter. So, service of notice to the learned Attorney-General would be nothing but empty formality and the contention is raised for the sake of raising such contention.

76. Further, we have also reproduced certain recommendations of the National Commission to Review the Working of the Constitution in the earlier paragraphs and have also relied upon the same. In the Report, the Commission has recommended that any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a Member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence. The Commission has also recommended that every candidate at the time of election must declare his assets and liabilities along with those of his close relatives and all candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public. Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office. Many such other recommendations are reproduced in earlier paragraphs.

77. With regard to the second contention, it has already been dealt with in previous paragraphs.

78. What emerges from the above discussion can be summarised thus:

(*A*) The legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective but the legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the court. A declaration that an order made by a court of law is void is normally a part of the judicial function. The legislature cannot declare that decision rendered by the Court is not binding or is of no effect.

It is true that the legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision. This exercise of power is subject to constitutional provision, therefore, it cannot enact a law which is violative of fundamental right.

(*B*) Section 33-B which provides that notwithstanding anything contained in the judgment of any court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish

any such information in respect of his election which is not required to be disclosed or furnished under the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as this Court has held that the voter has a fundamental right under Article 19(1)(*a*) to know the antecedents of a candidate for various reasons recorded in the earlier judgment as well as in this judgment.

The Amended Act does not wholly cover the directions issued by this Court. On the contrary, it provides that a candidate would not be bound to furnish certain information as directed by this Court.

(*C*) The judgment rendered by this Court in *Assn. for Democratic Reforms*[1] has attained finality, therefore, there is no question of interpreting constitutional provision which calls for reference under Article 145(3).

(*D*) The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by this Court are against the statutory provisions is, on the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern respective rights of the parties. However, voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them. Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures.

(*E*) It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. During the last more than half a decade, it has been so done by this Court consistently. There cannot be any distinction between the fundamental rights mentioned in Chapter III of the Constitution and the declaration of such rights on the basis of the judgments rendered by this Court.

79. In the result, Section 33-B of the Amended Act is held to be illegal, null and void. However, this judgment would not have any retrospective effect but would be prospective. Writ petitions stand disposed of accordingly.

P. VENKATARAMA REDDI, J.— The width and amplitude of the right to information about the candidates contesting elections to Parliament or the State Legislature in the context of the citizen's right to vote broadly falls for consideration in these writ petitions under Article 32 of the Constitution.

While I respectfully agree with the conclusion that Section 33-B of the Representation of the People Act, 1951 does not pass the test of constitutionality, I have come across a limited area of disagreement on certain aspects, especially pertaining to the extent of disclosures that could be insisted upon by the Court in the light of legislation on the subject. Moreover, the importance and intricacies of the subject-matter and the virgin ground trodden by this Court in *Union of India* v. *Assn. for Democratic Reforms*[1] to bring the right to information of the voter within the sweep of Article 19(1)(*a*) has impelled me to elucidate and clarify certain crucial aspects. Hence, this separate opinion.

I. (1) Freedom of expression and right to information

81. In the Constitution of our democratic Republic, among the fundamental freedoms, freedom of speech and expression shines radiantly in the firmament of Part III. We must take legitimate pride that this cherished freedom has grown from strength to strength in the post-independence era. It has been constantly nourished and shaped to new dimensions in tune with the contemporary needs by the constitutional courts. Barring a few aberrations, the executive government and the political parties too have not lagged behind in safeguarding this valuable right which is the insignia of the democratic culture of a nation. Nurtured by this right, press and electronic media have emerged as powerful instruments to mould the public opinion and to educate, entertain and enlighten the public.

82. Freedom of speech and expression, just as the equality clause and the guarantee of life and liberty, has been very broadly construed by this Court right from the 1950s. It has been variously described as a "basic human right", "a natural right" and the like. It embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help formation of one's opinion and viewpoint and debates on matters of public concern. The importance which our Constitution-makers wanted to attach to this freedom is evident from the fact that reasonable restrictions on that right could be placed by law only on the limited grounds specified in Article 19(2), not to speak of inherent limitations of the right.

83. In due course of time, several species of rights unenumerated in Article 19(1)(*a*) have branched off from the genus of the article through the process of interpretation by this Apex Court. One such right is the "right to information". Perhaps, the first decision which has adverted to this right is *State of U.P.* v. *Raj Narain*[7]. "The right to know", it was observed (at SCC p. 453, para 74) by Mathew, J.

> "which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security".

It was said very aptly: (SCC p. 453, para 74)

> "*74*. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few

secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries."

84. The next milestone which showed the way for concretizing this right is the decision in *S.P. Gupta* v. *Union of India*[12] in which this Court dealt with the issue of High Court Judges' transfer. Bhagwati, J. observed: (SCC p. 275, para 67)

> "The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(*a*). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception...."

85. People's right to know about governmental affairs was emphasized in the following words: (SCC p. 273, para 64)

> "No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. It is only if people know how Government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy."

86. These two decisions have recognized that the right of the citizens to obtain information on matters relating to public acts flows from the fundamental right enshrined in Article 19(1)(*a*). The pertinent observations made by the learned Judges in these two cases were in the context of the question whether the privilege under Section 123 of the Evidence Act could be claimed by the State in respect of the Blue Book in the first case i.e. *Raj Narain case*[7] and the file throwing light on the consultation process with the Chief Justice, in the second case. Though the scope and ambit of Article 19(1)(*a*) vis-à-vis the right to information did not directly arise for consideration in those two landmark decisions, the observations quoted supra have a certain amount of relevance in evaluating the nature and character of the right.

87. Then, we have the decision in *Dinesh Trivedi* v. *Union of India*[42]. This Court was confronted with the issue whether background papers and investigatory reports which were referred to in *Vohra Committee's Report* could be compelled to be made public. The following observations of Ahmadi, C.J. are quite pertinent: (SCC p. 313, para 16)

> "*16.* In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is, by no means, absolute."

88. The proposition expressed by Mathew, J. in *Raj Narain case*[7] was quoted with approval.

89. The next decision which deserves reference is the case of *Secy., Ministry of I&B* v. *Cricket Assn. of Bengal*[11]. Has an organizer or producer of

any event a right to get the event telecast through an agency of his choice, whether national or foreign? That was the primary question decided in that case. It was highlighted that the right to impart and receive information is a part of the fundamental right under Article 19(1)(*a*) of the Constitution. On this point, Sawant, J. had this to say at SCC p. 251, para 122(*ii*):

> "*122.* (*ii*) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(*a*) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property...."

90. Jeevan Reddy, J. spoke more or less in the same voice: (SCC p. 300, para 201)

> "*3.* (*b*) The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them."

91. A conspectus of these cases would reveal that the right to receive and impart information was considered in the context of privilege pleaded by the State in relation to confidential documents relating to public affairs and the freedom of electronic media in broadcasting/telecasting certain events.

I. (2) Right to information in the context of the voter's right to know the details of contesting candidates and the right of the media and others to enlighten the voter

92. For the first time in *Union of India* v. *Assn. for Democratic Reforms*[1] which is the forerunner to the present controversy, the right to know about the candidate standing for election has been brought within the sweep of Article 19(1)(*a*). There can be no doubt that by doing so, a new dimension has been given to the right embodied in Article 19(1)(*a*) through a creative approach dictated by the need to improve and refine the political process of election. In carving out this right, the Court had not traversed a beaten track but took a fresh path. It must be noted that the right to information evolved by this Court in the said case is qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though to a certain extent, there may be overlapping. The right to information of the voter/citizen is sought to be enforced against an individual who intends to become a public figure and the information relates to his personal matters. Secondly, that right cannot materialize without the State's intervention. The State or its instrumentality has to compel a subject to make the information available to the public, by means of legislation or orders having the force of law. With respect, I am unable to share the view that it stands on the same footing as right to telecast

and the right to view sports and games or other items of entertainment through television (vide observations at para 38 of *Assn. for Democratic Reforms case*[1]). One more observation at SCC p. 314, para 30 to the effect that "the decision-making process of a voter would include his right to know about public functionaries who are required to be elected by him" needs explanation. Till a candidate gets elected and enters the House, it would not be appropriate to refer to him as a public functionary. Therefore, the right to know about a public act done by a public functionary to which we find reference in *Raj Narain case*[7] is not the same thing as the right to know about the antecedents of the candidate contesting the election. Nevertheless, the conclusion reached by the Court that the voter has such a right and that the right falls within the realm of freedom of speech and expression guaranteed by Article 19(1)(*a*) can be justified on good and substantial grounds. To this aspect, I will advert a little later. Before that, I would like to say that it would have been in the fitness of things if the case (*UOI* v. *Assn. for Democratic Reforms*[1]) was referred to the Constitution Bench as per the mandate of Article 145(3) for the reason that a new dimension has been added to the concept of freedom of expression so as to bring within its ambit a new species of right to information. Apparently, no such request was made at the hearing and all parties invited the decision of the three-Judge Bench. The law has been laid down therein elevating the right to secure information about a contesting candidate to the position of a fundamental right. That decision has been duly taken note of by Parliament and acted upon by the Election Commission. It has attained finality. At this stage, it would not be appropriate to set the clock back and refer the matter to the Constitution Bench to test the correctness of the view taken in that case. I agree with my learned Brother Shah, J. in this respect. However, I would prefer to give reasons of my own — may not be very different from what the learned Judge had expressed, to demonstrate that the proposition laid down by this Court rests on a firm constitutional basis.

93. I shall now proceed to elucidate as to how the right to know the details about the contesting candidate should be regarded as a part of the freedom of expression guaranteed by Article 19(1)(*a*). This issue has to be viewed from more than one angle — from the point of view of the voter, the public viz. representatives of the press, organizations such as the petitioners which are interested in taking up public issues and thirdly, from the point of view of the persons seeking election to the legislative bodies.

94. The trite saying that "democracy is for the people, of the people and by the people" has to be remembered forever. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by this Court in *Lily*

Thomas v. *Speaker, Lok Sabha*[54] (SCC pp. 236-37, para 2) quoting from *Black's Law Dictionary*. The citizens of the country are enabled to take part in the government through their chosen representatives. In a parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The people's representatives fill the role of law-makers and custodians of the Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large. The moment they put in papers for contesting the election, they are subjected to public gaze and public scrutiny. The character, strength and weakness of the candidate is widely debated. Nothing is therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus twofold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. To scuttle the flow of information — relevant and essential — would affect the electorate's ability to evaluate the candidate. Not only that, the information relating to the candidates will pave the way for public debate on the merits and demerits of the candidates. When once there is public disclosure of the relevant details concerning the candidates, the press, as a media of mass communication and voluntary organizations vigilant enough to channel the public opinion on right lines will be able to disseminate the information and thereby enlighten and alert the public at large regarding the adverse antecedents of a candidate. It will go a long way in promoting the freedom of speech and expression. That goal would be accomplished in two ways. It will help the voter who is interested in seeking and receiving information about the candidate to form an opinion according to his or her conscience and best of judgment and secondly, it will facilitate the press and voluntary organizations in imparting information on a matter of vital public concern. An informed voter — whether he acquires information directly by keeping track of disclosures or through the press and other channels of communication — will be able to fulfil his responsibility in a more satisfactory manner. An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus, the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. In turn, it would lead to the preservation of the integrity of

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electoral process which is so essential for the growth of democracy. Though I do not go to the extent of remarking that the election will be a farce if the candidates' antecedents are not known to the voters, I would say that such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicized and openly debated.

95. The problem can be approached from another angle. As observed by this Court in *Assn. for Democratic Reforms case*[1] a voter "speaks out or expresses by casting vote". Freedom of expression, as contemplated by Article 19(1)(*a*) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. The act of manifesting by action or language is one of the meanings given in *Ramanatha Aiyar's Law Lexicon* (edited by Justice Y.V. Chandrachud). Even a manifestation of an emotion, feeling etc. without words would amount to expression. The example given in *Collin's Dictionary of English Language* (1983 Reprint) is: "tears are an expression of grief", is quite apposite. Another shade of meaning is: "a look on the face that indicates mood or emotion; e.g.: a joyful expression". Communication of emotion and display of talent through music, painting etc. is also a sort of expression. Having regard to the comprehensive meaning of the phrase "expression", voting can be legitimately regarded as a form of expression. Ballot is the instrument by which the voter expresses his choice between candidates or in respect to propositions; and his "vote" is his choice or election, as expressed by his ballot (vide *A Dictionary of Modern Legal Usage,* 2nd Edn., by A. Garner Bryan). "Opinion expressed, resolution or decision carried, by voting" is one of the meanings given to the expression "vote" in the *New Oxford Illustrated Dictionary*. It is well settled and it needs no emphasis that the fundamental right of freedom of speech and expression should be broadly construed and it has been so construed all these years. In the light of this, the dictum of the Court that the voter "speaks out or expresses by casting a vote" is apt and well founded. I would only reiterate and say that freedom of voting by expressing preference for a candidate is nothing but freedom of expressing oneself in relation to a matter of prime concern to the country and the voter himself.

I. (3) Right to vote is a constitutional right though not a fundamental right but right to make choice by means of ballot is part of freedom of expression

96. The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The Constituent Assembly Debates reveal that the idea to treat the voting right as a fundamental right was dropped; nevertheless, it was decided to provide for it elsewhere in the Constitution. This move found its expression in Article 326 which enjoins that

the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one* years of age, and is not otherwise disqualified under the Constitution or law on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice — shall be entitled to be registered as voter at such election.

However, case after case starting from *Ponnuswami case*[50] characterized it as a statutory right. "The right to vote or stand as a candidate for election", it was observed in *Ponnuswami case*[50] (AIR p. 71, para 18) "is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it". It was further elaborated in the following words:

> "Strictly speaking, it is the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

97. In *Jyoti Basu* v. *Debi Ghosal*[52] this Court again pointed out in no uncertain terms that: (SCC p. 696, para 8)

> "*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."

With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely the RP Act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned Solicitor-General that the right to vote not being a fundamental right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met. Here, a distinction has to be drawn between the conferment of the right to vote on fulfilment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(*a*) is attracted. Freedom of voting as distinct from right to vote is thus a

* Now 18 years

species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. None of the decisions of this Court wherein the proposition that the right to vote is a pure and simple statutory right was declared and reiterated, considered the question whether the citizen's freedom of expression is or is not involved when a citizen entitled to vote casts his vote in favour of one or the other candidate. The issues that arose in *Ponnuswami case*[50] and various cases cited by the learned Solicitor-General fall broadly within the realm of procedural or remedial aspects of challenging the election or the nomination of a candidate. None of these decisions, in my view, go counter to the proposition accepted by us that the fundamental right of freedom of expression sets in when a voter actually casts his vote. I, therefore, find no merit in the submission made by the learned Solicitor-General that these writ petitions have to be referred to a larger Bench in view of the apparent conflict. As already stated, the factual matrix and legal issues involved in those cases were different and the view, we are taking, does not go counter to the actual ratio of the said decisions rendered by the eminent Judges of this Court.

98. Reliance has been placed by the learned Solicitor-General on the Constitution Bench decision in *Jamuna Prasad Mukhariya* v. *Lachhi Ram*[55]. That was a case of special appeal to this Court against the decision of an Election Tribunal. Apart from assailing the finding of the Tribunal on the aspect of "corrupt practice", Sections 123(5) and 124(5) (as they stood then) of the RP Act were challenged as ultra vires Article 19(1)(*a*). The former provision declared the character assassination of a candidate as a major corrupt practice and the latter provision made an appeal to vote on the ground of caste a minor corrupt practice. The contention that these provisions impinged on the freedom of speech and expression was unhesitatingly rejected. The Court observed that those provisions did not stop a man from speaking. They merely prescribed conditions which must be observed if a citizen wanted to enter Parliament. It was further observed that the right to stand as a candidate and contest an election is a special right created by the statute and can only be exercised on the conditions laid down by the statute. In that context, the Court made an observation that the fundamental right chapter had no bearing on the right to contest the election which is created by the statute and the appellant had no fundamental right to be elected as a Member of Parliament. If a person wants to get elected, he must observe the rules laid down by law. So holding, those sections were held to be *intra vires*. I do not think that this decision which dealt with the contesting candidate's rights and obligations has any bearing on the freedom of expression of the voter and the public in general in the context of elections. The remark that "the fundamental right chapter has no bearing on a right like this created by statute" cannot be divorced from the context in which it was made.

55 AIR 1954 SC 686 : (1955) 1 SCR 608

99. The learned Senior Counsel appearing for one of the interveners (BJP) has advanced the contention that if the right to information is culled out from Article 19(1)(*a*) and read as an integral part of that right, it is fraught with dangerous consequences inasmuch as the grounds of reasonable restrictions which could be imposed are by far limited and therefore, the Government may be constrained to part with certain sensitive informations which would not be in public interest to disclose. This raises the larger question whether apart from the heads of restriction envisaged by sub-article (2) of Article 19, certain inherent limitations should not be read into the article, if it becomes necessary to do so in national or societal interest. The discussion on this aspect finds its echo in the separate opinion of Jeevan Reddy, J. in *Cricket Assn. case*[11]. The learned Judge was of the view that the freedom of speech and expression cannot be so exercised as to endanger the interest of the nation or the interest of the society, even if the expression "national interest" or "public interest" has not been used in Article 19(2). It was pointed out that such implied limitation has been read into the First Amendment of the US Constitution which guarantees the freedom of speech and expression in unqualified terms.

100. The following observations of the US Supreme Court in *Gitlow* v. *New York*[56] are very relevant in this context: (US p. 666)

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom."

101. Whenever the rare situations of the kind anticipated by the learned counsel arise, the Constitution and the courts are not helpless in checking the misuse and abuse of the freedom. Such a check need not necessarily be found strictly within the confines of Article 19(2).

II. Sections 33-A and 33-B of the Representation of the People (Third Amendment) Act, 2002 — whether Section 33-A by itself effectively secures the voter's/citizen's right to information — whether Section 33-B is unconstitutional

II. (1) Sections 33-A and 33-B of the Representation of the People (Third Amendment) Act

102. Now I turn my attention to the discussion of the core question, that is to say, whether the impugned legislation falls foul of Article 19(1)(*a*) for limiting the area of disclosure and whether Parliament acted beyond its competence in deviating from the directives given by this Court to the Election Commission in *Democratic Reforms Assn. case*[1]. By virtue of the Representation of the People (Third Amendment) Act, 2002 the only information which a prospective contestant is required to furnish apart from the information which he is obliged to disclose under the existing provisions

56 69 L Ed 1138 : 268 US 652 (1925)

is the information on two points: (*i*) whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed; and (*ii*) whether he has been convicted of an offence [other than the offence referred to in sub-sections (1) to (3) of Section 8] and sentenced to imprisonment for one year or more. On other points spelt out in this Court's judgment, the candidate is not liable to furnish any information and that is so, notwithstanding anything contained in any judgment or order of a court OR any direction, order or instruction issued by the Election Commission. Omission to furnish the information as per the mandate of Section 33-B and furnishing false information in that behalf is made punishable. That is the sum and substance of the two provisions, namely, Sections 33-A and 33-B.

103. The plain effect of the embargo contained in Section 33-B is to nullify substantially the directives issued by the Election Commission pursuant to the judgment of this Court. At present, the instructions issued by the Election Commission could only operate in respect of the items specified in Section 33-A and nothing more. It is for this reason that Section 33-B has been challenged as ultra vires the Constitution both on the ground that it affects the fundamental right of the voter/citizen to get adequate information about the candidate and that Parliament is incompetent to nullify the judgment of this Court. I shall briefly notice the rival contentions on this crucial issue.

II. (2) Contentions

104. The petitioners' contention is that the legislation on the subject of disclosure of particulars of candidates should adopt in entirety the directives issued by this Court to the Election Commission in the pre-Ordinance period. Any dilution or deviation of those norms or directives would necessarily violate the fundamental right guaranteed by Article 19(1)(*a*) as interpreted by this Court and therefore the law, as enacted by Parliament, infringes the said guarantee. This contention has apparently been accepted by my learned Brother M.B. Shah, J. The other viewpoint presented on behalf of the Union of India and one of the interveners is that the freedom of the legislature in identifying and evolving the specific areas in which such information should be made public cannot be curtailed by reference to the ad hoc directives given by this Court in the pre-Ordinance period and the legislative wisdom of Parliament, especially in election matters, cannot be questioned. This is the position even if the right to know about the candidate is conceded to be part of Article 19(1)(*a*). It is for Parliament to decide to what extent and how far the information should be made available. In any case, it is submitted that the Court's verdict has been duly taken note of by Parliament and certain provisions have been made to promote the right to information vis-à-vis the contesting candidates. Section 33-B is only a part of this exercise and it does not go counter to Article 19(1)(*a*) even though the scope of public disclosures has been limited to one important aspect only.

II. (3) Broad points for consideration

105. A liberal but not a constricted approach in the matter of disclosure of information in relation to candidates seeking election is no doubt a desideratum. The wholesale adoption of the Court's diktats on the various items of information while enacting the legislation would have received public approbation and would have been welcomed by the public. It would have been in tune with the recommendations of various commissions and even the statements made by eminent and responsible political personalities. However, the fact remains that Parliament in its discretion did not go the whole hog, but chose to limiting the scope of mandated disclosures to only one of the important aspects highlighted in the judgment. The question remains to be considered whether in doing so, Parliament outstepped its limits and enacted a law in violation of the guarantee enshrined in Article 19(1)(*a*) of the Constitution. The allied question is whether Parliament has no option but to scrupulously adopt the directives given by this Court to the Election Commission. Is it open to Parliament to independently view the issue and formulate the parameters and contents of disclosure, though it has the effect of diluting or diminishing the scope of disclosures which, in the perception of the Court, were desirable? In considering these questions of far-reaching importance from the constitutional angle, it is necessary to have a clear idea of the ratio and implications of this Court's judgment in *Assn. for Democratic Reforms case*[1].

II. (4) Analysis of the judgment in Assn. for Democratic Reforms case*[1]*— whether and how far the directives given therein have an impact on the parliamentary legislation — approach of the Court in testing the legislation

106. The first proposition laid down by this Court in the said case is that a citizen/voter has the right to know about the antecedents of the contesting candidate and that right is a part of the fundamental right under Article 19(1)(*a*). In this context, M.B. Shah, J. observed that: [SCC p. 322, para 46(7)]

> "Voter's speech or expression in case of election would include casting of votes, that is to say, *voter speaks out or expresses by casting vote*."

It was then pointed out that the information about the candidate to be selected is essential as it would be conducive to transparency and purity in the process of election. The next question considered was how best to enforce that right. The Court having noticed that there was a void in the field in the sense that it was not covered by any legislative provision, gave directions to the Election Commission to fill the vacuum by requiring the candidate to furnish information on the specified aspects while filing the nomination paper. Five items of information which the Election Commission should call for from the prospective candidates were spelt out by the Court. Two of them relate to criminal background of the candidate and pendency of criminal cases against him. Points 3 and 4 relate to assets and liabilities of the candidate and his/her family. The last one is about the educational qualifications of the candidate.

The legal basis and the justification for issuing such directives to the Commission has been stated thus (vide SCC p. 309, paras 19-20):

> "*19*. At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.
>
> *20*. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted."

Again, at para 49 it was emphasized: (SCC p. 322)

> "*49*. It is to be stated that the Election Commission has from time to time issued instructions/orders to meet with the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible…."

107. Thus, the Court was conscious of the fact that the Election Commission could act in the matter only so long as the field is not covered by legislation. The Court also felt that the vacuum or void should be suitably filled so that the right to information concerning a candidate would soon become a reality. In other words, till Parliament applied its mind and came forward with appropriate legislation to give effect to the right available to a voter-citizen, the Court felt that the said goal has to be translated into action through the media of the Election Commission, which is endowed with "residuary power" to regulate the election process in the best interests of the electorate. Instead of leaving it to the Commission and with a view to give quietus to the possible controversies that might arise, the Court considered it expedient to spell out five points (broadly falling into three categories) on which the information has to be called for from the contesting candidate. In the very nature of things, the directives given by the Court were intended to operate only till the law was made by the legislature and in that sense "pro tempore" in nature. The five directives cannot be considered to be rigid theorems — inflexible and immutable — but only reflect the perception and tentative thinking of the Court at a point of time when the legislature did not address itself to the question.

108. When Parliament, in the aftermath of the verdict of this Court, deliberated and thought it fit to secure the right to information to a citizen only to a limited extent (having a bearing on criminal antecedents), a fresh look has to be necessarily taken by the Court and the validity of the law made has to be tested on a clean slate. It must be remembered that the right to get information which is a corollary to the fundamental right to free speech and expression has no fixed connotation. Its contours and parameters cannot be precisely defined and the Court in my understanding, never meant to do so. It

is often a matter of perception and approach. How far to go and where to stop? These are the questions to be pondered over by the legislature and the Constitutional Court called upon to decide the question of validity of the legislation. For instance, many voters/citizens may like to have more complete information — a sort of biodata of the candidate starting from his school days such as his academic career, the properties which he had before and after entering into politics, the details of his income and tax payments for the last one decade and sources of acquisition of his and his family's wealth. Can it be said that all such information which will no doubt enable the voter and public to have a comprehensive idea of the contesting candidate, should be disclosed by a prospective candidate and that the failure to provide for it by law would infringe the fundamental right under Article 19(1)(*a*)? The preponderance of view would be that it is not reasonable to compel a candidate to make disclosures affecting his privacy to that extent in the guise of effectuating the right to information. A line has to be drawn somewhere. While there cannot be a lip service to the valuable right to information, it should not be stretched too far. At the same time, the essence and substratum of the right has to be preserved and promoted, when once it is brought within the fold of fundamental right. A balanced but not a rigid approach, is needed in identifying and defining the parameters of the right which the voter/citizen has. The standards to be applied to disclosures vis-à-vis public affairs and governance AND the disclosures relating to personal life and biodata of a candidate cannot be the same. The measure or yardstick will be somewhat different. It should not be forgotten that the candidates' right to privacy is one of the many factors that could be kept in view, though that right is always subject to overriding public interest.

109. In my view, the points of disclosure spelt out by this Court in *Assn. for Democratic Reforms case*[1] should serve as broad indicators or parameters in enacting the legislation for the purpose of securing the right to information about the candidate. The paradigms set by the Court, though pro tempore in nature as clarified supra, are entitled to due weight. If the legislature in utter disregard of the indicators enunciated by this Court proceeds to make a legislation providing only for a semblance or pittance of information or omits to provide for disclosure on certain essential points, the law would then fail to pass the muster of Article 19(1)(*a*). Though certain amount of deviation from the aspects of disclosure spelt out by this Court is not impermissible, a substantial departure cannot be countenanced. The legislative provision should be such as to promote the right to information to a reasonable extent, if not to the fullest extent on details of concern to the voters and citizens at large. While enacting the legislation, the legislature has to ensure that the fundamental right to know about the candidate is reasonably secured and information which is crucial, by any objective standards, is not denied. It is for the Constitutional Court in exercise of its judicial review power to judge whether the areas of disclosure carved out by the legislature are reasonably adequate to safeguard the citizens' right to information. The Court has to take a holistic view and adopt a balanced approach, keeping in view the twin principles that the citizens' right to information to know about the personal

details of a candidate is not an unlimited right and that at any rate, it has no fixed concept and the legislature has freedom to choose between two reasonable alternatives. It is not a proper approach to test the validity of legislation only from the standpoint whether the legislation implicitly and word to word gives effect to the directives issued by the Court as an ad hoc measure when the field was unoccupied by legislation. Once legislation is made, this Court has to make an independent assessment in the process of evaluating whether the items of information statutorily ordained are reasonably adequate to secure the right of information to the voter so as to facilitate him to form a fairly clear opinion on the merits and demerits of the candidates. In embarking on this exercise, as already stated, this Court's directives on the points of disclosure even if they be tentative or ad hoc in nature, cannot be brushed aside, but should be given due weight. But, I reiterate that the shape of the legislation need not be solely controlled by the directives issued to the Election Commission to meet an ad hoc situation. As I said earlier, the right to information cannot be placed in straitjacket formulae and the perceptions regarding the extent and amplitude of this right are bound to vary.

III. Section 33-B is unconstitutional

III. (1) The right to information cannot be frozen and stagnated

110. In my view, the constitutional validity of Section 33-B has to be judged from the above angle and perspective. Considered in that light, I agree with the conclusion of M.B. Shah, J. that Section 33-B does not pass the test of constitutionality. The reasons are more than one. Firstly, when the right to secure information about a contesting candidate is recognized as an integral part of fundamental right as it ought to be, it follows that its ambit, amplitude and parameters cannot be chained and circumscribed for all times to come by declaring that no information, other than that specifically laid down in the Act, should be required to be given. When the legislation delimiting the areas of disclosure was enacted, it may be that Parliament felt that the disclosure on other aspects was not necessary for the time being. Assuming that the guarantee of right to information is not violated by making a departure from the paradigms set by the Court, it is not open to Parliament to stop all further disclosures concerning the candidate in future. In other words, a blanket ban on dissemination of information other than that spelt out in the enactment, irrespective of the need of the hour and the future exigencies and expedients is, in my view, impermissible. It must be remembered that the concept of freedom of speech and expression does not remain static. The felt necessities of the times coupled with experiences drawn from the past may give rise to the need to insist on additional information on the aspects not provided for by law. New situations and the march of events may demand the flow of additional facets of information. The right to information should be allowed to grow rather than being frozen and stagnated; but the mandate of Section 33-B prefaced by the non obstante clause impedes the flow of such information conducive to the freedom of expression. In the face of the prohibition under Section 33-B, the Election Commission which is entrusted

with the function of monitoring and supervising the election process will have to sit back with a sense of helplessness in spite of the pressing need for insisting on additional information. Even the Court may at times feel handicapped in taking necessary remedial steps to enforce the right to information. In my view, the legislative injunction curtailing the nature of information to be furnished by the contesting candidates only to the specific matters provided for by the legislation and nothing more would emasculate the fundamental right to freedom of expression of which the right to information is a part. The very objective of recognizing the right to information as part of the fundamental right under Article 19(1)(*a*) in order to ensure free and fair elections would be frustrated if the ban prescribed by Section 33-B is taken to its logical effect.

III. (2) Impugned legislation fails to effectuate right to information on certain vital aspects

111. The second reason why Section 33-B should be condemned is that by blocking the ambit of disclosures only to what has been specifically provided for by the amendment, Parliament failed to give effect to one of the vital aspects of information viz. disclosure of assets and liabilities and thus failed in substantial measure to give effect to the right to information as a part of the freedom of expression. The right to information which is now provided for by the legislature no doubt relates to one of the essential points but in ignoring the other essential aspect relating to assets and liabilities as discussed hereinafter, Parliament has unduly restricted the ambit of information which the citizens should have and thereby impinged on the guarantee enshrined in Article 19(1)(*a*).

III. (3) How far the principle that the legislature cannot encroach upon the judicial sphere applies

112. It is a settled principle of constitutional jurisprudence that the only way to render a judicial decision ineffective is to enact a valid law by way of amendment or otherwise fundamentally altering the basis of the judgment either prospectively or retrospectively. The legislature cannot overrule or supersede a judgment of the Court without lawfully removing the defect or infirmity pointed out by the Court because it is obvious that the legislature cannot trench on the judicial power vested in the courts. Relying on this principle, it is contended that the decision of the Apex Constitutional Court cannot be set at naught in the manner in which it has been done by the impugned legislation. As a sequel, it is further contended that the question of altering the basis of judgment or curing the defect does not arise in the instant case as Parliament cannot pass a law in curtailment of fundamental right recognized, amplified and enforced by this Court.

113. The contention that the fundamental basis of the decision in *Assn. for Democratic Reforms case*[1] has not at all been altered by Parliament, does not appeal to me. I have discussed at length the real scope and ratio of the judgment and the nature and character of directives given by this Court to the Election Commission. As observed earlier, those directions are pro tempore in nature when there was a vacuum in the field. When once Parliament

stepped in and passed the legislation providing for right of information, maybe on certain limited aspects, the void must be deemed to have been filled up and the judgment works itself out, though the proposition laid down and observations made in the context of Article 19(1)(*a*) on the need to secure information to the citizens will hold good. Now the new legislation has to be tested on the touchstone of Article 19(1)(*a*). Of course, in doing so, the decision of this Court should be given due weight and there cannot be a marked departure from the items of information considered essential by this Court to effectuate the fundamental right to information. Viewed in this light, it must be held that Parliament did not by law provide for disclosure of information on certain crucial points such as assets and liabilities and at the same time, placed an embargo on calling for further informations by enacting Section 33-B. That is where Section 33-B of the impugned Amendment Act does not pass the muster of Article 19(1)(*a*), as interpreted by this Court.

IV. Right to information with reference to specific aspects

114. I shall now discuss the specifics of the problem. With a view to promote the right to information, this Court gave certain directives to the Election Commission which, as I have already clarified, were ad hoc in nature. The Election Commission was directed to call for details from the contesting candidates broadly on three points, namely, (*i*) criminal record, (*ii*) assets and liabilities, and (*iii*) educational qualification. The Third Amendment to the RP Act which was preceded by an ordinance provided for disclosure of information. How far the Third Amendment to the Representation of the People Act, 2002 safeguards the right of information which is a part of the guaranteed right under Article 19(1)(*a*), is the question to be considered now with specific reference to each of the three points spelt out in the judgment of this Court in *Assn. for Democratic Reforms case*[1].

IV. (1) Criminal background and pending criminal cases against candidates — Section 33-A of the RP (Third Amendment) Act

115. As regards the first aspect, namely, criminal record, the directives in *Assn. for Democratic Reforms case*[1] are twofold: (SCC p. 322, para 48)

> "(*1*) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine.
>
> (*2*) Prior to six months of filing of nomination, whether the candidate is an accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law."

As regards the second directive, Parliament has substantially proceeded on the same lines and made it obligatory for the candidate to furnish information as to whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the competent court. However, the case in which cognizance has been taken but charge has not been framed is not covered by clause (*i*) of Section 33-

A(I). Parliament having taken the right step of compelling disclosure of the pendency of cases relating to major offences, there is no good reason why it failed to provide for the disclosure of the cases of the same nature of which cognizance has been taken by the Court. It is common knowledge that on account of a variety of reasons such as the delaying tactics of one or the other accused and inadequacies of the prosecuting machinery, framing of formal charges gets delayed considerably, especially in serious cases where committal procedure has to be gone through. On that account, the voter/citizen shall not be denied information regarding cognizance taken by the Court of an offence punishable with imprisonment for two years or more. The citizen's right to information, when once it is recognized to be part of the fundamental right under Article 19(1)(*a*), cannot be truncated in the manner in which it has been done. Clause (*i*) of Section 33-A(I) therefore falls short of the avowed goal to effectuate the right of information on a vital aspect. Cases in which cognizance has been taken should therefore be comprehended within the area of information accessible to the voters/citizens, in addition to what is provided for in clause (*i*) of Section 33-A.

116. Coming to clause (*ii*) of Section 33-A(I), Parliament broadly followed the pattern shown by the Court itself. This Court thought it fit to draw a line between major/serious offences and minor/non-serious offences while giving Direction 2 (vide para 48). If so, the legislative thinking that this distinction should also hold good in regard to past cases cannot be faulted on the ground that the said clause fails to provide adequate information about the candidate. If Parliament felt that the convictions and sentences of the long past relating to petty/non-serious offences need not be made available to the electorate, it cannot be definitely said that the valuable right to information becomes a casualty. Very often, such offences by and large may not involve moral turpitude. It is not uncommon, as one of the learned Senior Counsel pointed out that the political personalities are prosecuted for politically related activities such as holding demonstrations and visited with the punishment of fine or short imprisonment. Information regarding such instances may not be of real importance to the electorate in judging the worth of the relative merits of the candidates. At any rate, it is a matter of perception and balancing of various factors, as observed supra. The legislative judgment cannot be faulted merely for the reason that the pro tempore directions of this Court have not been scrupulously followed. As regards acquittals, it is reasonable to take the view that such information will not be of much relevance inasmuch as acquittal prima facie implies that the accused is not connected with the crime or the prosecution has no legs to stand. It is not reasonable to expect that from the factum of prosecution resulting in acquittal, the voters/citizens would be able to judge the candidate better. On the other hand, such information in general has the potential to send misleading signals about the honesty and integrity of the candidate.

117. I am therefore of the view that as regards past criminal record, what Parliament has provided for is fairly adequate.

118. One more aspect which needs a brief comment is the exclusion of offences referred to in sub-sections (1) and (2) of Section 8 of the RP Act, 1951. Section 8 deals with disqualification on conviction for certain offences. Those offences are of serious nature from the point of view of national and societal interest. Even the existing provisions viz. Rule 4-A inserted by the Conduct of Elections (Amendment) Rules, 2002 makes a provision for disclosure of such offences in the nomination form. Hence, such offences have been excluded from the ambit of clause (*ii*) of Section 33-A.

IV. (2) Assets and liabilities

119. Disclosure of assets and liabilities is another thorny issue. If the right to information is to be meaningful and if it is to serve its avowed purpose, I am of the considered view that the candidate entering the electoral contest should be required to disclose the assets and liabilities (barring articles of household use). A Member of Parliament or State Legislature is an elected representative occupying high public office and at the same time, he is a "public servant" within the meaning of the Prevention of Corruption Act as ruled by this Court in the case of *P.V. Narasimha Rao* v. *State*[46]. They are the repositories of public trust. They have public duties to perform. It is borne out by experience that by virtue of the office they hold there is a real potential for misuse. The public awareness of financial position of the candidate will go a long way in forming an opinion whether the candidate, after election to the office had amassed wealth either in his own name or in the name of family members viz. spouse and dependent children. At the time when the candidate seeks re-election, the citizens/voters can have a comparative idea of the assets before and after the election so as to assess whether the high public office had possibly been used for self-aggrandizement. Incidentally, the disclosure will serve as a check against misuse of power for making quick money, a malady which nobody can deny, has been pervading the political spectrum of our democratic nation. As regards liabilities, the disclosure will enable the voter to know, inter alia, whether the candidate has outstanding dues payable to public financial institutions or the Government. Such information has a relevant bearing on the antecedents and the propensities of the candidate in his dealings with public money. "Assets and liabilities" is one of the important aspects to which extensive reference has been made in *Assn. for Democratic Reforms case*[1]. The Court did consider it, after an elaborate discussion, as a vital piece of information as far as the voter is concerned. But, unfortunately, the observations made by this Court in this regard have a been given a short shrift by Parliament with little realization that they have a significant bearing on the right to get information from the contesting candidates and such information is necessary to give effect to the freedom of expression.

120. As regards the purpose of disclosure of assets and liabilities, I would like to make it clear that it is not meant to evaluate whether the candidate is financially sound or has sufficient money to spend in the election. Poor or rich are alike entitled to contest the election. Every citizen has equal accessibility in the public arena. If the information is meant to mobilize

public opinion in favour of an affluent/financially sound candidate, the tenet of socialistic democracy and the concept of equality so firmly embedded in our Constitution will be distorted. I cannot also share the view that this information on assets would enable the public to verify whether unaccounted money played a part in contesting the election. So long as Explanation 1 to Section 77 of the RP Act, 1951 stands and the contributions can legitimately come from any source, it is not possible for a citizen/voter to cause a verification to be made on those lines. In my opinion, the real purposes of seeking information in regard to assets and liabilities are those which I adverted to in the preceding paragraph. It may serve other purposes also, but, I have confined myself to the relevancy of such disclosure vis-à-vis right to information only.

121. It has been contended with much force that the right to information made available to the voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouse invades his/her right to privacy which is implied in Article 21. After giving anxious consideration to this argument, I am unable to uphold the same. In this context, I would like to recall the apt words of Mathew, J., in *Gobind* v. *State of M.P.*[23] While analysing the right to privacy as an ingredient of Article 21, it was observed: (SCC p. 155, para 22)

> "22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an *important countervailing interest is shown to be superior*." (emphasis supplied)

It was then said succinctly: (SCC pp. 155-56, para 22)

> "If the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State-interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right."

It was further explained: (SCC p. 156, para 23)

> "[P]rivacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values."

By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the

husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse *benami* is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well. That is one way of looking at the problem. More important, it is to be noted that Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure; but, the hitch lies in the fact that the disclosure has to be made to the Speaker or Chairman of the House after he or she is elected. No provision has been made for giving access to the details filed with the presiding officer of the House. By doing so, Parliament has omitted to give effect to the principle, which it rightly accepted as a step in aid to promote integrity in public life. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of other family members, Parliament refrained from making a provision for furnishing the information at the time of filing the nomination. This has resulted in jeopardizing the right to information implicitly guaranteed by Article 19(1)(*a*). Therefore, the provision made in Section 75-A regarding declaration of assets and liabilities of the elected candidates to the presiding officer has failed to effectuate the right to information and the freedom of expression of the voters/citizens.

IV. (3) Educational qualifications

122. The last item left for discussion is about educational qualifications. In my view, the disclosure of information regarding educational qualifications of a candidate is not an essential component of the right to information flowing from Article 19(1)(*a*). By not providing for disclosure of educational qualifications, it cannot be said that Parliament violated the guarantee of Article 19(1)(*a*). Consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being Member of the House of the People or Legislative Assembly. That apart, I am inclined to think that the information relating to educational qualifications of contesting candidates does not serve any useful purpose in the present context and scenario. It is a well-known fact that barring a few exceptions, most of the candidates elected to Parliament or the State Legislatures are fairly educated even if they are not graduates or postgraduates. To think of illiterate candidates is based on a factually incorrect assumption. To say that well-educated persons such as those having graduate and postgraduate qualifications will be able to serve the people better and conduct themselves in a better way inside and outside the House is nothing but overlooking the stark realities. The experience and events in public life and the legislatures

have demonstrated that the dividing line between the well educated and less educated from the point of view of his/her calibre and culture is rather thin. Much depends on the character of the individual, the sense of devotion to duty and the sense of concern to the welfare of the people. These characteristics are not the monopoly of well-educated persons. I do not think that it is necessary to supply information to the voter to facilitate him to indulge in an infructuous exercise of comparing the educational qualifications of the candidates. It may be that certain candidates having exceptionally high qualifications in specialized field may prove useful to the society, but it is natural to expect that such candidates would voluntarily come forward with an account of their own academic and other talents as a part of their election programme. Viewed from any angle, the information regarding educational qualifications is not a vital and useful piece of information to the voter, in ultimate analysis. At any rate, two views are reasonably possible. Therefore, it is not possible to hold that Parliament should have necessarily made the provision for disclosure of information regarding educational qualifications of the candidates.

V. Conclusions

123. Finally, the summary of my conclusions:

(*1*) Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(*a*). This right to information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though, to a certain extent, there may be overlapping.

(*2*) The right to vote at the elections to the House of the People or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(*a*). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.

(*3*) The directives given by this Court in *Union of India* v. *Assn. for Democratic Reforms*[1] were intended to operate only till the law was made by the legislature and in that sense "pro tempore" in nature. Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by this Court, even if they be tentative or ad hoc in nature, should be given due weight and substantial departure therefrom cannot be countenanced.

(*4*) The Court has to take a holistic view and adopt a balanced approach in examining the legislation providing for right to information and laying down the parameters of that right.

(*5*) Section 33-B inserted by the Representation of the People (Third Amendment) Act, 2002 does not pass the test of constitutionality, firstly, for the reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients and secondly, for the reason that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate.

(*6*) The right to information provided for by Parliament under Section 33-A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure.

(*7*) The provision made in Section 75-A regarding declaration of assets and liabilities of the elected candidates to the Speaker or the Chairman of the House has failed to effectuate the right to information and the freedom of expression of the voters/citizens. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of the spouse or dependent children, Parliament ought to have made a provision for furnishing this information at the time of filing the nomination. Failure to do so has resulted in the violation of guarantee under Article 19(1)(*a*).

(*8*) The failure to provide for disclosure of educational qualification does not, in practical terms, infringe the freedom of expression.

(*9*) The Election Commission has to issue revised instructions to ensure implementation of Section 33-A subject to what is laid down in this judgment regarding the cases in which cognizance has been taken. The Election Commission's orders related to disclosure of assets and liabilities will still hold good and continue to be operative. However, Direction 4 of para 14 insofar as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information should not be enforced.

124. Accordingly, the writ petitions stand disposed of without costs.

DHARMADHIKARI, J.— I have carefully gone through the well-considered separate opinions of Brothers M.B. Shah and P.V. Reddi, JJ. Both the learned Judges have come to a common conclusion that Section 33-B inserted in the Representation of the People Act, 1951 by Amendment Ordinance 4 of 2002, which on repeal is succeeded by the Third Amendment Act of 2002, is liable to be declared invalid being violative of Article 19(1)(*a*) of the Constitution.

126. I am in respectful agreement with the above conclusion reached in common by both the learned Brothers. I would, however, like to supplement the above conclusion.

127. The reports of the advisory commissions set up one after the other by the Government to which a reference has been made by Brother Shah, J., highlight the present political scenario where money power and muscle power have substantially polluted and perverted the democratic processes in India. To control the ill-effects of money power and muscle power the commissions recommend that election system should be overhauled and drastically changed lest democracy would become a teasing illusion to common citizens of this country. Not only a half-hearted attempt in the direction of reform of the election system is to be taken, as has been done by the present legislation by amending some provisions of the Act here and there, but a much improved election system is required to be evolved to make the election process both transparent and accountable so that influence of tainted money and physical force of criminals do not make democracy a farce — the citizen's fundamental "right to information" should be recognised and fully effectuated. This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act.

128. Making of law for election reform is undoubtedly a subject exclusively of the legislature. Based on the decision of this Court in the case of *Assn. for Democratic Reforms*[1] and the directions made therein to the Election Commission, the Amendment Act under consideration has made an attempt to fill the void in law but the void has not been filled fully and does not satisfy the requirements for exercise of fundamental freedom of the citizen to participate in election as a well-informed voter.

129. Democracy based on "free and fair elections" is considered as a basic feature of the Constitution in the case of *Kesavananda Bharati*[4]. Lack of adequate legislative will to fill the vacuum in law for reforming the election process in accordance with the law declared by this Court in the case of *Assn. for Democratic Reforms*[1] obligates this Court as an important organ in constitutional process to intervene.

130. In my opinion, this Court is obliged by the Constitution to intervene because the legislative field, even after the passing of the Ordinance and the Amendment Act, leaves a vacuum. This Court in the case of *Assn. for Democratic Reforms*[1] has determined the ambit of fundamental "right of information" to a voter. The law, as it stands today after amendment, is deficient in ensuring "free and fair elections". This Court has, therefore, found it necessary to strike down Section 33-B of the Amendment Act so as to revive the law declared by this Court in the case of *Assn. for Democratic Reforms*[1].

131. With these words, I agree with Conclusions (*A*) to (*E*) in the opinion of Brother Shah, J. and Conclusions (*1*), (*2*), (*4*), (*5*), (*6*), (*7*) and (*9*) in the opinion of Brother P.V. Reddi, J.

132. With utmost respect, I am unable to agree with Conclusions (*3*) and (*8*) in the opinion of Brother P.V. Reddi, J., as on those aspects, I have expressed my respectful agreement with Brother Shah, J.

club bills remained unpaid at least till October 2010. Non-payment of these bills despite considerable efflux of time is unbecoming of a Judge and amounts to misbehaviour on your part."

40. Although, the language of Charges 3, 5 and 13 and the grounds forming part of these charges are not exactly identical to the allegations contained in the notice of motion, but if the same are read with the explanatory note, it becomes clear that all these charges are founded on the details contained in Paras (*i*) to (*iii*) of the explanatory note. However, we do not consider it proper to discuss in detail the substance of the charges framed against the petitioner because the investigation being made by the Committee is at a preliminary stage and any observation by this Court may prejudice the cause of the petitioner. At the same time, we have no hesitation in holding that by framing Charges 3, 5 and 13, the Committee did not traverse beyond the scope of the allegations.

41. No doubt, Charge 14 does not have direct traces in the allegations contained in the notice of motion and the explanatory note, but this minor deviation does not warrant quashing of all the charges and it will be open to the petitioner to contend before the Committee that Charge 14 should be ignored because the same is not founded on the allegations contained in the notice of motion or the explanatory note.

42. In the result, the writ petition is dismissed.

(2011) 8 Supreme Court Cases 497

(BEFORE R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.)

CENTRAL BOARD OF SECONDARY EDUCATION AND ANOTHER .. Appellants;

Versus

ADITYA BANDOPADHYAY AND OTHERS .. Respondents.

Civil Appeals No. 6454 of 2011† with Nos. 6456-58, 6461-62, 6464, 6459 and 6465-68 of 2011, decided on August 9, 2011

A. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 3, 6, 2(f), 2(i), 2(h), 2(j), 8, 9, and 24 — Public examination — Right of examinee to inspect his evaluated answer books — Permissibility and scope — Examinee in a public examination, held, has a right to inspect his evaluated answer books or taking certified copies thereof — Such book is a document and record in terms of Ss. 2(f) and 2(i) and therefore, "information" under RTI Act — However, right to information is a facet of freedom of speech and expression under Art. 19 and is subject to reasonable restrictions — Hence, it is subject to exemptions and exceptions under RTI Act that may be applicable [Ed.: For limits on the right to inspect answer books *see* Shortnotes *J* and *K*, below] — Constitution of India —**

† Arising out of SLP (C) No. 7526 of 2009. From the Judgment and Order dated 5-2-2009 of the High Court of Calcutta in WP No. 18189 (W) of 2008

Arts. 19(1)(a) & (2) — Education and Universities — Examinations — Public examinations — Right of examinee to inspect evaluated answer books — Education and Universities — CBSE Bye-Laws — Bye-laws 61 and 62

B. **Human and Civil Rights — Right to Information Act, 2005 — Statement of Objects and Reasons, Preamble and Ss. 3, 6, 2(f), 2(i), 2(h), 2(j), 8, 9 and 24 — Manner of interpretation: (a) object of providing right to information, and (b) rationale behind providing safeguards, exemptions and exceptions, discussed — Right to information, held, has to be read in harmony with exemption and exclusion provisions — Public Accountability and Vigilance — Public Trust Doctrine — Principle of, as found in RTI Act, discussed — Right to information — Constitution of India, Arts. 19(1)(a) & (2)**

The respondent examinee applied for inspection and re-evaluation of his answer book. The appellant (i.e. CBSE Board) rejected the said application. The High Court by the impugned judgment allowed the writ thereagainst and held that examinees have a right under RTI Act to examine their answer books.

The issues that arose in the present appeal were as follows:

(*i*) Whether an examinee's right to information under the RTI Act includes a right to inspect his evaluated answer books in a public examination or taking certified copies thereof?

(*ii*) Whether the decisions of in *Maharashtra State Board of Secondary and Higher Secondary Education case*, (1984) 4 SCC 27 and other cases referred to, in any way affect or interfere with the right of an examinee seeking inspection of his answer books or seeking certified copies thereof?

(*iii*) Whether an examining body holds the evaluated answer books "in a fiduciary relationship" and consequently has no obligation to give inspection of the evaluated answer books under Section 8(1)(*e*) of the RTI Act?

(*iv*) If the examinee is entitled to inspection of the evaluated answer books or seek certified copies thereof, whether such right is subject to any limitations, conditions or safeguards?

Dismissing the appeals in substance and affirming the right of examinees to inspect answer books, the Supreme Court

Held :

The High Court directing the examining bodies to permit examinees to have inspection of their answer books is affirmed, subject to the clarifications regarding the scope of the RTI Act, safeguards and conditions. (Para 68)

The right to information is a facet of the freedom of "speech and expression" as contained in Article 19(1)(*a*), Constitution of India and such a right is subject to reasonable restriction in the interest of the security of the State and to exemptions and exceptions. (Para 22)

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428; *Dinesh Trivedi* v. *Union of India*, (1997) 4 SCC 306; *People's Union for Civil Liberties* v. *Union of India*, (2004) 2 SCC 476, *relied on*

The answer book is a document or record in terms of Sections 2(*f*) and 2(*i*), RTI Act. The evaluated answer book becomes a record containing the "opinion" of the examiner. Therefore the evaluated answer book is also an "information" under the RTI Act. Having regard to Section 3, the citizens have the right to access to all the information held by or under the control of any public authority

except those excluded or exempted under the RTI Act. The object of the RTI Act is to empower the citizens to fight against corruption and hold the Government and their instrumentalities accountable to the citizens, by providing them access to information regarding functioning of every public authority. The RTI Act was enacted in order to ensure smoother, greater and more effective access to information and provide an effective framework for effectuating the right to information recognised under Article 19 of the Constitution.

(Paras 23, 24 and 12)

Certain safeguards have been built into the RTI Act so that the revelation of information will not conflict with other public interests which include efficient operation of the Governments, optimum use of limited fiscal resources and preservation of confidential and sensitive information. The RTI Act provides for exclusions by way of exemptions and exceptions (under Sections 8, 9 and 24) in regard to information held by the public authorities. [Paras 25(*i*) to (*iii*)]

Having regard to the scheme of the RTI Act, the right of the citizens to access any information held by or under the control of any public authority, should be read in harmony with the exclusions/exemptions in the RTI Act.

(Para 25)

C. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 24, 6 and 3 — Exemption under S. 24, whether applicable to examining bodies — Held, examining bodies are neither "intelligence" nor "security" organisations and therefore, not covered under S. 24 exemption — Education and Universities — Examinations (Para 26)**

D. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 9, 6 and 3 — Exemption under S. 9, whether applicable to evaluated answer books in a public examination — Held, disclosure of information with reference to answer books does not involve infringement of any copyright and therefore, S. 9 will not apply — Education and Universities — Examinations (Para 26)**

E. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 22, 8, 3, 2(f), 2(i), 2(h) and 2(j) — Overriding effect of S. 22, RTI Act over rules and bye-laws for public examinations — Effect on examinee's rights of (a) inspection, and (b) re-evaluation of answer books — Held, superior statute like RTI Act with overriding provisions like S. 22 will prevail over bye-laws of CBSE — Evaluation of answer books being information under RTI Act, inspection of answer book is permissible even if CBSE bye-laws do not provide for such inspection — Therefore, principles in *Maharashtra State Board case*, (1984) 4 SCC 27 or other decisions following it, will not apply so far as inspection of answer books is concerned — However, re-evaluation is not permissible as it is neither available under RTI Act nor bye-laws of CBSE — Education and Universities — Examinations**

Held :

If the rules and regulations of the examining body provide for re-evaluation, inspection or disclosure of the answer books, then none of the principles in *Maharashtra State Board case* or other decisions following it, will apply or be relevant. (Para 33)

Maharashtra State Board of Secondary and Higher Secondary Education v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27; *Pramod Kumar Srivastava* v. *Bihar Public Service Commission*, (2004) 6 SCC 714 : 2004 SCC (L&S) 883; *Board of Secondary Education* v. *Pravas Ranjan Panda*, (2004) 13 SCC 383; *Board of Secondary Education* v. *D. Suvankar*, (2007) 1 SCC 603; *W.B. Council of Higher Secondary Education* v. *Ayan Das*, (2007) 8 SCC 242 : (2007) 2 SCC (L&S) 871, *clarified*

If an examination is governed only by the rules and regulations of the examining body which bar inspection, disclosure or re-evaluation, the examinee will be entitled only for re-totalling by checking whether all the answers have been evaluated and further checking whether there is no mistake in the totalling of marks for each question and marks have been transferred correctly to the title (abstract) page. The position may however be different, if there is a superior statutory right entitling the examinee, as a citizen to seek access to the answer books, as information. (Para 34)

Re-evaluation of answer books is not a relief available under the RTI Act. Therefore, the question whether re-evaluation should be permitted or not, does not arise. In the case of CBSE, the provisions barring re-evaluation and inspection contained in Bye-law 61. (Paras 35 and 34)

However, in view of Section 22, RTI Act the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer books fall under the exempted category of information described in Section 8(1)(*e*), RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations. Therefore, the decision in *Maharashtra State Board case* and the subsequent decisions following the same, will not affect or interfere with the right of the examinee seeking inspection of the answer books or taking certified copies thereof. (Para 36)

Maharashtra State Board of Secondary and Higher Secondary Education v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27; *Pramod Kumar Srivastava* v. *Bihar Public Service Commission*, (2004) 6 SCC 714 : 2004 SCC (L&S) 883; *Board of Secondary Education* v. *Pravas Ranjan Panda*, (2004) 13 SCC 383; *Board of Secondary Education* v. *D. Suvankar*, (2007) 1 SCC 603; *W.B. Council of Higher Secondary Education* v. *Ayan Das*, (2007) 8 SCC 242 : (2007) 2 SCC (L&S) 871, *distinguished* and *clarified*

F. **Education and Universities — Examinations — Public examinations — Fiduciary relationship — Non-existence of — Examining body, held, is not a fiduciary in relation either to examinee or examiner — Rationale for, explained — Answer books are not information available to an examining body by virtue of a fiduciary relationship — Therefore, furnishing copy of answer book, is not breach of confidentiality, privacy, secrecy or trust — Examining body is "principal" and examiner is "agent" — Therefore, right of examinee to inspect his answer books is not barred by exemption under S. 8(1)(e), RTI Act — Human and Civil Rights — Right to Information Act, 2005 — Ss. 8(1)(e), 3, 6, 2(f), 2(i), 2(h) and 2(j) — Tort Law — Breach of trust — Equity**

G. **Education and Universities — Examinations — Relationship of examining body with examiner, explained — With reference to answer books, although examining body is not in fiduciary relationship with**

examinee and/or examiner, examiner is in a fiduciary relationship with examining body

H. **Education and Universities — Examinations — Duties and roles of examining body and examiner**

I. **Equity — Fiduciary relationship — Meaning, examples and types of fiduciary relationship, explained and stated — Philosophical and wider meaning distinguished from normal and well-recognised meaning as used in S. 8(1), RTI Act — Human and Civil Rights — Right to Information Act, 2005 — S. 8(1)(e) — Expression "information available to a person in his fiduciary relationship" as used in normal sense, explained — Words and Phrases — "Fiduciary relationship" and "fiduciary" — Contract Act, 1872, S. 19**

Held :

Answer books not being information available to an examining body in its fiduciary relationship, the exemption under Section 8(1)(*e*) is not available to the examining bodies. As no other exemption under Section 8 is available in respect of the evaluated answer books, the examining bodies will have to permit inspection sought by the examinees. (Para 51)

The terms "fiduciary" and "fiduciary relationship" refer to different capacities and relationship, involving a common duty or obligation. "Fiduciary" is one whose intention is to act for the benefit of another as to matters relevant to the relation between them. (Paras 38 and 38.2)

The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and conduct, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party. (Para 39)

Bristol and West Building Society v. *Mothew*, 1998 Ch 1 : (1997) 2 WLR 436 : (1996) 4 All ER 698 (CA); *Wolf* v. *Superior Court*, 107 Cal App 4th 25 (2003), *approved*

Black's Law Dictionary (7th Edn., p. 640); *American Restatement* (Trusts and Agency); *Corpus Juris Secundum* (Vol. 36-A, p. 381); *Words and Phrases*, Permanent Edn. (Vol. 16-A, p. 41), *referred to*

There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. (Para 40)

In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words "information available to a person in his fiduciary relationship" are used in Section 8(1)(*e*) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to

be protected or benefited by the actions of the fiduciary. There is no fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body. (Paras 41 and 43)

The duty of examining bodies is to subject the candidates to a process of verification/examination/testing of their knowledge, ability or skill, or to ascertain whether they can be said to have successfully completed or passed the course of study or training or to find out whether such person is suitable for a particular post, job or assignment. An examining body, if it is a public authority entrusted with public functions, is required to act fairly, reasonably, uniformly and consistently for public good and in public interest. (Para 42)

Bihar School Examination Board v. *Suresh Prasad Sinha*, (2009) 8 SCC 483 : (2009) 3 SCC (Civ) 438, *relied on*

One of the duties of the fiduciary is to make thorough disclosure of all the relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. Therefore, even if a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer book, Section 8(1)(*e*) would operate as an exemption to prevent access to any third party and will not operate as a bar for the very person who wrote the answer book, seeking inspection or disclosure of it. (Paras 45 and 44)

When an examinee seeks "information" by inspection/certified copies of his answer books, he knows the contents thereof being the author thereof. Therefore, in furnishing the copy of an answer book, there is no question of breach of confidentiality, privacy, secrecy or trust. (Paras 46 and 47)

There is no merit in the contention that even if fiduciary relationship does not exist between the examining body and the examinee, it exists with reference to the examiner who evaluates the answer books. The examining body is the "principal" and the examiner is the "agent" entrusted with the work, that is, the evaluation of answer books. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner. On the other hand, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer book or the result of evaluation of the answer book to anyone other than the examining body. Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him. He does not have any copyright or proprietary right, or confidentiality right in regard to the evaluation. Therefore, it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner, either. (Paras 48 to 50)

J. **Education and Universities — Examinations — Public examinations — Inspection of evaluated answer books by examinee — Safeguard of non-disclosure of persons associated with examination of answer book, pointed out — Names and particulars of such persons, held, will have to be severed under S. 10 of RTI Act from answer book prior to giving them to examinee for inspection — Human and Civil Rights — Right to Information Act, 2005, Ss. 8, 10, 3, 4, 6, 2(f), 2(i), 2(h) and 2(j)**

Held :

The information as to the names or particulars of the examiners/co-ordinators/scrutinisers/head examiners are exempted from disclosure under

Section 8(1)(*g*) of the RTI Act, on the ground that if such information is disclosed, it may endanger their physical safety. Those portions of the answer books which contain information regarding the examiners/co-ordinators/ scrutinisers/head examiners or which may disclose their identity with reference to signature or initials, shall have to be removed, covered, or otherwise severed from the non-exempted part of the answer books, under Section 10 of the RTI Act. (Para 53)

K. **Education and Universities — Examinations — Public examinations — Right of examinee to inspect evaluated answer books — Time-limit within which answer books may be assessed — Held, right to access information does not extend beyond period during which examining body is expected to retain answer books as per rules — In case of CBSE, answer books are required to be maintained for a period of three months and thereafter they are liable to be disposed of/destroyed — Hence application for inspection of the same must be made within that period — Information Commission cannot extend said period under S. 19(8) of RTI Act — Human and Civil Rights — Right to Information Act, 2005, Ss. 19(8) and 8**

L. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 19(8), 8(3), 8(1)(b), 8(1)(d), 8(1)(h) and 8(1)(j) — Duration for which information may be preserved — Extension of prescribed duration by exercise of power under S. 19(8), RTI Act — Whether can be made — Power of Information Commission under S. 19(8), held, cannot be used to extend duration for which information is required to be preserved under rules and regulations concerned — S. 8(3), RTI Act does not require all "information" to be preserved and maintained for twenty years or more, nor does it override any rules or regulations governing period for which record, document or information is required to be preserved by any public authority**

Held :

The right to access information does not extend beyond the period during which the examining body is expected to retain the answer books. In the case of CBSE, the answer books are required to be maintained for a period of three months and thereafter they are liable to be disposed of/destroyed. (Para 54)

The power of the Information Commission under Section 19(8) of the RTI Act to require a public authority to take any such steps as may be necessary *to secure compliance with the provision of the Act*, does not include a power to direct the *public authority* to preserve the information, for any period larger than what is provided under the rules and regulations of the public authority. (Para 55)

Section 8(3) nowhere provides that records or information have to be maintained for a period of twenty years. The period for which any particular record or information has to be maintained would depend upon the relevant statutory rule or regulation of the public authority relating to the preservation of records. (Para 56)

Section 8(3) provides that any protection against disclosure that may be available, under Sections 8(1)(*b*), (*d*) to (*h*) and (*j*) cease to be available after twenty years in regard to records which are required to be preserved for more than twenty years. Where any record or information is required to be destroyed

under the rules and regulations of a public authority prior to twenty years, Section 8(3) will not prevent destruction in accordance with the rules. Section 8(3) of the RTI Act is not therefore a provision requiring all "information" to be preserved and maintained for twenty years or more, nor does it override any rules or regulations governing the period for which the record, document or information is required to be preserved by any public authority. (Para 58)

M. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 4(1)(b), 4(1)(c), 8, 9, 24 and 2 — Three categories of information distinguished under RTI Act: (a) information which promotes *transparency and accountability* has to be suo motu published and disseminated by public authorities [i.e. that information mentioned in Ss. 4(1)(b) and (c)], (b) information other than that mentioned in Ss. 4(1)(b) and (c) which is important and can be accessed, and (c) information belonging to third category is information which is not available with public authority and not required by public authority to maintain, cannot be accessed — Public authorities also have no obligation to provide information as to their opinion, advice, inferences or assumptions — Public authorities also cannot cater to indiscriminate and impractical demands (unrelated to transparency and accountability) which adversely affect their efficiency — Public Accountability and Vigilance — Public Trust Doctrine — Category of information in RTI Act where public trust doctrine found, pointed out — Constitution of India, Arts. 19(1)(a) & (2)**

N. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 8 and 3 — Manner of interpretation — Held, S. 8 should not be construed strictly, literally and narrowly — Exemption under S. 8 is not a fetter on right to information under S. 3 — Purpose of S. 8 is to protect public interest and democratic ideals — Therefore, harmonious construction prescribed — Purposive, reasonable and balanced construction also prescribed because it is not possible to enumerate all types of information which require to be exempted from disclosure in public interest — Interpretation of Statutes — Basic Rules — Harmonious construction — Constitution of India — Arts. 19(1)(a) & (2) — Public Accountability and Vigilance — Right to information**

Held :

The effect of the provisions and scheme of the RTI Act is to divide "information" into three categories. They are: (*i*) information which promotes *transparency and accountability* in the working of every public authority [Sections 4(1)(*b*) and (*c*)], (*ii*) other information held by public authority [that is, all the information other than those falling under Sections 4(1)(*b*) and (*c*)], and (*iii*) information which is not held by or under the control of any public authority and which cannot be accessed by a public authority under any law for the time being in force. Information under the third category does not fall within the scope of the RTI Act. Section 3 of the RTI Act gives every citizen, the right to "information" held by or under the control of a public authority, which falls either under the first or second category. In regard to the information falling under the first category, there is also a special responsibility upon the public authorities to suo motu *publish and disseminate such information* so that they will be easily and readily accessible to the public without any need to access

them by having recourse to Section 6 of the RTI Act. There is no such obligation to publish and disseminate the other information which falls under the second category. [Paras 59(*i*) to (*iii*)]

With regard to second category of information, equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of Governments, etc.). (Para 66)

Indiscriminate and impractical demands or directions under the RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counterproductive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. (Para 67)

Though Section 8 is an exception to Section 3, it should not be construed strictly, literally and narrowly. The Preamble to the RTI Act specifically states that the object of the Act is to harmonise these two conflicting interests. When Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals. (Para 61)

When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the Governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The courts and Information Commissions enforcing the provisions of the RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act. (Para 62)

The RTI Act provides access to all information *that is available and existing*. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in Section 8 of the RTI Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the RTI Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. (Para 63)

A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide "advice" or "opinion" to an applicant, nor required to obtain and furnish any "opinion" or "advice" to an applicant. The reference to "opinion" or "advice" in the definition of "information" in Section 2(*f*) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act. (Para 63)

Advocates who appeared in this case :

Parag P. Tripathi, Additional Solicitor General, Bhaskar P. Gupta, Mahabir Singh, P.K. Goswami, Tapash Ray and Dr. Rajeev Dhavan, Senior Advocates (Tara Chandra Sharma, Ms Neelam Sharma, Rupesh Kumar, Ajay Sharma, Pijush K. Roy, Mithilesh Kr. Singh, Ranajit Chatterjee, Shankar Divate, Anuj Bhandari, Pramod Dayal, Nikunj Dayal, Rakesh Agarwal, Pulkit Agarwal, Ms Payal Dayal, Parthiv Goswami, S. Hariharan, Rajiv Mehta, Saurendra Betal, D.M. Nargolkar, L.C. Agrawala, F.I. Choudhury, Rameshwar Prasad Goyal, Abhijit Sengupta, B.P. Yadav, Ms Sampa Sengupta Ray, Ms Anima Kujur, Ranjan Mukherjee, Azem H. Laskar, Divya Jyoti Jaipuriar, Ms Jyoti Mendiratta, Navin Prakash, Sunil Kr. Verma and Ms Rekha Pandey, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.— Leave granted. For convenience, we will refer to the facts of the first case.

2. The first respondent appeared for the Secondary School Examination, 2008 conducted by the Central Board of Secondary Education (for short "CBSE" or "the appellant"). When he got the marksheet he was disappointed with his marks. He thought that he had done well in the examination but his answer books were not properly valued and that improper valuation had resulted in low marks. Therefore he made an application for inspection and re-evaluation of his answer books.

3. CBSE rejected the said request by letter dated 12-7-2008. The reasons for rejection were:

> "(*i*) The information sought was exempted under Section 8(1)(*e*) of the Right to Information Act since CBSE shared fiduciary relationship with its evaluators and maintained confidentiality of both manner and method of evaluation.

(*ii*) The Examination Bye-laws of the Board provided that no candidate shall claim or is entitled to re-evaluation of his answers or disclosure or inspection of answer book(s) or other documents.

(*iii*) The larger public interest does not warrant the disclosure of such information sought.

(*iv*) The Central Information Commission by its order dated 23-4-2007 in Appeal No. ICPB/A-3/CIC/2006 dated 10-2-2006 had ruled out such disclosure."

4. Feeling aggrieved the first respondent filed WP No. 18189 (W) of 2008 before the Calcutta High Court and sought the following reliefs:

(*a*) for a declaration that the action of CBSE in excluding the provision of re-evaluation of answer sheets, in regard to the examinations held by it was illegal, unreasonable and violative of the provisions of the Constitution of India;

(*b*) for a direction to CBSE to appoint an independent examiner for re-evaluating his answer books and issue a fresh marks card on the basis of re-evaluation;

(*c*) for a direction to CBSE to produce his answer books in regard to the 2008 Secondary School Examination so that they could be properly reviewed and fresh marks card can be issued with re-evaluation marks;

(*d*) for quashing the communication of CBSE dated 12-7-2008 and for a direction to produce the answer books into Court for inspection by the first respondent.

The respondent contended that Section 8(1)(*e*) of the Right to Information Act, 2005 ("the RTI Act", for short) relied upon by CBSE was not applicable and relied upon the provisions of the RTI Act to claim inspection.

5. CBSE resisted the petition. It contended that as per its Bye-laws, re-evaluation and inspection of answer books were impermissible and what was permissible was only verification of marks. They relied upon CBSE Examination Bye-laws 61 and 62, relevant portions of which are extracted below:

"**61.** ***Verification of marks obtained by a candidate in a subject***.—(*i*) A candidate who has appeared at an examination conducted by the Board may apply to the Regional Officer concerned of the Board for verification of marks in any particular subject. The verification will be restricted to checking whether all the answers have been evaluated and that there has been no mistake in the totalling of marks for each question in that subject and that the marks have been transferred correctly on the title page of the answer book and to the award list and whether the supplementary answer book(s) attached with the answer book mentioned by the candidate are intact. No revaluation of the answer book or supplementary answer book(s) shall be done.

(*ii*) Such an application must be made by the candidate within 21 days from the date of the declaration of result for main examination and 15 days for compartment examination.

(*iii*) All such applications must be accompanied by payment of fee as prescribed by the Board from time to time.

(*iv*) *No candidate shall claim, or be entitled to, revaluation of his/her answers or disclosure or inspection of the answer book(s) or other documents.*

* * *

(*vi*) In no case the verification of marks shall be done in the presence of the candidate or anyone else on his/her behalf, nor will the answer books be shown to him/her or his/her representative.

(*vii*) Verification of marks obtained by a candidate will be done by the officials appointed by or with the approval of the Chairman.

(*viii*) The marks, on verification will be revised upward or downward, as per the actual marks obtained by the candidate in his/her answer book.

62. ***Maintenance of answer books***.—The answer books shall be maintained for a period of three months and shall thereafter be disposed of in the manner as decided by the Chairman from time to time."

(emphasis supplied)

6. CBSE submitted that 12 to 13 lakhs candidates from about 9000 affiliated schools across the country appear in Class X and Class XII examinations conducted by it and this generates as many as 60 to 65 lakhs of answer books; that as per Examination Bye-law 62, it maintains the answer books only for a period of three months after which they are disposed of. It was submitted that if the candidates were to be permitted to seek re-evaluation of answer books or inspection thereof, it will create confusion and chaos, subjecting its elaborate system of examinations to delay and disarray. It was stated that apart from Class X and Class XII examinations, CBSE also conducts several other examinations (including the All-India Pre-Medical Test, All-India Engineering Entrance Examination and Jawahar Navodaya Vidyalaya's Selection Test). If CBSE was required to re-evaluate the answer books or grant inspection of answer books or grant certified copies thereof, it would interfere with its effective and efficient functioning, and will also require huge additional staff and infrastructure.

7. It was submitted that the entire examination system and evaluation by CBSE is done in a scientific and systemic manner designed to ensure and safeguard the high academic standards and at each level utmost care was taken to achieve the object of excellence, keeping in view the interests of the students. CBSE referred to the following elaborate procedure for evaluation adopted by it:

"The examination papers are set by the teachers with at least 20 years of teaching experience and proven integrity. Paper-setters are normally appointed from amongst academicians recommended by the then Committee of Courses of the Board. Every paper-setter is asked to set more than one set of question papers which are moderated by a team of moderators who are appointed from the academicians of the university or from amongst the Senior Principals. The function of the moderation team is to ensure correctness and consistency of different sets of question

papers with the curriculum and to assess the difficulty level to cater to the students of different schools in different categories.

a After assessing the papers from every point of view, the team of moderators gives a declaration whether the whole syllabus is covered by a set of question papers, whether the distribution of difficulty level of all the sets is parallel and various other aspects to ensure uniform standard. The Board also issues detailed instructions for the guidance of the moderators in order to ensure uniform criteria for assessment.

b The evaluation system on the whole is well organised and foolproof. All the candidates are examined through question papers set by the same paper-setters. Their answer books are marked with fictitious roll numbers so as to conceal their identity. The work of allotment of fictitious roll number is carried out by a team working under a Chief Secrecy Officer having full autonomy. The Chief Secrecy Officer and his team of assistants are academicians drawn from the universities and other autonomous educational bodies not connected with the Board. The Chief Secrecy Officer himself is usually a person of the rank of a university professor. No official of the Board at the Central or Regional level is associated with him in the performance of the task assigned to him.

c

d The codes of fictitious roll numbers and their sequences are generated by the Chief Secrecy Officer himself on the basis of a mathematical formula which randomise the real roll numbers and are known only to him and his team. This ensures complete secrecy about the identification of the answer book so much so, that even the Chairman, of the Board and the Controller of Examination of the Board do not have any information regarding the fictitious roll numbers granted by the Chief Secrecy Officer and their real counterpart numbers.

e

At the evaluation stage, the Board ensures complete fairness and uniformity by providing a marking scheme which is uniformly applicable to all the examiners in order to eliminate the chances of subjectivity. These marking schemes are jointly prepared at the Headquarters of the Board in Delhi by the subject experts of all the regions. The main purpose of the marking scheme is to maintain uniformity in the evaluation of the answer books.

f

The evaluation of the answer books in all major subjects including Mathematics and Science subjects is done in centralised 'on the spot' evaluation centres where the examiners get answer book in interrupted serial orders. Also, the answer books are jumbled together as a result of which the examiners, say in Bangalore may be marking the answer book of a candidate who had his examination in Pondicherry, Goa, Andaman and Nicobar Islands, Kerala, Andhra Pradesh, Tamil Nadu or Karnataka itself but he has no way of knowing exactly which answer book he is examining.

g

h

The answer books having been marked with fictitious roll numbers give no clue to any examiner about the State or territory it belongs to. It cannot give any clue about the candidate's school or centre of examination. The examiner cannot have any inclination to do any favour to a candidate because he is unable to decodify his roll number or to know as to which school, place or State or territory he belongs to.

The examiners check all the questions in the papers thoroughly under the supervision of a head examiner and award marks to the sub-parts individually not collectively. They take full precautions and due attention is given while assessing an answer book to do justice to the candidate. Re-evaluation is administratively impossible to be allowed in a Board where lakhs of students take examination in multiple subjects.

There are strict instructions to the additional head examiners not to allow any shoddy work in evaluation and not to issue more than 20-25 answer books for evaluation to an examiner on a single day. The examiners are practising teachers who guard the interest of the candidates. There is no ground to believe that they do unjust marking and deny the candidates their due. It is true that in some cases totalling errors have been detected at the stage of scrutiny or verification of marks. In order to minimise such errors and to further strengthen and to improve its system, from 1993 checking of totals and other aspects of the answers has been trebled in order to detect and eliminate all lurking errors.

The results of all the candidates are reviewed by the Results Committee functioning at the Headquarters. The Regional Officers are not the number (*sic* members) of this Committee. This Committee reviews the results of all the regions and in case it decides to standardise the results in view of the results shown by the regions over the previous years, it adopts a uniform policy for the candidates of all the regions. No special policy is adopted for any region, unless there are some special reasons. This practice of awarding standardised marks in order to moderate the overall results is a practice common to most of the Boards of Secondary Education. The exact number of marks awarded for the purpose of standardisation in different subjects varies from year to year. The system is extremely impersonalised and has no room for collusion or infringement. It is in a word a scientific system."

CBSE submitted that the procedure evolved and adopted by it ensures fairness and accuracy in the evaluation of answer books and made the entire process as foolproof as possible and therefore denial of re-evaluation or inspection or grant of copies cannot be considered to be denial of fair play or unreasonable restriction on the rights of the students.

8. A Division Bench of the High Court heard and disposed of the said writ petition along with the connected writ petitions (relied upon by the West Bengal Board of Secondary Education and others) by a common judgment dated 5-2-2009. The High Court held that the evaluated answer books of an examinee writing a public examination conducted by the statutory bodies like

CBSE or any university or Board of Secondary Education, being a "document, manuscript record, and opinion" fell within the definition of "information" as defined in Section 2(*f*) of the RTI Act. It held that the provisions of the RTI Act should be interpreted in a manner which would lead towards dissemination of information rather than withholding the same; and in view of the right to information, the examining bodies were bound to provide inspection of evaluated answer books to the examinees. Consequently it directed CBSE to grant inspection of the answer books to the examinees who sought information. The High Court, however, rejected the prayer made by the examinees for re-evaluation of the answer books, as that was not a relief that was available under the RTI Act. The RTI Act only provided a right to access information, but not for any consequential reliefs. Feeling aggrieved by the direction to grant inspection, CBSE has filed this appeal by special leave.

9. Before us CBSE contended that the High Court erred in:

(*i*) directing CBSE to permit inspection of the evaluated answer books, as that would amount to requiring CBSE to disobey its Examination Bye-law 61(4), which provided that no candidate shall claim or be entitled to re-evaluation of answer books or disclosure/ inspection of answer books;

(*ii*) holding that Bye-law 61(4) was not binding upon the examinees, in view of the overriding effect of the provisions of the RTI Act, even though the validity of that bye-law had not been challenged;

(*iii*) not following the decisions of this Court in *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*[1], *Pramod Kumar Srivastava* v. *Bihar Public Service Commission*[2], *Board of Secondary Education* v. *Pravas Ranjan Panda*[3], *Board of Secondary Education* v. *D. Suvankar*[4] and *W.B. Council of Higher Secondary Education* v. *Ayan Das*[5]; and

(*iv*) holding that the examinee had a right to inspect his answer book under Section 3 of the RTI Act and the examining bodies like CBSE were not exempted from disclosure of information under Section 8(1)(*e*) of the RTI Act.

The appellants contended that they were holding the "information" (in this case, the evaluated answer books) in a fiduciary relationship and, therefore, exempted under Section 8(1)(*e*) of the RTI Act.

10. The examinees and the Central Information Commission contended that the object of the RTI Act is to ensure maximum disclosure of information and minimum exemptions from disclosure; that an examining

1 (1984) 4 SCC 27
2 (2004) 6 SCC 714 : 2004 SCC (L&S) 883
3 (2004) 13 SCC 383
4 (2007) 1 SCC 603
5 (2007) 8 SCC 242 : (2007) 2 SCC (L&S) 871

body does not hold the evaluated answer books, in any fiduciary relationship either with the student or the examiner; and that the information sought by any examinee by way of inspection of his answer books, will not fall under any of the exempted categories of information enumerated in Section 8 of the RTI Act. It was submitted that an examining body being a public authority holding the "information", that is, the evaluated answer books, and the inspection of answer books sought by the examinee being exercise of "right to information" as defined under the Act, the examinee as a citizen has the right to inspect the answer books and take certified copies thereof. It was also submitted that having regard to Section 22 of the RTI Act, the provisions of the said Act will have effect notwithstanding anything inconsistent in any law and will prevail over any rule, regulation or bye-law of the examining body barring or prohibiting inspection of answer books.

11. On the contentions urged, the following questions arise for our consideration:

(*i*) Whether an examinee's right to information under the RTI Act includes a right to inspect his evaluated answer books in a public examination or taking certified copies thereof?

(*ii*) Whether the decision of this Court in *Maharashtra State Board of Secondary and Higher Secondary Education*[1] and other cases referred to above, in any way affect or interfere with the right of an examinee seeking inspection of his answer books or seeking certified copies thereof?

(*iii*) Whether an examining body holds the evaluated answer books "in a fiduciary relationship" and consequently has no obligation to give inspection of the evaluated answer books under Section 8(1)(*e*) of the RTI Act?

(*iv*) If the examinee is entitled to inspection of the evaluated answer books or seek certified copies thereof, whether such right is subject to any limitations, conditions or safeguards?

Relevant legal provisions

12. To consider these questions, it is necessary to refer to the Statement of Objects and Reasons, the Preamble and the relevant provisions of the RTI Act. The RTI Act was enacted in order to ensure smoother, greater and more effective access to information and provide an effective framework for effectuating the right to information recognised under Article 19 of the Constitution. The Preamble to the Act declares the object sought to be achieved by the RTI Act thus:

"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information

1 *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27

Commission and State Information Commissions and for matters connected therewith or incidental thereto.

Whereas the Constitution of India has established democratic republic;

And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;"

13. Chapter II of the Act containing Sections 3 to 11 deals with the right to information and obligations of public authorities. Section 3 provides for the right to information and reads thus: "*Subject to the provisions of this Act, all citizens shall have the right to information.*" This section makes it clear that the RTI Act gives a right to a citizen to only access information, but not to seek any consequential relief based on such information.

14. Section 4 deals with the obligations of public authorities to maintain the records in the manner provided and publish and disseminate the information in the manner provided. Section 6 deals with requests for obtaining information. It provides that the applicant making a request for information shall not be required to give any reason for requesting the information or any personal details except those that may be necessary for contacting him.

15. Section 8 deals with exemption from disclosure of information and is extracted below in its entirety:

"**8.** ***Exemption from disclosure of information***.—(1) Notwithstanding anything contained in this Act, *there shall be no obligation to give any citizen*,—

(*a*) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(*b*) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(*c*) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(*d*) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(*e*) *information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information*;

(*f*) information received in confidence from foreign Government;

(*g*) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(*h*) information which would impede the process of investigation or apprehension or prosecution of offenders;

(*i*) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(*j*) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (*a*), (*c*) and (*i*) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under Section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act." (emphasis supplied)

16. Section 9 provides that without prejudice to the provisions of Section 8, a request for information may be rejected if such a request for providing access would involve an infringement of copyright. Section 10 deals with severability of exempted information and sub-section (1) thereof is extracted below:

"**10.** ***Severability***.—(1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any

information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."

17. Section 11 deals with the third-party information and sub-section (1) thereof is extracted below:

"**11.** ***Third-party information***.—(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party."

18. The definitions of "information", "public authority", "record and right to information" in clauses (*f*), (*h*), (*i*) and (*j*) of Section 2 of the RTI Act are extracted below:

"2. (*f*) '*information*' means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;

* * *

(*h*) '*public authority*' means any authority or body or institution of self-government established or constituted—

(*a*) by or under the Constitution;

(*b*) by any other law made by Parliament;

(*c*) by any other law made by State Legislature;

(*d*) by notification issued or order made by the appropriate Government, and includes any—

(*i*) body owned, controlled or substantially financed;

(*ii*) non-government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;

(*i*) '*record*' includes—

(*a*) any document, manuscript and file;

(*b*) any microfilm, microfiche and facsimile copy of a document;

(*c*) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(*d*) any other material produced by a computer or any other device;

(*j*) '*right to information*' means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(*i*) inspection of work, documents, records;

(*ii*) taking notes, extracts or certified copies of documents or records;

(*iii*) taking certified samples of material;

(*iv*) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

19. Section 22 provides for the Act to have overriding effect and is extracted below:

"**22.** ***Act to have overriding effect***.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

20. It will also be useful to refer to a few decisions of this Court which considered the importance and scope of the right to information. In *State of U.P.* v. *Raj Narain*[6] this Court observed: (SCC p. 453, para 74)

"*74.* In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech*, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security." (emphasis supplied)

21. In *Dinesh Trivedi* v. *Union of India*[7] this Court held: (SCC pp. 313-14, paras 16-17 & 19)

"*16.* In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute. ...

17. Implicit in this assertion is the proposition that in transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated.

6 (1975) 4 SCC 428
7 (1997) 4 SCC 306

* * *

19. ... To ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to maintain a fine balance which would serve public interest."

22. In *People's Union for Civil Liberties* v. *Union of India*[8], this Court held that right to information is a facet of the freedom of "speech and expression" as contained in Article 19(1)(*a*) of the Constitution of India and such a right is subject to any reasonable restriction in the interest of the security of the State and subject to exemptions and exceptions.

Re: Question (i)

23. The definition of "information" in Section 2(*f*) of the RTI Act refers to any material in any form which includes records, documents, opinions, papers among several other enumerated items. The term "record" is defined in Section 2(*i*) of the said Act as including any document, manuscript or file among others. When a candidate participates in an examination and writes his answers in an answer book and submits it to the examining body for evaluation and declaration of the result, the answer book is a document or record. When the answer book is evaluated by an examiner appointed by the examining body, the evaluated answer book becomes a record containing the "opinion" of the examiner. Therefore the evaluated answer book is also an "information" under the RTI Act.

24. Section 3 of the RTI Act provides that subject to the provisions of this Act all the citizens shall have *the right to information*. The term "*right to information*" is defined in Section 2(*j*) as the right to information accessible under the Act which is held by or under the control of any public authority. Having regard to Section 3, the citizens have the right to access to all the information held by or under the control of any public authority except those excluded or exempted under the Act. The object of the Act is to empower the citizens to fight against corruption and hold the Government and their

8 (2004) 2 SCC 476

instrumentalities accountable to the citizens, by providing them access to information regarding functioning of every public authority.

25. Certain safeguards have been built into the Act so that the revelation of information will not conflict with other public interests which include efficient operation of the Governments, optimum use of limited fiscal resources and preservation of confidential and sensitive information. The RTI Act provides access to information held by or under the control of public authorities and not in regard to information held by any private person. The Act provides for the following exclusions by way of exemptions and exceptions (under Sections 8, 9 and 24) in regard to information held by the public authorities:

(*i*) Exclusion of the Act in entirety under Section 24 to intelligence and security organisations specified in the Second Schedule even though they may be "public authorities" (except in regard to information with reference to allegations of corruption and human rights violations).

(*ii*) Exemption of the several categories of information enumerated in Section 8(1) of the Act which no public authority is under an obligation to give to any citizen, notwithstanding anything contained in the Act [however, in regard to the information exempted under clauses (*d*) and (*e*), the competent authority, and in regard to the information excluded under clause (*j*), the Central Public Information Officer/State Public Information Officer/the appellate authority, may direct disclosure of information, if larger public interest warrants or justifies the disclosure].

(*iii*) If any request for providing access to information involves an infringement of a copyright subsisting in a person other than the State, the Central/State Public Information Officer may reject the request under Section 9 of the RTI Act.

Having regard to the scheme of the RTI Act, the right of the citizens to access any information held or under the control of any public authority, should be read in harmony with the exclusions/exemptions in the Act.

26. The examining bodies (universities, Examination Boards, CBSE, etc.) are neither intelligence nor security organisations and therefore the exemption under Section 24 will not apply to them. The disclosure of information with reference to answer books does not also involve infringement of any copyright and therefore Section 9 will not apply. Resultantly, unless the examining bodies are able to demonstrate that the evaluated answer books fall under any of the categories of exempted "information" enumerated in clauses (*a*) to (*j*) of sub-section (1) of Section 8, they will be bound to provide access to the information and any applicant can either inspect the document/record, take notes, extracts or obtain certified copies thereof.

27. The examining bodies contend that the evaluated answer books are exempted from disclosure under Section 8(1)(*e*) of the RTI Act, as they are "information" held in its fiduciary relationship. They fairly conceded that evaluated answer books will not fall under any other exemptions in

sub-section (1) of Section 8. Every examinee will have the right to access his evaluated answer books, by either inspecting them or take certified copies thereof, unless the evaluated answer books are found to be exempted under Section 8(1)(*e*) of the RTI Act.

Re: Question (ii)

28. In *Maharashtra State Board*[1], this Court was considering whether denial of re-evaluation of answer books or denial of disclosure by way of inspection of answer books, to an examinee, under Rules 104(1) and (3) of the Maharashtra Secondary and Higher Secondary Board Rules, 1977 was violative of the principles of natural justice and violative of Articles 14 and 19 of the Constitution of India. Rule 104(1) provided that no re-evaluation of the answer books shall be done and on an application of any candidate verification will be restricted to checking whether all the answers have been examined and that there is no mistake in the totalling of marks for each question in that subject and transferring marks correctly on the first cover page of the answer book. Rule 104(3) provided that no candidate shall claim or be entitled to re-evaluation of his answer books or inspection of answer books as they were treated as confidential.

29. This Court while upholding the validity of Rule 104(3) held as under: (*Maharashtra State Board case*[1], SCC pp. 38-39 & 42, paras 12, 14, 16 & 15)

> "*12.* … the 'process of evaluation of answer papers or of subsequent verification of marks' under clause (3) of Regulation 104 does not attract the principles of natural justice since no decision-making process which brings about adverse civil consequences to the examinees is involved. The principles of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to verify the correctness of the evaluation made by the examiners by themselves conducting an inspection of the answer books and determining whether there has been a proper and fair valuation of the answers by the examiners. …
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> * * *
>
> *14.* … So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. …
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> * * *
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> *16.* … The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters

1 *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27

covered by the Act and there is no scope for interference by the court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution."

* * *

"*15.* ... it was perfectly within the competence of the Board, rather it was its plain duty, to apply its mind and decide as a matter of policy relating to the conduct of the examination as to whether disclosure and inspection of the answer books should be allowed to the candidates, whether and to what extent verification of the result should be permitted after the results have already been announced and whether any right to claim revaluation of the answer books should be recognised or provided for. All these are undoubtedly matters which have an intimate nexus with the objects and purposes of the enactment and are, therefore, within the ambit of the general power to make regulations...." (*Maharashtra State Board case*[1], SCC p. 41, para 15)

30. This Court in *Maharashtra State Board*[1] held that Regulation 104(3) cannot be held to be unreasonable merely because in certain stray instances, errors or irregularities had gone unnoticed even after verification of the answer books concerned according to the existing procedure and it was only after further scrutiny made either on orders of the court or in the wake of contentions raised in the petitions filed before a court, that such errors or irregularities were ultimately discovered. This Court reiterated the view that "the test of reasonableness is not applied in vacuum but in the context of life's realities" and concluded that realistically and practically, providing all the candidates inspection of their answer books or re-evaluation of the answer books in the presence of the candidates would not be feasible.

31. Dealing with the contention that every student is entitled to fair play in examination and receive marks matching his performance, this Court held: (*Maharashtra State Board case*[1], SCC p. 31)

"What constitutes fair play depends upon the facts and circumstances relating to each particular given situation. If it is found that every possible precaution has been taken and all necessary safeguards provided to ensure that the answer books inclusive of supplements are kept in safe custody so as to eliminate the danger of their being tampered with, [and] that the evaluation is done by the examiners applying uniform standards with checks and cross-checks at different stages and that measures for detection of malpractice, etc. have also been effectively adopted, in such cases it will not be correct on the part of the courts to strike down the provision prohibiting revaluation on the ground that it violates the rules of fair play. It appears that the procedure evolved by the Board for ensuring fairness and accuracy in evaluation of the answer books has

1 *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27

made the system as foolproof as can be possible and is entirely satisfactory. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in the regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when [we find that] all safeguards against errors and malpractices have been provided for, there cannot be [said to be] any denial of fair play to the examinees by reason of the prohibition against asking for revaluation."

32. This Court in *Maharashtra State Board*[1] concluded that if inspection and verification in the presence of the candidates, or revaluation, have to be allowed as of right, it may lead to gross and indefinite uncertainty, particularly in regard to the relative ranking, etc. of the candidate, besides leading to utter confusion on account of the enormity of the labour and time involved in the process. This Court concluded: (*Maharashtra State Board case*[1], SCC pp. 56-57, para 29)

"*29.* … the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass-root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded."

33. The above principles laid down in *Maharashtra State Board*[1] have been followed and reiterated in several decisions of this Court, some of which are referred to in para 9 above. But the principles laid down in the decisions such as *Maharashtra State Board*[1] depend upon the provisions of the rules and regulations of the examining body. If the rules and regulations of the examining body provide for re-evaluation, inspection or disclosure of the answer books, then none of the principles in *Maharashtra State Board*[1] or other decisions following it, will apply or be relevant. There has been a gradual change in trend with several examining bodies permitting inspection and disclosure of the answer books.

34. It is thus now well settled that a provision barring inspection or disclosure of the answer books or re-evaluation of the answer books and restricting the remedy of the candidates only to re-totalling is valid and binding on the examinee. In the case of CBSE, the provisions barring re-evaluation and inspection contained in Bye-law 61, are akin to Rule 104

1 *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27

considered in *Maharashtra State Board*[1]. As a consequence if an examination is governed only by the rules and regulations of the examining body which bar inspection, disclosure or re-evaluation, the examinee will be entitled only for re-totalling by checking whether all the answers have been evaluated and further checking whether there is no mistake in the totalling of marks for each question and marks have been transferred correctly to the title (abstract) page. The position may however be different, if there is a superior statutory right entitling the examinee, as a citizen to seek access to the answer books, as information.

35. In these cases, the High Court has rightly denied the prayer for re-evaluation of answer books sought by the candidates in view of the bar contained in the rules and regulations of the examining bodies. It is also not a relief available under the RTI Act. Therefore, the question whether re-evaluation should be permitted or not, does not arise for our consideration. What arises for consideration is the question whether the examinee is entitled to inspect his evaluated answer books or take certified copies thereof. This right is claimed by the students, not with reference to the rules or bye-laws of examining bodies, but under the RTI Act which enables them and entitles them to have access to the answer books as "information" and inspect them and take certified copies thereof.

36. Section 22 of the RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer books fall under the exempted category of information described in clause (*e*) of Section 8(1) of the RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations. Therefore, the decision of this Court in *Maharashtra State Board*[1] and the subsequent decisions following the same, will not affect or interfere with the right of the examinee seeking inspection of the answer books or taking certified copies thereof.

Re: Question (iii)

37. Section 8(1) enumerates the categories of information which are exempted from disclosure under the provisions of the RTI Act. The examining bodies rely upon clause (*e*) of Section 8(1) which provides that there shall be no obligation on any public authority to give any citizen, information available to it in its fiduciary relationship. This exemption is subject to the condition that if the competent authority [as defined in Section 2(*e*) of the RTI Act] is satisfied that the larger public interest warrants the disclosure of such information, the information will have to be disclosed.

1 *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27

Therefore the question is: whether the examining body holds the evaluated answer books in its fiduciary relationship?

38. The terms "fiduciary" and "fiduciary relationship" refer to different capacities and relationship, involving a common duty or obligation.

38.1. *Black's Law Dictionary* (7th Edn., p. 640) defines "fiduciary relationship" thus:

> "*Fiduciary relationship*.—A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships usually arise in one of four situations: (*1*) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (*2*) when one person assumes control and responsibility over another, (*3*) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (*4*) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer."

38.2. *American Restatement* (Trusts and Agency) define "fiduciary" as one whose intention is to act for the benefit of another as to matters relevant to the relation between them. *Corpus Juris Secundum* (Vol. 36-A, p. 381) attempts to define "fiduciary" thus:

> "A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.
>
> The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate. Some examples of what, in particular connections, the term has been held to include and not to include are set out in the note."

38.3. *Words and Phrases*, Permanent Edn. (Vol. 16-A, p. 41) defines "fiducial relation" thus:

> "There is a technical distinction between a 'fiducial relation' which is more correctly applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, and other similar relationships, and 'confidential relation' which includes the legal relationships, and also every other relationship wherein confidence is rightly reposed and is exercised.
>
> Generally, the term 'fiduciary' applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."

38.4. In *Bristol and West Building Society* v. *Mothew*[9] the term "fiduciary" was defined thus: (Ch pp. 14-15)

> "A *fiduciary* is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. … A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal." (emphasis supplied)

38.5. In *Wolf* v. *Superior Court*[10] the California Court of Appeals defined "fiduciary relationship" as under:

> "any relationship existing between the parties to the transaction where one of the parties is duty-bound to act with utmost good faith for the benefit of the other party. Such a relationship ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interests of the other party without the latter's knowledge and consent."

39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the

9 1998 Ch 1 : (1997) 2 WLR 436 : (1996) 4 All ER 698 (CA)

10 107 Cal App 4th 25 (2003)

benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.

40. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.

41. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words "information available to a person in his fiduciary relationship" are used in Section 8(1)(*e*) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary—a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a Director of a company with reference to a shareholder, an executor with reference to a legatee, a Receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body.

42. The duty of examining bodies is to subject the candidates who have completed a course of study or a period of training in accordance with its curricula, to a process of verification/examination/testing of their knowledge, ability or skill, or to ascertain whether they can be said to have successfully completed or passed the course of study or training. Other specialised examining bodies may simply subject the candidates to a process of

verification by an examination, to find out whether such person is suitable for a particular post, job or assignment. An examining body, if it is a public authority entrusted with public functions, is required to act fairly, reasonably, uniformly and consistently for public good and in public interest.

43. This Court has explained the role of an examining body in regard to the process of holding examination in the context of examining whether it amounts to "service" to a consumer, in *Bihar School Examination Board* v. *Suresh Prasad Sinha*[11] in the following manner: (SCC p. 487, paras 11-13)

> "*11.* ... The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative.
>
> *12.* When the Examination Board conducts an examination in discharge of its statutory function, it does not offer its 'services' to any candidate. Nor does a student who participates in the examination conducted by the Board, hire or avail of any service from the Board for a consideration. On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education; and if so, determine his position or rank or competence vis-à-vis other examinees. The process is not, therefore, availment of a service by a student, but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination.
>
> *13.* ... The fact that in the course of conduct of the examination, or evaluation of answer scripts, or furnishing of marksheets or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service provider for a consideration, nor convert the examinee into a consumer...."

It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer books are evaluated by the examining body.

44. We may next consider whether an examining body would be entitled to claim exemption under Section 8(1)(*e*) of the RTI Act, even assuming that it is in a fiduciary relationship with the examinee. That section provides that notwithstanding anything contained in the Act, there shall be no obligation to give any citizen *information available to a person in his fiduciary relationship*. This would only mean that even if the relationship is fiduciary, the exemption would operate in regard to giving access to the information

11 (2009) 8 SCC 483 : (2009) 3 SCC (Civ) 438

held in fiduciary relationship, to third parties. There is no question of the fiduciary withholding information relating to the beneficiary, from the beneficiary himself.

45. One of the duties of the fiduciary is to make thorough disclosure of all the relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. By that logic, the examining body, if it is in a fiduciary relationship with an examinee, will be liable to make a full disclosure of the evaluated answer books to the examinee and at the same time, owe a duty to the examinee not to disclose the answer books to anyone else. If *A* entrusts a document or an article to *B* to be processed, on completion of processing, *B* is not expected to give the document or article to anyone else but is bound to give the same to *A* who entrusted the document or article to *B* for processing. Therefore, if a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer book, Section 8(1)(*e*) would operate as an exemption to prevent access to any third party and will not operate as a bar for the very person who wrote the answer book, seeking inspection or disclosure of it.

46. An evaluated answer book of an examinee is a combination of two different "informations". The first is the answers written by the examinee and the second is the marks/assessment by the examiner. When an examinee seeks inspection of his evaluated answer books or seeks a certified copy of the evaluated answer book, the information sought by him is not really the answers he has written in the answer books (which he already knows), nor the total marks assigned for the answers (which has been declared). What he really seeks is the information relating to the break-up of marks, that is, the specific marks assigned to each of his answers. When an examinee seeks "information" by inspection/certified copies of his answer books, he knows the contents thereof being the author thereof.

47. When an examinee is permitted to examine an answer book or obtain a certified copy, the examining body is not really giving him some information which is held by it in trust or confidence, but is only giving him an opportunity to read what he had written at the time of examination or to have a copy of his answers. Therefore, in furnishing the copy of an answer book, there is no question of breach of confidentiality, privacy, secrecy or trust. The real issue, therefore, is not in regard to the answer book but in regard to the marks awarded on the evaluation of the answer book. Even here the total marks given to the examinee in regard to his answer book are already declared and known to the examinee. What the examinee actually wants to know is the break-up of marks given to him, that is, how many marks were given by the examiner to each of his answers so that he can assess how his performance has been evaluated and whether the evaluation is proper as per his hopes and expectations. Therefore, the test for finding out whether the information is exempted or not, is not in regard to the answer book but in regard to the evaluation by the examiner.

48. This takes us to the crucial issue of evaluation by the examiner. The examining body engages or employs hundreds of examiners to do the evaluation of thousands of answer books. The question is: whether the information relating to the "evaluation" (that is, assigning of marks) is held by the examining body in a fiduciary relationship? The examining bodies contend that even if fiduciary relationship does not exist with reference to the examinee, it exists with reference to the examiner who evaluates the answer books. On a careful examination we find that this contention has no merit.

49. The examining body entrusts the answer books to an examiner for evaluation and pays the examiner for his expert service. The work of evaluation and marking the answer book is an assignment given by the examining body to the examiner which he discharges for a consideration. Sometimes, an examiner may assess answer books, in the course of his employment, as a part of his duties without any specific or special remuneration. In other words, the examining body is the "principal" and the examiner is the "agent" entrusted with the work, that is, the evaluation of answer books. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner.

50. On the other hand, when an answer book is entrusted to the examiner for the purpose of evaluation, for the period the answer book is in his custody and to the extent of the discharge of his functions relating to evaluation, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer book or the result of evaluation of the answer book to anyone other than the examining body. Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him. He does not have any copyright or proprietary right, or confidentiality right in regard to the evaluation. Therefore, it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner.

51. We, therefore, hold that an examining body does not hold the evaluated answer books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption under Section 8(1)(*e*) is not available to the examining bodies with reference to the evaluated answer books. As no other exemption under Section 8 is available in respect of the evaluated answer books, the examining bodies will have to permit inspection sought by the examinees.

Re: Question (iv)

52. When an examining body engages the services of an examiner to evaluate the answer books, the examining body expects the examiner not to disclose the information regarding evaluation to anyone other than the examining body. Similarly the examiner also expects that his name and particulars would not be disclosed to the candidates whose answer books are evaluated by him. In the event of such information being made known, a disgruntled examinee who is not satisfied with the evaluation of the answer books, may act to the prejudice of the examiner by attempting to endanger

his physical safety. Further, any apprehension on the part of the examiner that there may be danger to his physical safety, if his identity becomes known to the examinees, may come in the way of effective discharge of his duties. The above applies not only to the examiner, but also to the scrutiniser, co-ordinator and head examiner who deal with the answer book.

53. The answer book usually contains not only the signature and code number of the examiner, but also the signatures and code number of the scrutiniser/co-ordinator/head examiner. The information as to the names or particulars of the examiners/co-ordinators/scrutinisers/head examiners are therefore exempted from disclosure under Section 8(1)(*g*) of the RTI Act, on the ground that if such information is disclosed, it may endanger their physical safety. Therefore, if the examinees are to be given access to evaluated answer books either by permitting inspection or by granting certified copies, such access will have to be given only to that part of the answer book which does not contain any information or signature of the examiners/co-ordinators/scrutinisers/head examiners, exempted from disclosure under Section 8(1)(*g*) of the RTI Act. Those portions of the answer books which contain information regarding the examiners/co-ordinators/scrutinisers/head examiners or which may disclose their identity with reference to signature or initials, shall have to be removed, covered, or otherwise severed from the non-exempted part of the answer books, under Section 10 of the RTI Act.

54. The right to access information does not extend beyond the period during which the examining body is expected to retain the answer books. In the case of CBSE, the answer books are required to be maintained for a period of three months and thereafter they are liable to be disposed of/destroyed. Some other examining bodies are required to keep the answer books for a period of six months. The fact that right to information is available in regard to answer books does not mean that answer books will have to be maintained for any longer period than required under the rules and regulations of the public authority. The obligation under the RTI Act is to make available or give access to *existing information* or information which is expected to be preserved or maintained.

55. If the rules and regulations governing the functioning of the respective public authority require preservation of the information for only a limited period, the applicant for information will be entitled to such information only if he seeks the information when it is available with the public authority. For example, with reference to answer books, if an examinee makes an application to CBSE for inspection or grant of certified copies beyond three months (or six months or such other period prescribed for preservation of the records in regard to other examining bodies) from the date of declaration of results, the application could be rejected on the ground that such information is not available. The power of the Information Commission under Section 19(8) of the RTI Act to require a public authority to take any such steps as may be necessary *to secure compliance with the*

provision of the Act, does not include a power to direct the *public authority* to preserve the information, for any period larger than what is provided under the rules and regulations of the public authority.

56. On behalf of the respondent examinees, it was contended that having regard to sub-section (3) of Section 8 of the RTI Act, there is an implied duty on the part of every public authority to maintain the information for a minimum period of twenty years and make it available whenever an application was made in that behalf. This contention is based on a complete misreading and misunderstanding of Section 8(3). The said sub-section nowhere provides that records or information have to be maintained for a period of twenty years. The period for which any particular record or information has to be maintained would depend upon the relevant statutory rule or regulation of the public authority relating to the preservation of records.

57. Section 8(3) provides that information relating to any occurrence, event or matter which has taken place and occurred or happened *twenty years before the date* on which any request is made under Section 6, shall be provided to any person making a request. This means that where any information required to be maintained and preserved for a period beyond twenty years under the rules of the public authority, is exempted from disclosure under any of the provisions of Section 8(1) of the RTI Act, then, notwithstanding such exemption, access to such information shall have to be provided by disclosure thereof, after a period of twenty years except where they relate to information falling under clauses (*a*), (*c*) and (*i*) of Section 8(1).

58. In other words, Section 8(3) provides that any protection against disclosure that may be available, under clauses (*b*), (*d*) to (*h*) and (*j*) of Section 8(1) will cease to be available after twenty years in regard to records which are required to be preserved for more than twenty years. Where any record or information is required to be destroyed under the rules and regulations of a public authority prior to twenty years, Section 8(3) will not prevent destruction in accordance with the rules. Section 8(3) of the RTI Act is not therefore a provision requiring all "information" to be preserved and maintained for twenty years or more, nor does it override any rules or regulations governing the period for which the record, document or information is required to be preserved by any public authority.

59. The effect of the provisions and scheme of the RTI Act is to divide "information" into three categories. They are:

(*i*) Information which promotes *transparency and accountability* in the working of every public authority, disclosure of which may also help in containing or discouraging corruption [enumerated in clauses (*b*) and (*c*) of Section 4(1) of the RTI Act].

(*ii*) Other information held by public authority [that is, all information other than those falling under clauses (*b*) and (*c*) of Section 4(1) of the RTI Act].

(*iii*) Information which is not held by or under the control of any public authority and which cannot be accessed by a public authority under any law for the time being in force.

Information under the third category does not fall within the scope of the RTI Act. Section 3 of the RTI Act gives every citizen, the right to "information" held by or under the control of a public authority, which falls either under the first or second category. In regard to the information falling under the first category, there is also a special responsibility upon the public authorities to suo motu *publish and disseminate such information* so that they will be easily and readily accessible to the public without any need to access them by having recourse to Section 6 of the RTI Act. There is no such obligation to publish and disseminate the other information which falls under the second category.

60. Information falling under the first category, enumerated in Sections 4(1)(*b*) and (*c*) of the RTI Act are extracted below.

60.1. "**4.** ***Obligations of public authorities***.—(1) Every public authority shall—

(*a*) * * *

(*b*) publish within one hundred and twenty days from the enactment of this Act—

(*i*) the particulars of its organisation, functions and duties;

(*ii*) the powers and duties of its officers and employees;

(*iii*) the *procedure followed in the decision-making process, including channels of supervision and accountability*;

(*iv*) *the norms set by it for the discharge of its functions*;

(*v*) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(*vi*) a statement of the categories of documents that are held by it or under its control;

(*vii*) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

(*viii*) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(*ix*) a directory of its officers and employees;

(*x*) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(*xi*) *the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made*;

(*xii*) *the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes*;

(*xiii*) *particulars of recipients of concessions, permits or authorisations granted by it*;

(*xiv*) details in respect of the information, available to or held by it, reduced in an electronic form;

(*xv*) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(*xvi*) the names, designations and other particulars of the Public Information Officers;

(*xvii*) such other information as may be prescribed;

and thereafter update these publications every year;

(*c*) publish all relevant facts while formulating important policies or announcing the decisions which affect public;" (emphasis supplied)

60.2. Sub-sections (2), (3) and (4) of Section 4 relating to the dissemination of information enumerated in Sections 4(1)(*b*) and (*c*) are extracted below:

"4. (2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (*b*) of sub-section (1) *to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.*

(3) For the *purposes of sub-section (1)*, every *information shall be disseminated widely and in such form and manner which is easily accessible to the public.*

(4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.—For the purposes of sub-sections (3) and (4), 'disseminated' means making known or communicated the information to the public through noticeboards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority." (emphasis supplied)

61. Some High Courts have held that Section 8 of the RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that, therefore, Section 8 should be construed strictly, literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and accountability by providing access to information under the control of public authorities.

The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the Governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The Preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore, when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.

62. When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the Governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act, that is, Section 8 of the Freedom to Information Act, 2002. The courts and Information Commissions enforcing the provisions of the RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act.

63. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information *that is available and existing*. This is clear from a combined reading of Section 3 and the definitions of "information" and "right to information" under clauses (*f*) and (*j*) of Section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in Section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide "advice" or "opinion" to an applicant, nor required to obtain and furnish any "opinion" or "advice" to an applicant. The reference to "opinion" or "advice" in the definition of "information" in Section 2(*f*) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act.

64. Section 19(8) of the RTI Act has entrusted the Central/State Information Commissions, with the power to require any public authority to take any such steps as may be necessary to secure the compliance with the provisions of the Act. Apart from the generality of the said power, clause (*a*) of Section 19(8) refers to six specific powers, to implement the provision of the Act.

64.1. Sub-clause (*i*) of Section 19(8)(*a*) empowers a Commission to require the public authority to provide access to information if so requested in a particular "form" (that is, either as a document, microfilm, compact disc, pen drive, etc.). This is to secure compliance with Section 7(9) of the Act.

64.2. Sub-clause (*ii*) of Section 19(8)(*a*) empowers a Commission to require the public authority to appoint a Central Public Information Officer or State Public Information Officer. This is to secure compliance with Section 5 of the Act.

64.3. Sub-clause (*iii*) of Section 19(8)(*a*) empowers a Commission to require a public authority to publish certain information or categories of information. This is to secure compliance with Sections 4(1) and (2) of the RTI Act.

64.4. Sub-clause (*iv*) of Section 19(8)(*a*) empowers a Commission to require a public authority to make necessary changes to its practices relating to the maintenance, management and destruction of the records. This is to secure compliance with clause (*a*) of Section 4(1) of the Act.

64.5. Sub-clause (*v*) of Section 19(8)(*a*) empowers a Commission to require the public authority to increase the training for its officials on the right to information. This is to secure compliance with Sections 5, 6 and 7 of the Act.

64.6. Sub-clause (*vi*) of Section 19(8)(*a*) empowers a Commission to require the public authority to provide annual reports in regard to the compliance with clause (*b*) of Section 4(1). This is to ensure compliance with the provisions of clause (*b*) of Section 4(1) of the Act.

65. The power under Section 19(8) of the Act, however, does not extend to requiring a public authority to take any steps which are not required or contemplated to secure compliance with the provisions of the Act or to issue directions beyond the provisions of the Act. The power under Section 19(8) of the Act is intended to be used by the Commissions to ensure compliance with the Act, in particular ensure that every public authority maintains its records duly catalogued and indexed in the manner and in the form which facilitates the right to information and ensure that the records are computerised, as required under clause (*a*) of Section 4(1) of the Act; and to ensure that the information enumerated in clauses (*b*) and (*c*) of Section 4(1) of the Act are published and disseminated, and are periodically updated as provided in sub-sections (3) and (4) of Section 4 of the Act. If the "information" enumerated in clause (*b*) of Section 4(1) of the Act are

effectively disseminated (by publications in print and on websites and other effective means), apart from providing transparency and accountability, citizens will be able to access relevant information and avoid unnecessary applications for information under the Act.

66. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of the RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (*b*) of Section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information [that is, information other than those enumerated in Sections 4(1)(*b*) and (*c*) of the Act], equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of Governments, etc.).

67. Indiscriminate and impractical demands or directions under the RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counterproductive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquillity and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising "information furnishing", at the cost of their normal and regular duties.

Conclusion

68. In view of the foregoing, the order of the High Court directing the examining bodies to permit examinees to have inspection of their answer books is affirmed, subject to the clarifications regarding the scope of the RTI Act and the safeguards and conditions subject to which "information" should be furnished. The appeals are disposed of accordingly.

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(2016) 3 Supreme Court Cases 525

(BEFORE M. YUSUF EQBAL AND CHOCKALINGAM NAGAPPAN, JJ.)

Transferred Case (C) No. 91 of 2015†

RESERVE BANK OF INDIA .. Petitioner;

Versus

JAYANTILAL N. MISTRY .. Respondent.

With

Transferred Case (C) No. 92 of 2015‡

ICICI BANK LIMITED .. Petitioner;

Versus

S.S. VOHRA AND OTHERS .. Respondents.

With

Transferred Case (C) No. 93 of 2015††

NATIONAL BANK FOR AGRICULTURE AND RURAL DEVELOPMENT .. Petitioner;

Versus

KISHAN LAL MITTAL .. Respondent.

With

Transferred Case (C) No. 94 of 2015†‡

RESERVE BANK OF INDIA .. Petitioner;

Versus

P.P. KAPOOR .. Respondent.

With

Transferred Case (C) No. 95 of 2015‡†

RESERVE BANK OF INDIA .. Petitioner;

Versus

SUBHAS CHANDRA AGRAWAL .. Respondent.

With

Transferred Case (C) No. 96 of 2015‡‡

RESERVE BANK OF INDIA .. Petitioner;

Versus

RAJA M. SHANMUGAM .. Respondent.

† Arising out of Transfer Petition (C) No. 707 of 2012
‡ Arising out of Transfer Petition (C) No. 708 of 2012
†† Arising out of Transfer Petition (C) No. 711 of 2012
†‡ Arising out of Transfer Petition (C) No. 712 of 2012
‡† Arising out of Transfer Petition (C) No. 713 of 2012
‡‡ Arising out of Transfer Petition (C) No. 715 of 2012

With

Transferred Case (C) No. 97 of 2015†††

NATIONAL BANK FOR AGRICULTURE AND RURAL DEVELOPMENT .. Petitioner;

Versus

SANJAY SITARAM KURHADE .. Respondent.

With

Transferred Case (C) No. 98 of 2015†††

RESERVE BANK OF INDIA .. Petitioner;

Versus

K.P. MURALIDHARAN NAIR .. Respondent.

With

Transferred Case (C) No. 99 of 2015†‡‡

RESERVE BANK OF INDIA .. Petitioner;

Versus

ASHWINI DIXIT .. Respondent.

With

Transferred Case (C) No. 100 of 2015†‡‡

RESERVE BANK OF INDIA .. Petitioner;

Versus

A. VENUGOPAL AND ANOTHER .. Respondents.

With

Transferred Case (C) No. 101 of 2015‡††

RESERVE BANK OF INDIA .. Petitioner;

Versus

MOHAN K. PATIL AND OTHERS .. Respondents.

Transferred Cases (C) No. 91 of 2015 with Nos. 92-101 of 2015, decided on December 16, 2015

A. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 8(1)(e) and 2(f) — Fiduciary relationship — Information received from banks by RBI relating to financial health and probity in banking and financial system of the country, such as details of unpaid loans by industrialists, names of top defaulters, investigation and audit reports re banks, advisories issued to foreign branches of Indian banks, etc. — Withholding of, as information received in fiduciary capacity — Concept of "fiduciary relationship" —**

††† Arising out of Transfer Petition (C) No. 716 of 2012
†‡‡ Arising out of Transfer Petition (C) No. 717 of 2012
†‡† Arising out of Transfer Petition (C) No. 718 of 2012
†‡‡ Arising out of Transfer Petition (C) No. 709 of 2012
‡†† Arising out of Transfer Petition (C) No. 714 of 2012

Meaning of, explained — Information when may be denied on such ground — Public interest served by disclosure, to be weighed against this exceptional ground, to deny information — Role and duty of RBI

— Held, RBI is a statutory body and a regulatory authority to oversee the functioning of the banks and the country's banking sector — Further, RBI is supposed to uphold public interest and not the interest of individual banks and is not in any fiduciary relationship with any bank — Further, RBI has no legal duty to maximise the benefit of any public sector or private sector bank, and thus, there is no relationship of "trust" between them — In the present case, held, the banks and financial institutions had an obligation to provide all the information to RBI and such information shared under an obligation/duty cannot be considered to come under the purview of being shared in fiduciary relationship

— Further, S. 2(f) provides that inspection reports, documents, etc. fall under the purview of "information" which is obtained by the public authority (RBI) from a private body — Thus, held, even if it was considered that RBI and the banks and financial institutions shared a "fiduciary relationship", S. 2(f) would still make the information shared between them to be accessible by the public — Hence, held, RBI could not have withheld the information sought on this ground — All impugned orders of CIC directing disclosure of the above sought information, affirmed — Banking Regulation Act, 1949 — Ss. 27, 34-A and 35 — Reserve Bank of India Act, 1934 — S. 45-E — Credit Information Companies (Regulation) Act, 2005 — Ss. 17, 20, 22 and 28 — State Bank of India Act, 1955 — S. 44 — State Bank of India (Subsidiary Banks) Act, 1959 — S. 52 — Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, S. 13

B. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 8(1)(a) & (d) — Information received from banks by RBI relating to financial health and probity in banking and financial system of the country, such as details of unpaid loans by industrialists, names of top defaulters, investigation and audit reports re banks, advisories issued to foreign branches of Indian banks, etc. — Withholding of such information on ground of disclosure being detrimental to economic interests of country, commercial confidence and public interest — Economic interest of country — What is — Information when may be denied on such ground — Public interest served by disclosure to be weighed against this exceptional ground to deny information — Role and duty of RBI**

— Held, when it comes to national economic interest, disclosure of information about currency or exchange rates, interest rates, taxes, regulation or supervision of banking, insurance and other financial institutions, proposals for expenditure or borrowing and foreign investment could in some cases harm the national economy, particularly if released prematurely — However, lower level economic and financial information, like contracts and departmental budgets should not be withheld under this exemption — Hence, held, RBI could not have withheld the information sought in the present cases on these grounds — All impugned orders of CIC directing disclosure of the above sought information, affirmed — Banking Regulation Act, 1949 — Ss. 27, 34-A and 35 — Reserve Bank of India Act, 1934 — S. 45-E — Credit

Information Companies (Regulation) Act, 2005 — Ss. 17, 20, 22 and 28 — State Bank of India Act, 1955 — S. 44 — State Bank of India (Subsidiary Banks) Act, 1959 — S. 52 — Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 — S. 13 — Words and Phrases — "Economic interest of country"

C. **Human and Civil Rights — Right to Information Act, 2005 — S. 3 — Right to information — Importance of, in modern society — Rationale for enactment of RTI Act, 2005 — Discussed (Paras 48 to 50)**

D. **Human and Civil Rights — Right to Information Act, 2005 — Ss. 10(1) and 8 — Information available with RBI in respect of banking and financial system — Extent of disclosure necessary — Held, RBI cannot be put in a fix, by making it accountable to supply information of every action taken by it — However, in the instant case, RBI is accountable and as such it has to provide the information sought herein to the information seekers under S. 10(1) of the RTI Act i.e. information received from banks by RBI relating to unpaid loans by industrialists, names of top defaulters, investigation and audit reports re banks, advisories issued to foreign branches of Indian banks, etc., directed to be disclosed — All impugned orders of CIC directing disclosure of the above sought information, affirmed**

E. **Human and Civil Rights — Right to Information Act, 2005 — S. 3 and S. 8 — Right to information and its limits — Scheme of, explained — Constitution of India, Arts. 19(1)(a) & (2)**

F. **Human and Civil Rights — Right to Information Act, 2005 — S. 8(1)(a) — Information which may be denied under and which may not be denied under — Explained**

The RTI applicants, in the transferred cases, had sought certain pieces of information under the Right to Information Act, 2005 but some of it was denied by Reserve Bank of India and other banks on the ground of economic interest, commercial confidence, fiduciary relationship and public interest.

In TC No. 94 of 2015, the RTI applicant had asked about the details of the loans taken by the industrialists that had not been repaid, and he had asked about the names of the top defaulters who had not repaid their loans to public sector banks. RBI resisted the disclosure of the information claiming exemption under Sections 8(1)(*a*) and 8(1)(*e*) of the RTI Act on the ground that disclosure would affect the economic interest of the country, and that the information had been received by RBI from the banks in fiduciary capacity. In TC No. 95 of 2015, the RTI applicant had asked about the details of the show-cause notices and fines imposed by RBI on various banks. RBI resisted the disclosure of the information claiming exemption under Sections 8(1)(*a*), (*d*) and (*e*) of the RTI Act on the ground that disclosure would affect the economic interest of the country, the competitive position of the banks and that the information has been received by RBI in fiduciary capacity. The respondent (in Transfer Case No. 92 of 2015), sought certain information in relation to ICICI Bank, advisory issued to the Hong Kong Branch of ICICI Bank, etc. The respondent (in Transfer Case No. 91 of 2015),

inter alia, sought information from CPIO of RBI, regarding investigation and audit report pertaining to Makarpura Industrial Estate Coop. Bank Ltd., cooperative banks gone in liquidation, etc., but was denied being exempt from disclosure under Sections 8(1)(*a*) and (*e*) of the RTI Act. Pieces of information, were also sought by the respective respondent-applicants in other transferred cases.

The petitioner RBI moved before High Courts by way of a writ petition, being aggrieved by the decision of the Central Information Commission (CIC) which had directed disclosure of the information sought in all these cases. Subsequently, various transfer petitions were filed seeking transfer of the writ petitions pending before different High Courts to the Supreme Court.

RBI contended that in its capacity as the regulator and supervisor of the banking system of the country, it had access to various information collected and kept by the banks. The inspecting team and the officers carried out inspections of different banks and much of the information accessed by the inspecting officers of RBI was confidential. Referring to Section 28 of the Banking Regulation Act, it was submitted that RBI, in the public interest, could publish the information obtained by it, in a consolidated form but not otherwise. It was further contended that RBI was vested with the responsibility of regulation and supervision of the banking system. As part of its supervisory role, RBI supervised and monitored the banks under its jurisdiction through on-site inspection conducted on annual basis under the statutory powers derived by it under Section 35 of the Banking Regulation Act, 1949, off-site returns on key financial parameters and engaging banks in dialogue through periodical meetings. It was contended that a bank may not be able to disclose all data that may be relevant to assess its risk profile, due to the inherent need to preserve confidentiality in relation to its customers.

RBI also contended that in any policy of transparency, there was a need to build processes which ensure that the benefits of supervisory disclosure are appropriately weighed against the risk to stakeholders, such as depositors. It was contended that disclosure of scrutiny and information would create misunderstanding/misinterpretation in the minds of the public. It was submitted that the disclosure of information sought for by the applicant would not serve the public interest as it would give adverse impact in public confidence on the bank. This had serious implication for financial stability which rested on public confidence. This would also adversely affect the economic interest of the State and would not serve the larger public interest. The specific stand of the petitioner Reserve Bank of India was that the information sought for was exempted under Sections 8(1)(*a*), (*d*) and (*e*) of the Right to Information Act, 2005. It was contended that as the regulator and supervisor of the banking system, RBI had discretion in the disclosure of such information in public interest. It was contended that the Right to Information Act, 2005 could not override the provisions for confidentiality conferred on RBI.

The issue involved in these cases was whether the above information sought for under the Right to Information Act, 2005 could be denied by Reserve Bank of India and other banks to the public at large on the ground of economic interest, commercial confidence, fiduciary relationship with other bank on the one hand and the public interest on the other?

Rejecting the contentions of RBI and upholding all the impugned disclosure orders of CIC, the Supreme Court

Held :

The scope of fiduciary relationship consists of the following rules:

(*i*) *No conflict rule* — A fiduciary must not place himself in a position where his own interests conflict with that of his customer or the beneficiary. There must be 'real sensible possibility of conflict'.

(*ii*) *No profit rule* — A fiduciary must not profit from his position at the expense of his customer, the beneficiary.

(*iii*) *Undivided loyalty rule* — A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs.

(*iv*) *Duty of confidentiality* — A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person. (Para 58)

The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party. (Para 59)

CBSE v. *Aditya Bandopadhyay*, (2011) 8 SCC 497 : 6 SCEC 25, *followed*

Bristol and West Building Society v. *Mothew*, 1998 Ch 1 : (1997) 2 WLR 436 : (1996) 4 All ER 698 (CA); *Wolf* v. *Superior Court*, 107 Cal App 4th 25 (2003), *cited*

Black's Law Dictionary (7th Edn., p. 640); *American Restatements* (Trusts and Agency); *Words and Phrases*, Permanent Edn. (Vol. 16-A, p. 41), *relied on*

The Advanced Law Lexicon, 3rd Edn., 2005, *referred to*

In the instant case, RBI does not place itself in a fiduciary relationship with the financial institutions (though, in word it puts itself to be in that position) because, the reports of the inspections, statements of the banks, information related to the business obtained by RBI are not under the pretext of confidence or trust. In this case neither RBI nor the banks act in the interest of each other. By attaching an additional "fiduciary" label to the statutory duty, the regulatory authorities have intentionally or unintentionally created an in terrorem effect. (Para 60)

RBI is a statutory body set up by the RBI Act as India's Central Bank. It is a statutory regulatory authority to oversee the functioning of the banks and the country's banking sector. Under Section 35-A of the Banking Regulation Act, RBI has been given powers to issue any direction to the banks in public interest, in the

interest of banking policy and to secure proper management of a banking company. It has several other far-reaching statutory powers. RBI is supposed to uphold public interest and not the interest of individual banks. RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximise the benefit of any public sector or private sector bank, and thus, there is no relationship of "trust" between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus, RBI ought to act with transparency and not hide information that might embarrass individual banks. It is duty-bound to comply with the provisions of the RTI Act and disclose the information sought by the respondents herein. The baseless and unsubstantiated argument of RBI that the disclosure would hurt the economic interest of the country is totally misconceived. In the impugned order, CIC has given several reasons to state why the disclosure of the information sought by the respondents would hugely serve public interest, and non-disclosure would be significantly detrimental to public interest and not in the economic interest of India. RBI's argument that if people, who are sovereign, are made aware of the irregularities being committed by the banks then the country's economic security would be endangered, is not only absurd but is equally misconceived and baseless. (Paras 61 to 63)

The exemption contained in Section 8(1)(*e*) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship. As in the instant case, the financial institutions have an obligation to provide all the information to RBI and such an information shared under an obligation/duty cannot be considered to come under the purview of being shared in fiduciary relationship. One of the main characteristics of a fiduciary relationship is "trust and confidence": something that RBI and the banks lack between them. (Para 64)

What has to be weighed in the present case is the public interest and fiduciary relationship (which is being shared between RBI and the banks). Since the RTI Act is enacted to empower the common people, the test to determine the limits of Section 8 of the RTI Act is whether giving information to the general public would be detrimental to the economic interests of the country? To what extent should the public be allowed to get information? In the context of the above questions, it had long since come to our attention that the Public Information Officers (PIO) under the guise of one of the exceptions given under Section 8 of RTI Act, have thwarted the efforts of general public in getting their hands on the rightful information that they are entitled to. And in this case, RBI and the banks have sidestepped the general public's demand to give the requisite information on the pretext of "fiduciary relationship" and "economic interest". This attitude of RBI will only attract more suspicion and disbelief in them. RBI as a regulatory authority should work to make the banks accountable to their actions. (Paras 65 to 67)

From a reading of Section 2(*f*) of the RTI Act, 2005, it can be inferred that the legislature's intent was to make available to the general public, such information which had been obtained by the public authorities from the private body. Had it been the case where only information related to public authorities was to be provided, the legislature would not have included the words "private body". As

in this case, RBI is liable to provide information regarding inspection report and other documents to the general public. Even if RBI and the banks and financial institutions shared a "fiduciary relationship", Section 2(*f*) of the RTI Act, 2005 would still make the information shared between them to be accessible by the public. The facts reveal that banks are trying to cover up their underhand actions: thus, they are even more liable to be subjected to public scrutiny. Many banks and financial institutions have resorted to such acts which are neither clean nor transparent. RBI in association with them has been trying to cover up their acts from public scrutiny. It is the responsibility of RBI to take rigid action against those banks which have been practising disreputable business practices. From the past, we have also come across banks and financial institutions which have tried to defraud the public. These acts are neither in the best interests of the country nor in the interests of citizens. To our surprise, RBI as a watch dog should have been more dedicated towards disclosing information to the general public under the Right to Information Act, 2005. It is understood, however, that RBI cannot be put in a fix, by making it accountable for every action taken by it. However, in the instant case, RBI is accountable and as such it has to provide the information sought in the present cases, as directed by CIC in the impugned orders, to the information seekers under Section 10(1) of the RTI Act. (Paras 68 to 72)

Economic interest of a nation, in most common parlance, are the goals which a nation wants to attain to fulfil its national objectives. It is the part of our national interest, meaning thereby national interest cannot be seen with the spectacles (glasses) devoid of economic interest. It includes in its ambit a wide range of economic transactions or economic activities necessary and beneficial to attain the goals of a nation, which definitely includes as an objective, economic empowerment of its citizens. It has been recognised and understood without any doubt now that one of the tools to attain this goal is to make information available to people, because an informed citizen has the capacity to reasoned action and also to evaluate the actions of the legislature and executives, which is very important in a participative democracy and this will serve the nation's interest better, which as stated above also includes its economic interests. Recognising the significance of this tool it has not only been made one of the fundamental rights under Article 19 of the Constitution but also a Central Act has been brought into effect on 12-10-2005 as the Right to Information Act, 2005. (Para 74)

The ideal of "Government by the people" makes it necessary that people have access to information on matters of public concern. The free flow of information about the affairs of the Government paves way for debate in public policy and fosters accountability in the Government. It creates a condition for "open governance", which is a foundation of democracy. But neither have the fundamental rights nor the right to information been provided in absolute terms. The fundamental rights guaranteed under Article 19(1)(*a*) are restricted under Article 19(2) of the Constitution on the grounds of national and societal interest. Similarly, Section 8(1) of the Right to Information Act, 2005, contains the exemption provisions where right to information can be denied to public in the name of national security and sovereignty, national economic interests, relations with foreign States, etc. Thus, not all the information that the Government generates will or shall be given out to the public. (Paras 75 and 76)

Any excessive use of these rights which may lead to tampering with these boundaries will not further the national interest. And when it comes to national

economic interest, disclosure of information about currency or exchange rates, interest rates, taxes, the regulation or supervision of banking, insurance and other financial institutions, proposals for expenditure or borrowing and foreign investment, could in some cases, harm the national economy, particularly if released prematurely. However, lower level economic and financial information, like contracts and departmental budgets should not be withheld under this exemption. This makes it necessary to think when or at what stage an information is to be provided i.e. the appropriate time of providing the information which will depend on nature of information sought for and the consequences it will lead to after coming in the public domain. (Para 77)

In one of the cases, the respondent *V* sought certain information in relation to the Patna Branch of ICICI Bank and advisory issued to the Hong Kong Branch of ICICI Bank. The contention of the respondent was that the Finance Minister had made a written statement on the floor of the House on 24-7-2009 that some banks like SBI, ICICI, Bank of Baroda, Dena Bank, etc., were violating FEMA Guidelines for opening of accounts and categorically mentioned that the Patna Branch of ICICI Bank Ltd. had opened some fictitious accounts which were opened by fraudsters and hence, an advisory note was issued to the branch concerned on December 2007 for its irregularities. The Finance Minister even mentioned that in the year 2008, ICICI Bank Ltd. was also warned for alleged irregular dealings in securities in Hong Kong. Hence, the respondent sought such advisory note as issued by RBI to ICICI Bank. The Central Information Commissioner, in the impugned order, considered RBI Master Circular dated 1-7-2009 issued to all the commercial banks giving various directions and finally held as under:

"Section 10 of the RTI Act leaves it open to decide each case on its merits after having satisfied ourselves whether an advisory note needs to be provided as it is or whether some of its contents may be severed since they may be exempted per se under the RTI Act. However, we find no reason, whatsoever, to apply Section 10 of the RTI Act in order to severe the contents of the advisory note issued by RBI to ICICI Bank Ltd. as the matter has already been placed on the floor of the Lok Sabha by the Finance Minister." (Para 78)

Similarly, in another case the respondent *M* sought information from CPIO, RBI in respect of a cooperative bank viz. Saraspur Nagrik Sahkari Bank Ltd. related to inspection report, which was denied by CPIO on the ground that the information contained therein were received by RBI in a fiduciary capacity and are exempt under Section 8(1)(*e*) of the RTI Act. CIC directed the petitioner to furnish that information since RBI expressed its willingness to disclose a summary of a substantive part of the inspection report to the respondent. (Para 79)

In another case, where the respondent *K* sought information, inter alia, about the details of default in loans taken from public sector banks by industrialists, out of the list of defaulters, top 100 defaulters, names of the businessmen, firm name, principal amount, interest amount, date of default and date of availing the loan, etc. The said information was denied by CPIO mainly on the basis that it was held in fiduciary capacity and was exempt from disclosure of such information. Allowing the appeal, CIC directed for the disclosure of such information. (Para 80)

In these cases and in the rest of the cases CIC has considered elaborately the information sought for and passed orders which do not suffer from any error of law, irrationality or arbitrariness. The Central Information Commissioner has passed the impugned orders giving valid reasons and the said orders, therefore, need no interference by the Supreme Court. (Paras 82 and 83)

Mardia Chemicals Ltd. v. *Union of India*, (2004) 4 SCC 311, *relied on*

Jayantilal N. Mistry v. *RBI*, 2011 SCC OnLine CIC 15841; *S.S. Vohra* v. *RBI*, 2011 SCC OnLine CIC 8882; *Kishanlal Mittal* v. *NABARD*, 2011 SCC OnLine CIC 16327; *P.P. Kapoor* v. *RBI*, 2011 SCC OnLine CIC 16444; *Subhash Chandra Agrawal* v. *RBI*, 2011 SCC OnLine CIC 16596; *Raja M. Shanmugam* v. *RBI*, 2011 SCC OnLine CIC 17727, *affirmed*

RBI v. *Jayantilal N. Mistry*, WP (C) No. 8400 of 2011, order dated 29-11-2011 (Del), *vacated*

Ravin Ranchchodlal Patel v. *RBI*, 2006 SCC OnLine CIC 1414; *State of U.P.* v. *Raj Narain*, (1975) 4 SCC 428; *S.P. Gupta* v. *President of India*, 1981 Supp SCC 87; *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294; *RBI* v. *Jayantilal N. Mistry*, Transfer Petition No. 707 of 2012, order dated 30-3-2015 (SC); *People's Union for Civil Liberties* v. *Union of India*, (2003) 4 SCC 399; *R.S. Raghunath* v. *State of Karnataka*, (1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507; *ICICI Bank Ltd.* v. *SIDCO Leathers Ltd.*, (2006) 10 SCC 452; *Central Bank of India* v. *State of Kerala*, (2009) 4 SCC 94 : (2009) 2 SCC (Civ) 17; *A.G. Varadarajulu* v. *State of T.N.*, (1998) 4 SCC 231; *Peerless General Finance and Investment Co. Ltd.* v. *RBI*, (1992) 2 SCC 343; *B. Suryanarayana* v. *N. 1453 The Kolluru Parvathi Coop. Bank Ltd.*, 1985 SCC OnLine AP 59 : AIR 1986 AP 244, *referred to*

U.P. Financial Corpn. v. *Gem Cap (India) (P) Ltd.*, (1993) 2 SCC 299, *cited*

VN-D/56098/CV

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Chronological list of cases cited ***on page(s)***

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4. 2011 SCC OnLine CIC 17727, *Raja M. Shanmugam* v. *RBI* 542*g-h*, 568*e-f*
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23. 1981 Supp SCC 87, *S.P. Gupta* v. *President of India* 553*a*
24. (1975) 4 SCC 428, *State of U.P.* v. *Raj Narain* 552*f*

The Judgment of the Court was delivered by

M. YUSUF EQBAL, J.— The main issue that arises for our consideration in these transferred cases is as to whether all the information sought for under the Right to Information Act, 2005 can be denied by Reserve Bank of India and other banks to the public at large on the ground of economic interest, commercial confidence, fiduciary relationship with other banks on the one hand and the public interest on the other. If the answer to the above question is in the negative, then up to what extent the information can be provided under the 2005 Act.

2. It has been contended by RBI that it carries out inspections of banks and financial institutions on regular basis and the inspection reports prepared by it contain a wide range of information that is collected in a fiduciary capacity. The facts in brief of Transfer Case No. 91 of 2015 are that during May-June 2010 the statutory inspection of Makarpura Industrial Estate Cooperative Bank Ltd. was conducted by RBI under the Banking Regulation Act, 1949. Thereafter, in October 2010, the respondent sought the following information from CPIO of RBI under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	Procedure rules and regulations of inspection being carried out on cooperative banks.	RBI is conducting inspections under Section 35 of the BR Act, 1949 (AACS) at prescribed intervals.
2.	Last RBI investigation and audit report carried out by Shri Santosh Kumar during 23-4-2010 to 6-5-2010 sent to Registrar of the Cooperative of the Gujarat State, Gandhinagar on Makarpura Industrial Estate Coop. Bank Ltd. Reg. No. 2808.	The information sought is maintained by the Bank in a fiduciary capacity and was obtained by Reserve Bank during the course of inspection of the Bank and hence, cannot be given to the outsiders. Moreover, disclosure of such information may harm the interest of the Bank and banking system. Such information is also exempt from disclosure under

		Sections 8(1)(*a*) and (*e*) of the RTI Act, 2005.
3.	Last 20 years' inspection (carried out with name of inspector) report on above Bank and action-taken report.	Same as at Query (2) above.
4.	(*i*) Reports on all cooperative banks gone on liquidation. (*ii*) Action taken against all Directors and Managers for recovery of public funds and powers utilised by RBI and analysis and procedure adopted.	(*i*) Same as at Query (2) above. (*ii*) This information is not available with the Department.
5.	Name of remaining cooperative banks under your observations against irregularities and action-taken reports.	No specific information has been sought.
6.	Period required to take action and implementations.	No specific information has been sought.

3. On 30-3-2011, the first appellate authority disposed of the appeal of the respondent agreeing with the reply given by CPIO in Queries 2, 3 and first part of 4, relying on the decision of the Full Bench of the Central Information Commission passed in *Ravin Ranchchodlal Patel* v. *RBI*[1]. Thereafter, in the second appeal preferred by the aggrieved respondent, the Central Information Commission by the impugned order dated 1-11-2011[2], directed RBI to provide information as per records to the respondent in relation to Queries 2 to 6 before 30-11-2011. Aggrieved by the decision of the Central Information Commission (CIC), the petitioner RBI moved the Delhi High Court by way of a writ petition, inter alia, praying for quashing of the aforesaid order of CIC. The High Court, while issuing notice, stayed[3] the operation of the aforesaid order.

4. Similarly, in Transfer Case No. 92 of 2015, the respondent sought the following information from CPIO of RBI under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	The Hon'ble Finance Minister made a written statement on the floor of the House which, inter alia, must have been made after verifying the records from RBI and the Bank must have the copy of the facts as reported by Finance Minister. Please supply copy of the note sent to Finance Minister.	In the absence of the specific details, we are not able to provide any information.
2.	The Hon'ble Finance Minister made a statement that some of the banks like SBI, ICICI Bank Ltd., Bank of Baroda, Dena Bank, HSBC Bank,	We do not have this information.

1 2006 SCC OnLine CIC 1414
2 *Jayantilal N. Mistry* v. *RBI*, 2011 SCC OnLine CIC 15841
3 *RBI* v. *Jayantilal N. Mistry*, WP (C) No. 8400 of 2011, order dated 29-11-2011 (Del)

etc. were issued letter of displeasure for violating FEMA Guidelines for opening of accounts whereas some other banks were even fined rupees one crore for such violations. Please give me the names of the banks with details of violations committed by them.		
3.	"Advisory note" issued to ICICI Bank for account opened by some fraudsters at its Patna Branch. Information sought about "exact nature of irregularities committed by the Bank under 'FEMA'. Also give list of other illegalities committed by IBL and other details of offences committed by IBL through various branches in India and abroad along with action taken by the Regulator including the names and designations of his officials, branch name, type of offence committed, etc. The exact nature of offences committed by Patna Branch of the Bank and other branches of the Bank and names of his officials involved, type of offence committed by them and punishment awarded by authority concerned, names and designation of the designated authority, who investigated the above case and his findings and punishment awarded."	An advisory letter had been issued to the Bank in December 2007 for the Bank's Patna Branch having failed to (*a*) comply with RBI Guidelines on customer identification, opening/ operating of customer accounts, (*b*) the Bank not having followed the normal banker's prudence while opening an account in question. As regards the list of supervisory action taken by us, it may be stated that the query is too general and not specific. Further, we may state that supervisory actions taken were based on the scrutiny conducted under Section 35 of the Banking Regulation (BR) Act. The information in the scrutiny report is held in fiduciary capacity and the disclosure of which can affect the economic interest of the country and also affect the commercial confidence of the Bank. And such information is also exempt from disclosure under Sections 8(1)(*a*), (*d*) and (*e*) of the RTI Act (extracts enclosed). We, therefore, are unable to accede to your request.
4.	Exact nature of irregularities committed by ICICI Bank in Hong Kong.	In this regard, self-explicit printout taken from the website of Securities and Futures Commission, Hong Kong is enclosed.
5.	ICICI Bank's Moscow Branch involved in money laundering act.	We do not have the information.
6.	Imposition of fine on ICICI Bank under Section 13 of PMLA for loss of documents in floods.	We do not have any information to furnish in this regard.
7.	Copy of the warning or "advisory note" issued twice to the Bank in the last two years and reasons recorded therein. Name and designation of the authority who conducted this check and his decision to issue an advisory note only instead of penalties to be imposed under the Act.	As regards your request for copies/ details of advisory letters to ICICI Bank, we may state that such information is exempt from disclosure under Sections 8(1)(*a*), (*d*) and (*e*) of the RTI Act. The scrutiny of records of ICICI Bank

		is conducted by our Department of Banking Supervision (DBS). The Chief General Manager in charge of DBS, Centre Office Reserve Bank of India is Shri S. Karuppasamy.

5. In this matter, it has been alleged by the petitioner RBI that the respondent is aggrieved on account of his application form for three-in-one account with the Bank and ICICI Securities Ltd. (ISEC) lost in the floods in July 2005 and because of non-submission of required documents, the trading account with ISEC was suspended, for which the respondent approached the District Consumer Forum, which rejected the respondent's allegations of tampering of records and dismissed the complaint of the respondent. His appeal was also dismissed by the State Commission. The respondent then moved an application under the 2005 Act pertaining to the suspension of operation of his said trading account. As the consumer complaint as well as the abovementioned application did not yield any result for the respondent, he made an application under the Act before CPIO, SEBI, appeal to which went up to CIC, the Division Bench of which disposed of his appeal upholding the decision of CPIO and the appellate authority of SEBI. Thereafter, in August 2009, the respondent once again made the present application under the Act seeking the aforesaid information. Being aggrieved by the order of the appellate authority, the respondent moved second appeal before CIC, who by the impugned order[4] directed CPIO of RBI to furnish information pertaining to advisory notes as requested by the respondent within 15 working days. Hence, RBI approached the Bombay High Court by way of writ petition.

6. In Transfer Case No. 93 of 2015, the respondent sought the following information from CPIO of National Bank for Agriculture and Rural Development under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	Copies of inspection reports of apex cooperative banks of various States/ Mumbai DCCB from 2005 till date.	Furnishing of information is exempt under Section 8(1)(*a*) of the RTI Act.
2.	Copies of all correspondences with Maharashtra State Govt./RBI/ any other agency of State/Central Cooperative Bank from January 2010 till date.	Different departments in NABARD deal with various issues related to MSCB. The query is general in nature. Applicant may please be specific in query/information sought.
3.	Provide confirmed/draft minutes of meetings of governing Board/Board of Directors/Committee of Directors of NABARD from April 2007 till date.	Furnishing of information is exempt under Section 8(1)(*d*) of the RTI Act.

4 *S.S. Vohra* v. *RBI*, 2011 SCC OnLine CIC 8882

4.	Provide information on compliance with Section 4 of the RTI Act, 2005 by NABARD.	Compliance available on the website of NABARD i.e. www.nabard.org.
5.	Information may be provided on a CD.	-

7. The First Appellate Authority concurred with CPIO and held that inspection report cannot be supplied in terms of Section 8(1)(*a*) of the RTI Act. The respondent filed second appeal before the Central Information Commission, which was allowed[5]. RBI filed writ petition before the High Court challenging the order of CIC dated 14-11-2011 on identical issue and the High Court stayed the operation of the order of CIC.

8. In Transfer Case No. 94 of 2015, the respondent sought following information from CPIO of RBI under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	As mentioned at Query 2(*a*) what is RBI doing about uploading the entire list of Bank defaulters on the Bank's website? When will it be done? Why is it not done?	Pursuant to the then Finance Minister's Budget Speech made in Parliament on 28-2-1994, in order to alert the banks and financial institutions and put them on guard against the defaulters to other lending institutions. RBI has put in place scheme to collect details about borrowers of banks and financial institutions with outstanding balance aggregating Rs 1 crore and above which are classified as "doubtful" or "loss" or where suits are filed, as on 31st March and 30th September each year. In February 1999, Reserve Bank of India had also introduced a scheme for collection and dissemination of information on cases of wilful default of borrowers with outstanding balance of Rs 25 lakhs and above. At present, RBI disseminates list of abovesaid non-suit filed "doubtful" and "loss" borrowed accounts of Rs 1 crore and above on half-yearly basis (i.e. as on March 31 and September 30) to banks and financial institutions for *their confidential* use. The list of non-suit filed accounts of wilful defaulters of Rs 25 lakhs and above is also disseminated on quarterly basis to banks and financial institutions for

5 *Kishanlal Mittal* v. *NABARD*, 2011 SCC OnLine CIC 16327

		their confidential use. Section 45-E of the Reserve Bank of India Act, 1934 prohibits Reserve Bank from disclosing "credit information" except in the manner provided therein. (*iii*) However, banks and financial institutions were advised on 1-10-2002 to furnish information in respect of suit filed accounts between Rs 1 lakh and Rs 1 crore from the period ending March 2002 in a phased manner to CIBIL only. CIBIL is placing the list of defaulters (suit filed accounts) of Rs 1 crore and above and list of wilful defaulters (suit filed accounts) of Rs 25 lakh and above as on 31-3-2003 and onwards on its website (www.cibil.com).

9. The Central Information Commission heard the parties through video conferencing. CIC directed[6] CPIO of the petitioner to provide information as per the records to the respondent in relation to Queries 2(*b*) and 2(*c*) before 10-12-2011. The Commission has also directed the Governor, RBI to display this information on its website before 31-12-2011, in fulfilment of its obligations under Section 4(1)(*b*)(*xvii*) of the Right to Information Act, 2005 and to update it each year.

10. In Transfer Case No. 95 of 2015, the following information was sought and reply to it is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	Complete and detailed information including related documents/ correspondence/file noting, etc. of RBI on imposing fines on some banks for violating rules like also referred in enclosed news clipping.	As the violations of which the banks were issued show-cause notices and subsequently imposed penalties and based on the findings of the Annual Financial Inspection (AFI) of the banks, and the information is received by us in a fiduciary capacity, the disclosure of such information would prejudicially affect the economic interests of the State and harm the bank's competitive position. The SCNs/findings/reports/ associated correspondences/orders are, therefore, exempt from disclosure in terms of the provisions of Sections 8(1)(*a*), (*d*) and (*e*) of the RTI Act, 2005.
2.	Complete list of banks which were issued show-cause notices before fine was imposed as also referred in enclosed news clipping mentioning also default for which show-cause notice was issued to each of such banks.	

6 *P.P. Kapoor* v. *RBI*, 2011 SCC OnLine CIC 16444

3.	Complete list of banks which were issued show-cause notices before fine was imposed as also referred in enclosed news clippings mentioning also default for which show-cause notice was issued to each of such banks.	-do-
4.	List of banks out of those in Query (2) above where fine was not imposed giving details like, if their reply was satisfactory, etc.	-do-
5.	List of banks which were ultimately found guilty and fines mentioning also amount of fine on each of the bank and criterion to decide fine on each of the bank.	The names of the 19 banks and details of penalty imposed on them are furnished in Annexure 1. Regarding the criterion for deciding the fine, the penalties have been imposed on these banks for contravention of various directions and instructions such as failure to carry out proper due diligence on user appropriateness and suitability of products, selling derivative products to users not having proper risk management policies, not verifying the underlying/adequacy of underlying and eligible limits under past performance route, issued by RBI in respect of derivative transactions.
6.	Is fine imposed/action taken on some other banks also other than as mentioned in enclosed news clipping.	No other bank was penalised other than those mentioned in the annexure, in the context of Press Release No. 2010-2011/1555 of 26-4-2011.
7.	If yes, please provide details.	Not applicable, in view of the information provided in Query 5.
8.	Any other information.	The query is not specific.
9.	File notings on movement of this RTI petition and on every aspect of this RTI petition.	Copy of the note is enclosed.

11. In the second appeal, CIC heard the respondent via telephone and the petitioner through video conferencing. As directed by CIC, the petitioner filed written submission. CIC directed[7] CPIO of the petitioner to provide complete information in relation to Queries 1, 2 and 3 of the original application of the respondent before 15-12-2011.

12. In Transfer Case No. 96 of 2015, the respondent sought the following information from CPIO of RBI under the 2005 Act, reply to which is tabulated hereunder:

7 *Subhash Chandra Agrawal* v. *RBI*, 2011 SCC OnLine CIC 16596

Sl. No.	*Information sought*	*Reply*
1.	Before the Orissa High Court RBI has filed an affidavit stating that the total mark to market losses on account of currency derivatives is to the tune of more than Rs 32,000 crores. Please give bank-wise breakup of the MTM losses.	The information sought by you is exempted under Sections 8(1)(*a*) and (*e*) of the RTI Act, which state as under: "**8 *Exemptions from disclosure of information*.**—(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen (*a*) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence; * * * (*e*) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;"
2.	What is the latest figure available with RBI of the amount of losses suffered by Indian business houses? Please furnish the latest figures bank-wise and customer-wise.	Please refer to our response to Query 1 above.
3.	Whether the issue of derivative losses to Indian exporters was discussed in any of the meetings of Governor/Deputy Governor or senior official of Reserve Bank of India? If so, please furnish the minutes of the meeting where the said issue was discussed.	We have no information in this matter.
4.	Any other action-taken reports by RBI in this regard.	We have no information in this matter.

13. CIC allowed the second appeal and directed[8] CPIO FED of the petitioner to provide complete information in Queries 1, 2, 9 and 10 of the original application of the respondent before 5-1-2012. CPIO, FED complied with the order of CIC insofar Queries 2, 9 and 10 are concerned. RBI filed writ

8 *Raja M. Shanmugam* v. *RBI*, 2011 SCC OnLine CIC 17727

petition for quashing the order of CIC so far as it directs to provide complete information as per record on Query 1.

14. In Transfer Case No. 97 of 2015, the respondent sought following information from CPIO of National Bank for Agriculture and Rural Development under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	The report made by NABARD regarding 86 NPA accounts for Rs 3806.95 crores of Maharashtra State Cooperative Bank Ltd. [if any information of my application is not available in your Office/Department/Division/ Branch, transfer this application to the Office/Department/Division/ Branch concerned and convey me accordingly as per the provision of Section 6(3) of the Right to Information Act, 2005].	Please refer to your application dated 19-4-2011 seeking information under the RTI Act, 2005 which was received by us on 6-5-2011. In this connection, we advise that the questions put forth by you relate to the observations made in the inspection report of NABARD pertaining to MSCB which are confidential in nature. Since furnishing the information would impede the process of investigation or apprehension or prosecution of offenders, disclosure of the same is exempted under Section 8(1)(*h*) of the Act.

15. In Transfer Case No. 98 of 2015, the respondent sought the following information from CPIO of RBI under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	What contraventions and violations were made by SCB in respect of RBI instructions on derivatives for which RBI has imposed penalty of INR 10 lakhs on SCB in exercise of its powers vested under Section 47-A(1)(*b*) of the Banking Regulation Act, 1949 and as stated in RBI press release dated 26-4-2011 issued by the Department of Communications, RBI.	The Bank was penalised along with 18 other banks for contravention of various instructions issued by Reserve Bank of India in respect of derivatives, such as, failure to carry out due diligence in regard to suitability of products, selling derivative products to users not having risk management policies and not verifying the underlying/ adequacy of underlying and eligible limits under past performance route. The information is also available on our website under press releases.
2.	Please provide us the copies/details of all the complaints filed with RBI against SCB, accusing SCB of mis-selling derivative products, failure to carry out due diligence in regard to suitability of products, not verifying the underlying/adequacy of underlying and eligible limits under past performance and various	Complaints are received by Reserve Bank of India and as they constitute the third party information, the information requested by you cannot be disclosed in terms of Section 8(1)(*d*) of the RTI Act, 2005.

	other non-compliance with RBI instruction on derivatives. Also, please provide the above information in the following format: (*i*) Date of the complaint; (*ii*) Name of the complaint; (*iii*) Subject-matter of the complaint; (*iv*) Brief description of the facts and accusations made by the complainant; (*v*) Any other information available with RBI with respect to violation/contraventions by SCB of RBI instructions on derivatives.	
3.	Please provide us the copies of all the written replies/correspondences made by SCB with RBI and the recordings of all the oral submissions made by SCB to defend and explain the violations/contraventions made by SCB.	The action has been taken against the Bank based on the findings of the Annual Financial Inspection (AFI) of the Bank which is conducted under the provisions of Section 35 of the BR Act, 1949. The findings of the inspection are confidential in nature, intended specifically for the supervised entities and for corrective action by them. The information is received by us in fiduciary capacity, disclosure of which may prejudicially affect the economic interest of the State. As such, the information cannot be disclosed in terms of Sections 8(1)(*a*) and (*e*) of the RTI Act, 2005
4.	Please provide us the details/ copies of the findings, recordings, enquiry reports, directive orders file notings and/or any information on the investigations conducted by RBI against SCB in respect of non-compliance by SCB thereby establishing violations by SCBV in respect of non compliances with RBI instructions on derivatives. Please also provide the above information in the following format: (*i*) Brief violations/ contraventions made by SCB (*ii*) In brief, SCB replies/ defence/explanation against each violations/contraventions	-do-

	made by it under the show-cause notice. (*iii*) RBI investigations/notes/on the SCB. (*iv*) Replies/Defence/ Explanations for each of the violation/contravention made by SCB. (*v*) RBI remarks/findings with regard to the violations/ contraventions made by SCB.	

16. In Transfer Case No. 99 of 2015, the respondent sought the following information from CPIO of RBI under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	That, what action has the department taken against scams/financial irregularities of United Mercantile Cooperative Bank Ltd. as mentioned in the enclosed published news. Provide day-to-day progress report of the action taken.	*1.* Enquiry was carried out against scams/financial irregularities of United Mercantile Cooperative Bank Ltd. as mentioned in the enclosed published news. *2.* Note/Explanation has been called for from the Bank vide our letter dated 8-7-2011 regarding errors mentioned in enquiry report. *3.* The other information asked here is based on the conclusions of inspection report. We would like to state that conclusions found during inspections are confidential and the reports are finalised on the basis of information received from banks. We received the information from banks in a confident capacity. Moreover, disclosure of such information may cause damage to the banking system and financial interests of the State. Disclosure of such type of information is exempted under Sections 8(1)(*a*) and (*e*) of the RTI Act, 2005.
2.	That permission for opening how many extension counters was obtained by United Mercantile Cooperative Bank Ltd. from RBI. Provide details of expenditure incurred for constructing the extension counters. Had the Bank followed tender system for these	United Mercantile Cooperative Bank Ltd. was permitted to open 5, extension counters. The information regarding expenditure incurred on construction of these extension counters and tenders are not available with Reserve Bank of India.

	constructions, if yes, provide details of tenders concerned.	

17. In Transfer Case No. 100 of 2015, the respondent sought the following information from CPIO of RBI under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	Under which grade The george Town Cooperative Bank Ltd., Chennai, has been categorised as on 31-12-2006?	The classification of banks into various grades are done on the basis of inspection findings which is based on information/documents obtained in a fiduciary capacity and cannot be disclosed to outsiders. It is also exempted under Section 8(1)(*e*) of Right to Information Act, 2005.

18. The appellate authority observed that CPIO, UBD has replied that the classification of banks into various grades is done on the basis of findings recorded in inspection which are based on information/documents obtained in a fiduciary capacity and cannot be disclosed to outsiders. CPIO, UBD has stated that the same is exempted under Section 8(1)(*e*) of the RTI Act. Apart from the fact that information sought by the appellant is sensitive and cannot be disclosed, it could also harm the competitive position of the cooperative bank. Therefore, exemption from disclosure of the information is available under Section 8(1)(*d*) of the RTI Act.

19. In Transfer Case No. 101 of 2015, with regard to Deendayal Nagri Sahakari Bank Ltd., District Beed, the respondent sought the following information from CPIO of RBI under the 2005 Act, reply to which is tabulated hereunder:

Sl. No.	*Information sought*	*Reply*
1.	Copies of complaints received by RBI against illegal working of the said Bank, including violations of the Standing Orders of RBI as well as the provisions under Section 295 of the Companies Act, 1956.	Disclosure information regarding complaints received from third parties would harm the competitive position of a third party. Further, such information is maintained in a fiduciary capacity and is exempted from disclosure under Sections 8(1)(*d*) and (*e*) of the RTI Act.
2.	Action initiated by RBI against the said Bank, including all correspondence between RBI and the said Bank officials.	(*a*) A penalty of Rs 1 lakh was imposed on Deendayal Nagri Sahakari Bank Ltd. for violation of directives on loans to Directors/their relatives/concerns in which they are interested. The Bank paid the penalty on 8-10-2010. (*b*) As regards correspondence between RBI and the Cooperative Bank, it is advised that such

		information is maintained by RBI in fiduciary capacity and hence, cannot be given to outsiders. Moreover, disclosure of such information may harm the interest of the bank and banking system. Such information is exempt from disclosure under Sections 8(1)(*a*) and (*e*) of the RTI Act.
3.	Finding of the enquiry made by RBI, actions proposed and taken against the Bank and its officials, official notings, decisions, and final orders passed and issued.	Such information is maintained by the Bank in a fiduciary capacity and is obtained by RBI during the course of inspection of the Bank and hence, cannot be given to outsiders. The disclosure of such information would harm the competitive position of a third party. Such information is, therefore, exempted from disclosure under Sections 8(1)(*d*) and (*e*) of the RTI Act. As regards action taken against the Bank, it is replied at Sl. No. 2(*a*) above.
4.	Confidential letters received by RBI from the Executive Director of Vaishnavi Hatcheries Pvt. Ltd. complaining about the illegal working and pressure policies of the Bank and its Chairman for misusing the authority of digital signature for sanction of the backdated resignations of the Chairman of the Bank and few other Directors of the companies, details of action taken by RBI on that.	See reply at Sl. No. 2(*a*) above.

20. The first appellate authority observed that CPIO had furnished the information available on Queries 2 and 4. Further information sought in Queries 1 and 3 was exempted under Sections 8(1)(*a*), (*d*) and (*e*) of the RTI Act.

21. Various transfer petitions were, therefore, filed seeking transfer of the writ petitions pending before different High Courts. On 30-3-2015[9], while allowing the transfer petitions filed by Reserve Bank of India seeking transfer of various writ petitions filed by it in the High Courts of Delhi and Bombay, this Court passed the following orders:

> "Notice is served upon the substantial number of respondents. The learned counsel for the respondents have no objection if Writ Petitions Nos. 8400, 8605, 8693, 8583 of 2011, 32, 685, 263 and 1976 of 2012 pending in the High Court of Delhi at New Delhi and Writ Petitions (L) Nos. 2556 of 2011, 2798 of 2011 and 4897 of 2011 pending in the High

9 *RBI* v. *Jayantilal N. Mistry*, Transfer Petition No. 707 of 2012, order dated 30-3-2015 (SC)

Court of Bombay are transferred to this Court and be heard together. In the meanwhile, the steps may be taken to serve upon the unserved respondents. Accordingly, the transfer petitions are allowed and the abovementioned writ petitions are withdrawn to this Court. The High Court of Delhi and the High Court of Bombay are directed to remit the entire record of the said writ petitions to this Court within four weeks."

22. Mr T.R. Andhyarujina, learned Senior Counsel appearing for the petitioner Reserve Bank of India, assailed the impugned orders passed by the Central Information Commissioner as illegal and without jurisdiction. The learned counsel referred to various provisions of the Reserve Bank of India Act, 1934; the Banking Regulation Act, 1949 and the Credit Information Companies (Regulation) Act, 2005 and made the following submissions:

22.1. Reserve Bank of India being the statutory authority has been constituted under the Reserve Bank of India Act, 1934 for the purpose of regulating and controlling the money supply in the country. It also acts as statutory banker with the Government of India and State Governments and manages their public debts. In addition, it regulates and supervises commercial banks and cooperative banks in the country. RBI exercises control over the volume of credit, the rate of interest chargeable on loan and advances and deposits in order to ensure the economic stability. RBI is also vested with the powers to determine "*Banking Policy*" in the interest of banking system, monetary stability and sound economic growth. RBI, in exercise of powers conferred under Section 35 of the Banking Regulation Act, 1949, conducts inspection of the banks in the country.

22.2. RBI in its capacity as the regulator and supervisor of the banking system of the country has access to various information collected and kept by the banks. The inspecting team and the officers carry out inspections of different banks and much of the information accessed by the inspecting officers of RBI would be confidential. Referring to Section 28 of the Banking Regulation Act, it was submitted that RBI in the public interest may publish the information obtained by it, in a consolidated form but not otherwise.

22.3. The role of RBI is to safeguard the economic and financial stability of the country and it has large contingent of expert advisors relating to matters deciding the economy of the entire country and nobody can doubt the bona fides of the Bank. In this connection, the learned counsel referred to the decision of this Court in *Peerless General Finance and Investment Co. Ltd.* v. *RBI*[10].

22.4. Referring to the decision in *B. Suryanarayana* v. *N. 1453 The Kolluru Parvathi Coop. Bank Ltd.*[11] the learned counsel submitted that the Court will be highly chary to enter into and interfere with the decision of Reserve Bank of India. The learned counsel also referred to the decision in *Peerless General Finance and Investment Co. Ltd.* v. *RBI*[10] and contended that courts are not to interfere with the economic policy which is a function of the experts.

22.5. That RBI is vested with the responsibility of regulation and supervision of the banking system. As part of its supervisory role, RBI

10 (1992) 2 SCC 343
11 1985 SCC OnLine AP 59 : AIR 1986 AP 244

supervises and monitors the banks under its jurisdiction through on-site inspection conducted on annual basis under the statutory powers derived by it under Section 35 of the Banking Regulation Act, 1949, off-site returns on key financial parameters and engaging banks in dialogue through periodical meetings. RBI may take supervisory actions where warranted for violations of its guidelines/directives. The supervisory actions would depend on the seriousness of the offence, systemic implications and may range from imposition of penalty, to issue of strictures or letters of warning. While RBI recognises and promotes enhanced transparency in banks disclosures to the public, as transparency strengthens market discipline, a bank may not be able to disclose all data that may be relevant to assess its risk profile, due to the inherent need to preserve confidentiality in relation to its customers. In this light, while mandatory disclosures include certain prudential parameters such as capital adequacy, level of non-performing assets, etc., the supervisors themselves may not disclose all or some information obtained on-site or off-site. In some countries, wherever there are supervisory concerns, "prompt corrective action" programmes are normally put in place, which may or may not be publicly disclosed. Circumspection in disclosures by the supervisors arises from the potential market reaction that such disclosure might trigger, which may not be desirable. Thus, in any policy of transparency, there is a need to build processes which ensure that the benefits of supervisory disclosure are appropriately weighed against the risk to stakeholders, such as depositors.

22.6. As per the RBI Policy, the reports of the annual financial inspection and scrutiny of all banks/financial institutions are confidential documents, which cannot be disclosed. As a matter of fact, the annual financial inspection/scrutiny report reflect the supervisor's critical assessment of banks and financial institutions and their functions. Disclosure of the scrutiny and information would create misunderstanding/misinterpretation in the minds of the public. That apart, this may prove significantly counterproductive. The learned counsel submitted that the disclosure of information sought for by the applicant would not serve the public interest as it will have adverse impact on public confidence in the bank. This has serious implication for financial stability which rests on public confidence. This will also adversely affect the economic interest of the State and would not serve the larger public interest.

23. The specific stand of the petitioner Reserve Bank of India is that the information sought for is exempted under Sections 8(1)(*a*), (*d*) and (*e*) of the Right to Information Act, 2005. As the regulator and supervisor of the banking system, RBI has discretion in the disclosure of such information in public interest.

24. Mr Andhyarujina, learned Senior Counsel, referred to various decisions of the High Court and submitted that the disclosure of information would prejudicially affect the economic interest of the State. Further, if the information sought for is sensitive from the point of adverse market reaction it will lead to systematic crisis for financial stability.

25. The learned Senior Counsel put heavy reliance on the Full Bench decision[1] of the Central Information Commission and submitted that while passing the impugned order[2], the Central Information Commissioner completely overlooked the Full Bench decision and ignored the same. According to the learned counsel, the Bench, which passed the impugned order, is bound to follow the Full Bench decision. The Commission also erred in holding that the Full Bench decision is per incuriam as the Full Bench has not considered the statutory provisions of Section 8(2) of the Right to Information Act, 2005.

26. The learned Senior Counsel also submitted that the Commission erred in holding that even if the information sought for is exempted under Sections 8(1)(*a*), (*d*) or (*e*) of the Right to Information Act, 2005, Section 8(2) of the RTI Act would mandate the disclosure of the information.

27. The learned Senior Counsel further submitted that the basic question of law is whether the Right to Information Act, 2005 overrides various provisions of the special statutes which confer confidentiality in the information obtained by RBI? If the respondents are right in their contention, these statutory provisions of confidentiality in the Banking Regulation Act, 1949, the Reserve Bank of India Act, 1934 and the Credit Information Companies (Regulation) Act, 2005 would be repealed or overruled by the Right to Information Act, 2005.

28. Under the Banking Regulation Act, 1949, Reserve Bank of India has a right to obtain information from the banks under Section 27. This information can only be in its discretion published in such consolidated form as RBI deems fit. Likewise, under Section 34-A, production of documents of confidential nature cannot be compelled. Under sub-section (5) of Section 35, Reserve Bank of India may carry out inspection of any bank but its report can only be disclosed if the Central Government orders the publishing of the report of Reserve Bank of India when it appears necessary.

29. Under Section 45-E of the Reserve Bank of India Act, 1934, disclosure of any information relating to credit information submitted by banking company is confidential and under Section 45-E(3) notwithstanding anything contained in any law, no court, tribunal or authority can compel Reserve Bank of India to give information relating to credit information, etc.

30. Under Section 17(4) of the Credit Information Companies (Regulation) Act, 2005, credit information received by the credit information company cannot be disclosed to any person. Under Section 20, the credit information company has to adopt privacy principles and under Section 22 there cannot be unauthorised access to credit information.

31. It was further contended that the Credit Information Companies (Regulation) Act, 2005 was brought into force after the Right to Information Act, 2005 w.e.f. 14-12-2006. It is significant to note that Section 28 of the Banking Regulation Act, 1949 was amended by the Credit Information

1 *Ravin Ranchchodlal Patel* v. *RBI*, 2006 SCC OnLine CIC 1414
2 *Jayantilal N. Mistry* v. *RBI*, 2011 SCC OnLine CIC 15841

Companies (Regulation) Act, 2005. This is a clear indication that the Right to Information Act, 2005 cannot override credit information sought by any person in contradiction to the statutory provisions for confidentiality.

32. This is in addition to other statutory provisions of privacy in Section 44 of the State Bank of India Act, 1955, Section 52 of the State Bank of India (Subsidiary Banks) Act, 1959, Section 13 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

33. The Right to Information Act, 2005 is a general provision which cannot override specific provisions relating to confidentiality in earlier legislation in accordance with the principle that where there are general words in a later statute it cannot be held that the earlier statutes are repealed, altered or discarded.

34. The learned counsel submitted that Section 22 of the Right to Information Act, 2005 cannot have the effect of nullifying and repealing earlier statutes in relation to confidentiality. This has been well settled by this Court in:

(*a*) *R.S. Raghunath* v. *State of Karnataka*[12], SCC p. 348, paras 13 and 14,

(*b*) *ICICI Bank Ltd.* v. *SIDCO Leathers Ltd.*[13], SCC p. 466, paras 36 & 37,

(*c*) *Central Bank of India* v. *State of Kerala*[14], SCC p. 132, para 103,

(*d*) *A.G. Varadarajulu* v. *State of T.N.*[15], SCC p. 236, para 16.

Hence, the Right to Information Act, 2005 cannot override the provisions for confidentiality conferred on RBI by the earlier statutes referred to above.

35. The Preamble of the RTI Act, 2005 itself recognises the fact that since the revealing of certain information is likely to conflict with other public interests like "the preservation of confidentiality of sensitive information", there is a need to harmonise these conflicting interests. It is submitted that certain exemptions were carved out in the RTI Act to harmonise these conflicting interests. This Court in *CBSE* v. *Aditya Bandopadhyay*[16], has observed as under: (SCC p. 533, para 62)

> "*62.* When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the Governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has, however, made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act,

12 (1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507
13 (2006) 10 SCC 452
14 (2009) 4 SCC 94 : (2009) 2 SCC (Civ) 17
15 (1998) 4 SCC 231
16 (2011) 8 SCC 497 : 6 SCEC 25

that is, Section 8 of the Freedom to Information Act, 2002. The courts and Information Commissions enforcing the provisions of the RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act."

36. Apart from the legal position that the Right to Information Act, 2005 does not override statutory provisions of confidentiality in other Act, it is submitted that in any case Section 8(1)(*a*) of the Right to Information Act, 2005 states that there is no obligation to give any information which prejudicially affects the economic interests of the States. Disclosure of such vital information relating to banking would prejudicially affect the economic interests of the State. This was clearly stated by the Full Bench of the Central Information Commission by its order in *Ravin Ranchchodlal Patel*[1]. Despite this emphatic ruling individual Commissioners of the Information have disregarded it by holding that the decision of the Full Bench was per incuriam and directed disclosure of information.

37. Other exceptions in Section 8, viz. Sections 8(1)(*a*), (*d*) and 8(1)(*e*) would also apply to disclosure by RBI and banks. In sum, the learned Senior Counsel submitted that RBI cannot be directed to disclose information relating to banking under the Right to Information Act, 2005.

38. Mr Prashant Bhushan, learned counsel appearing for the respondents in Transfer Cases Nos. 94 and 95 of 2015, began his arguments by referring to the Preamble of the Constitution and submitted that through the Constitution it is the people who have created legislatures, executives and the judiciary to exercise such duties and functions as laid down in the Constitution itself.

39. The right to information regarding the functioning of public institutions is a fundamental right as enshrined in Article 19 of the Constitution of India. This Hon'ble Court has declared in a plethora of cases that the most important value for the functioning of a healthy and well-informed democracy is transparency. Mr Bhushan referred to the Constitution Bench judgment of this Court in *State of U.P.* v. *Raj Narain*[17] and submitted that it is a Government's responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their functionaries. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business is not in the interest of public. (SCC p. 453, para 74)

1 *Ravin Ranchchodlal Patel* v. *RBI*, 2006 SCC OnLine CIC 1414
17 (1975) 4 SCC 428 : AIR 1975 SC 865

40. In *S.P. Gupta* v. *President of India*[18], a seven-Judge Bench of this Court made the following observations regarding the right to information: (SCC pp. 273-74, para 66)

> "*66.* There is also in every democracy a certain amount of public suspicion and distrust of Government, varying of course from time to time according to its performance, which prompts people to insist upon maximum exposure of its functioning. It is axiomatic that every action of the Government must be actuated by public interest but even so we find cases, though not many, where governmental action is taken not for public good but for personal gain or other extraneous considerations. Sometimes governmental action is influenced by political and other motivations and pressures and at times, there are also instances of misuse or abuse of authority on the part of the executive. Now, if secrecy were to be observed in the functioning of Government and the processes of Government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open Government with means of information available to the public, there would be greater exposure of the functioning of Government and it would help to assure the people a better and more efficient administration. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open Government is clean Government and a powerful safeguard against political and administrative aberration and inefficiency."

41. In *Union of India* v. *Assn. for Democratic Reforms*[19], while declaring that it is part of the fundamental right of citizens under Article 19(1)(*a*) to know the assets and liabilities of candidates contesting election to Parliament or the State Legislatures, a three-Judge Bench of this Court held unequivocally that: (SCC p. 321, para 46)

> "*46.* ... (*5*) The right to get information in democracy is recognised all throughout and it is a natural right flowing from the concept of democracy."

Thereafter, legislation was passed amending the Representation of People Act, 1951 that candidates need not provide such information. This Court in *People's Union for Civil Liberties* v. *Union of India*[20], struck down that legislation by stating: (SCC pp. 438-39, para 42)

> "*42.* ... it should be properly understood that the fundamental rights enshrined in the Constitution such as, right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since the last more than 50 years, this Court has interpreted Articles 14, 19 and 21 and given meaning and colour so that the nation can have a truly republic democratic society."

18 1981 Supp SCC 87 : AIR 1982 SC 149
19 (2002) 5 SCC 294 : AIR 2002 SC 2112
20 (2003) 4 SCC 399

42. The RTI Act, 2005, as noted in its very Preamble, does not create any new right but only provides machinery to effectuate the fundamental right to information. The institution of CIC and SICs are part of that machinery. The Preamble also, inter alia, states—

> "... democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;"

43. The submission of RBI that exceptions be carved out of the RTI Act regime in order to accommodate the provisions of the RBI Act and Banking Regulation Act is clearly misconceived. The RTI Act, 2005 contains a clear provision (Section 22) by virtue of which it overrides all other Acts including the Official Secrets Act. Thus, notwithstanding anything to the contrary contained in any other law like the RBI Act or the Banking Regulation Act, the RTI Act, 2005 shall prevail insofar as transparency and access to information is concerned. Moreover, the RTI Act, 2005, being a later law, specifically brought in to usher transparency and to transform the way official business is conducted, would have to override all earlier practices and laws in order to achieve its objective. The only exceptions to access to information are contained in the RTI Act itself in Section 8.

44. In TC No. 94 of 2015, the RTI applicant Mr P.P. Kapoor had asked about the details of the loans taken by the industrialists that have not been repaid, and he had asked about the names of the top defaulters who have not repaid their loans to public sector banks. RBI resisted the disclosure of the information claiming exemption under Sections 8(1)(*a*) and 8(1)(*e*) of the RTI Act on the ground that disclosure would affect the economic interest of the country, and that the information has been received by RBI from the banks in fiduciary capacity. CIC found these arguments made by RBI to be totally misconceived in facts and in law, and held that the disclosure would be in public interest.

45. In TC No. 95 of 2015, the RTI applicant therein Mr Subhash Chandra Agrawal had asked about the details of the show-cause notices and fines imposed by RBI on various banks. RBI resisted the disclosure of the information claiming exemption under Sections 8(1)(*a*), (*d*) and 8(1)(*e*) of the RTI Act on the ground that disclosure would affect the economic interest of the country, the competitive position of the banks and that the information has been received by RBI in fiduciary capacity. CIC, herein also, found these arguments made by RBI to be totally misconceived in facts and in law and held that the disclosure would be in public interest.

46. In reply to the submission of the petitioner about fiduciary relationship, the learned counsel submitted that the scope of Section 8(1)(*e*) of the RTI Act has been decided by this Court in *CBSE* v. *Aditya Bandopadhyay*[16] wherein, while rejecting the argument that CBSE acts in a fiduciary capacity to the students, it was held that: (SCC p. 525, para 41)

> "*41.* In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who

16 (2011) 8 SCC 497 : 6 SCEC 25

participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words 'information available to a person in his fiduciary relationship' are used in Section 8(1)(*e*) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the action of the fiduciary...."

47. We have extensively heard all the counsel appearing for the petitioner Banks and the respondents and examined the law and the facts.

48. While introducing the Right to Information Bill, 2004, a serious debate and discussion took place. The then Prime Minister while addressing the House informed that the RTI Bill is to provide for setting out practical regime of right to information for people, to secure access to information under the control of public authorities in order to promote transparency and accountability in the working of every public authority. The new legislation would radically alter the ethos and culture of secrecy through ready sharing of information by the State and its agencies with the people. An era of transparency and accountability in governance is on the anvil. Information, and more appropriately access to information would empower and enable people not only to make informed choices but also participate effectively in decision-making processes. Tracing the origin of the idea of the then Prime Minister who had stated, "Modern societies are information societies. Citizens tend to get interested in all fields of life and demand information that is as comprehensive, accurate and fair as possible".

49. In the RTI Bill, reference has also been made to the decision of the Supreme Court to the effect that the right to information has been held as inherent in Article 19 of our Constitution, thereby, elevating it to a fundamental right of the citizen. The Bill, which sought to create an effective mechanism for easy exercise of this right, was held to have been properly titled as "Right to Information Act". The Bill further states that a citizen has to merely make a request to the Public Information Officer concerned specifying the particulars of the information sought by him. He is not required to give any reason for seeking information, or any other personal details except those necessary for contacting him. Further, the Bill states:

> "The categories of information exempted from disclosure are a bare minimum and are contained in Clause 8 of the Bill. Even these exemptions are not absolute and access can be allowed to them in public interest if disclosure of the information outweighs the harm to the public authorities. Such disclosure has been permitted even if it is in conflict with the provisions of the Official Secrets Act, 1923. Moreover, barring two categories that relate to information disclosure—which may affect sovereignty and integrity of India, etc., or information relating to Cabinet papers, etc.—all other categories of exempted information would be disclosed after twenty years.

* * *

There is another aspect about which information is to be made public. We had a lengthy discussion and it is correctly provided in the amendment under Clause 8 of the Bill. The following information shall be exempted from disclosure which would prejudicially affect the sovereignty and integrity of India; which has been expressly forbidden; which may result in a breach of privileges of Parliament or the legislature; and also information pertaining to defence matters. They are listed in Clauses 8(*a*) to (*g*). There are exceptions to this clause. Where it is considered necessary that the information will be divulged in the interest of the State, that will be done. There must be transparency in public life. There must be transparency in administration and people must have a right to know what has actually transpired in the Secretariat of the State as well as the Union Ministry. A citizen will have a right because it will be safe to prevent corruption. Many things are done behind the curtain. Many shoddy deals take place in the Secretariats of the Central and State Governments and the information will always be kept hidden. Such practice should not be allowed in a democratic country like ours. Ours is a republic. The citizenry should have a right to know what transpired in the Secretariat. Even Cabinet papers, after a decision has been taken, must be divulged as per the provisions of this amendment. It cannot be hidden from the knowledge of others."

50. Addressing the House, it was pointed out by the then Prime Minister that in our country, government expenditure, both at the Central and at the level of the States and local bodies, account for nearly 33% of our gross national product. At the same time, the socio-economic imperatives require our Government to intervene extensively in economic and social affairs. Therefore, the efficiency and effectiveness of the government processes are critical variables, which will determine how our Government functions and to what extent it is able to discharge the responsibilities entrusted. It was pointed out that there are widespread complaints in our country about wastefulness of expenditure, about corruption, and matters which have relations with the functioning of the Government. Therefore, it was very important to explore new effective mechanism to ensure that the Government will purposefully and effectively discharge the responsibilities entrusted to it.

51. Finally, the Right to Information Act was passed by Parliament called "the Right to Information Act, 2005". The Preamble states:

"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto

Whereas the Constitution of India has established democratic Republic;

And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

Now, therefore, it is expedient to provide for furnishing certain information to citizens who desire to have it."

52. Section 2 of the Act defines various authorities and the words. Section 2(*j*) defines "right to information" as under:

"**2. (*j*) 'right to information'** means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(*i*) inspection of work, documents, records;

(*ii*) taking notes, extracts, or certified copies of documents or records;

(*iii*) taking certified samples of material;

(*iv*) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

53. Section 3 provides that all citizens shall have the right to information subject to the provisions of this Act. Section 4 makes it obligatory on all public authorities to maintain records in the manner provided therein. According to Section 6, a person who desires to obtain any information under the Act shall make a request in writing or through electronic means in English or Hindi in the official language of the area in which the application is being made to the competent authority specifying the particulars of information sought by him or her. Sub-section (2) of Section 6 provides that the applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him. Section 7 lays down the procedure for disposal of the request so made by the person under Section 6 of the Act. Section 8, however, provides certain exemption from disclosure of information.

54. For better appreciation, Section 8 is quoted hereinbelow:

"**8.** ***Exemption from disclosure of information***.—(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen—

(*a*) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(*b*) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(*c*) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(*d*) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(*e*) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(*f*) information received in confidence from foreign Government;

(*g*) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(*h*) information which would impede the process of investigation or apprehension or prosecution of offenders;

(*i*) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(*j*) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (*a*), (*c*) and (*i*) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under Section 6, shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act."

55. The information sought for by the respondents from the petitioner Bank has been denied mainly on the ground that such information is exempted from disclosure under Sections 8(1)(*a*), (*d*) and (*e*) of the RTI Act.

56. The learned counsel appearing for the petitioner Bank mainly relied upon Section 8(1)(*e*) of the RTI Act taking the stand that Reserve Bank of India has fiduciary relationship with the other banks and that there is no reason to disclose such information as no larger public interest warrants such disclosure. The primary question, therefore, is whether Reserve Bank of India has rightly refused to disclose information on the ground of its fiduciary relationship with the banks.

57. *The Advanced Law Lexicon*, 3rd Edn., 2005, defines "fiduciary relationship" as:

> "*Fiduciary relationship*.—A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the [fiduciary] relationship.... Fiduciary relationship usually arises in one of the four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer."

58. The scope of fiduciary relationship consists of the following rules:

> "(*i*) *No conflict rule* — A fiduciary must not place himself in a position where his own interests conflict with that of his customer or the beneficiary. There must be 'real sensible possibility of conflict'.
>
> (*ii*) *No profit rule* — A fiduciary must not profit from his position at the expense of his customer, the beneficiary.
>
> (*iii*) *Undivided loyalty rule* — A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs.
>
> (*iv*) *Duty of confidentiality* — A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person."

59. The term "fiduciary relationship" has been well discussed by this Court in *CBSE* v. *Aditya Bandopadhyay*[16]. In the said decision, their Lordships referred to various authorities to ascertain the meaning of the term "fiduciary relationship" and observed thus: (SCC pp. 523-25, paras 38-40)

> "*38.1. Black's Law Dictionary* (7th Edn., p. 640) defines 'fiduciary relationship' thus:

16 (2011) 8 SCC 497 : 6 SCEC 25

'*Fiduciary relationship*.—A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships usually arise in one of four situations: (*1*) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (*2*) when one person assumes control and responsibility over another, (*3*) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (*4*) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.'

38.2. American Restatements (Trusts and Agency) define 'fiduciary' as one whose intention is to act for the benefit of another as to matters relevant to the relation between them. *Corpus Juris Secundum* (Vol. 36-A, p. 381) attempts to define 'fiduciary' thus:

'A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.

The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candour which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate. Some examples of what, in particular connections, the term has been held to include and not to include, are set out in the note.'

38.3. Words and Phrases, Permanent Edn. (Vol. 16-A, p. 41) defines 'fiducial relation' thus:

'There is a technical distinction between a "fiducial relation" which is more correctly applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, and other similar relationships, and "confidential relation" which includes

the legal relationships, and also every other relationship wherein confidence is rightly reposed and is exercised.

Generally, the term "fiduciary" applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.'

38.4. In *Bristol and West Building Society* v. *Mothew*[21] the term 'fiduciary' was defined thus: (Ch p. 18)

'... A *fiduciary* is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. ... A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.'

38.5. In *Wolf* v. *Superior Court*[22] the California Court of Appeals defined 'fiduciary relationship' as under:

'any relationship existing between the parties to the transaction where one of the parties is duty-bound to act with utmost good faith for the benefit of the other party. Such a relationship ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interests of the other party without the latter's knowledge and consent.'

39. The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term 'fiduciary relationship' is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted

21 1998 Ch 1 : (1997) 2 WLR 436 : (1996) 4 All ER 698 (CA)
22 107 Cal App 4th 25 (2003)

thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.

40. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis another employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer." (emphasis in original)

60. In the instant case, RBI does not place itself in a fiduciary relationship with the financial institutions (though, in word it puts itself to be in that position) because, the reports of the inspections, statements of the banks, information related to the business obtained by RBI are not under the pretext of confidence or trust. In this case, neither RBI nor the banks act in the interest of each other. By attaching an additional "fiduciary" label to the statutory duty, the regulatory authorities have intentionally or unintentionally created an in terrorem effect.

61. RBI is a statutory body set up by the RBI Act as India's Central Bank. It is a statutory regulatory authority to oversee the functioning of the banks and the country's banking sector. Under Section 35-A of the Banking Regulation Act, RBI has been given powers to issue any direction to the banks in public interest, in the interest of banking policy and to secure proper management of a banking company. It has several other far-reaching statutory powers.

62. RBI is supposed to uphold public interest and not the interest of individual banks. RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximise the benefit of any public sector or private sector bank, and thus there is no relationship of "trust" between them. RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus, RBI ought to act with transparency and not hide information that might embarrass individual banks. It is duty-bound to comply with the provisions of the RTI Act and disclose the information sought by the respondents herein.

63. The baseless and unsubstantiated argument of RBI that the disclosure would hurt the economic interest of the country is totally misconceived. In the impugned order[2], CIC has given several reasons to state why the disclosure of the information sought by the respondents would hugely serve public interest, and non-disclosure would be significantly detrimental to public interest and not in the economic interest of India. RBI's argument that if people, who are sovereign, are made aware of the irregularities being committed by the banks

2 *Jayantilal N. Mistry* v. *RBI*, 2011 SCC OnLine CIC 15841

then the country's economic security would be endangered, is not only absurd but is equally misconceived and baseless.

64. The exemption contained in Section 8(1)(*e*) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship. As in the instant case, the financial institutions have an obligation to provide all the information to RBI and such information shared under an obligation/duty cannot be considered to come under the purview of being shared in fiduciary relationship. One of the main characteristics of a fiduciary relationship is "trust and confidence": something that RBI and the banks lack between them.

65. In the present case, we have to weigh between the public interest and fiduciary relationship (which is being shared between RBI and the banks). Since the RTI Act is enacted to empower the common people, the test to determine limits of Section 8 of the RTI Act is whether giving information to the general public would be detrimental to the economic interests of the country? To what extent the public should be allowed to get information?

66. In the context of above questions, it had long since come to our attention that the Public Information Officers (PIO) under the guise of one of the exceptions given under Section 8 of the RTI Act, have evaded the general public from getting their hands on the rightful information that they are entitled to.

67. And in this case RBI and the banks have sidestepped the general public's demand to give the requisite information on the pretext of "fiduciary relationship" and "economic interest". This attitude of RBI will only attract more suspicion and disbelief in them. RBI as a regulatory authority should work to make the banks accountable to their actions.

68. Furthermore, the RTI Act under Section 2(*f*) clearly provides that the inspection reports, documents, etc. fall under the purview of "information" which is obtained by the public authority (RBI) from a private body. Section 2(*f*), reads thus:

> "**2. (*f*) 'information'** means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and *information relating to any private body which can be accessed by a public authority under any other law for the time being in force;*" (emphasis supplied)

From reading of the above section it can be inferred that the legislature's intent was to make available to the general public such information which had been obtained by the public authorities from the private body. Had it been the case where only information related to public authorities was to be provided, the legislature would not have included the words "private body". As in this case, RBI is liable to provide information regarding inspection report and other documents to the general public.

69. Even if we were to consider that RBI and the financial institutions shared a "fiduciary relationship", Section 2(*f*) would still make the information shared between them to be accessible by the public. The facts reveal that banks are trying to cover up their underhand actions, they are even more liable to be subjected to public scrutiny.

70. We have surmised that many financial institutions have resorted to such acts which are neither clean nor transparent. RBI in association with them has been trying to cover up their acts from public scrutiny. It is the responsibility of RBI to take rigid action against those banks which have been practising disreputable business practices.

71. From the past we have also come across financial institutions which have tried to defraud the public. These acts are neither in the best interests of the country nor in the interests of citizens. To our surprise, RBI as a watch dog should have been more dedicated towards disclosing information to the general public under the Right to Information Act, 2005.

72. We also understand that RBI cannot be put in a fix, by making it accountable for every action taken by it. However, in the instant case, RBI is accountable and as such it has to provide information to the information seekers under Section 10(1) of the RTI Act, which reads as under:

> "**10.** ***Severability***.—(1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."

73. It was also contended by the learned Senior Counsel for RBI that the disclosure of information sought for will also go against the economic interest of the nation. The submission is wholly misconceived.

74. Economic interest of a nation in most common parlance are the goals which a nation wants to attain to fulfil its national objectives. It is the part of our national interest, meaning thereby national interest cannot be seen with the spectacles (glasses) devoid of economic interest. It includes in its ambit a wide range of economic transactions or economic activities necessary and beneficial to attain the goals of a nation, which definitely includes as an objective economic empowerment of its citizens. It has been recognised and understood without any doubt now that one of the tools to attain this goal is to make information available to people, because an informed citizen has the capacity to reasoned action and also to evaluate the actions of the legislature and executives, which is very important in a participative democracy and this will serve the nation's interest better, which as stated above also includes its economic interests. Recognising the significance of this tool it has not only been made one of the fundamental rights under Article 19 of the Constitution but also a Central Act has been brought into effect on 12-10-2005 as the Right to Information Act, 2005.

75. The ideal of "Government by the people" makes it necessary that people have access to information on matters of public concern. The free flow of information about the affairs of Government paves way for debate in public

policy and fosters accountability in Government. It creates a condition for "open governance" which is the foundation of democracy.

76. But neither have the fundamental rights nor the right to information been provided in absolute terms. The fundamental rights guaranteed under Article 19 clause (1)(*a*) are restricted under Article 19 clause (2) on the grounds of national and societal interest. Similarly, Section 8 sub-section (1) of the Right to Information Act, 2005, contains the exemption provisions where right to information can be denied to public in the name of national security and sovereignty, national economic interests, relations with foreign States, etc. Thus, not all the information that the Government generates will or shall be given out to the public.

77. It is true that gone are the days of closed door policy-making and it is not acceptable also but it is equally true that there is some information which if published or released publicly, might actually cause more harm than good to our national interest ... if not domestically it can make the national interests vulnerable internationally and it is more so possible with the dividing line between national and international boundaries getting blurred in this age of rapid advancement of science and technology and global economy. It has to be understood that rights can be enjoyed without any inhibition only when they are nurtured within protective boundaries. Any excessive use of these rights which may lead to tampering with these boundaries will not further the national interest. And when it comes to national economic interest, disclosure of information about currency or exchange rates, interest rates, taxes, the regulation or supervision of banking, insurance and other financial institutions, proposals for expenditure or borrowing and foreign investment could in some cases harm the national economy, particularly if released prematurely. However, lower level economic and financial information, like contracts and departmental budgets should not be withheld under this exemption. This makes it necessary to think when or at what stage an information is to be provided i.e. the appropriate time of providing the information which will depend on nature of information sought for and the consequences it will lead to after coming in public domain.

78. In one of the cases, the respondent S.S. Vohra sought certain information in relation to the Patna Branch of ICICI Bank and advisory issued to the Hong Kong Branch of ICICI Bank. The contention of the respondent was that the Finance Minister had made a written statement on the floor of the House on 24-7-2009 that some banks like SBI, ICICI, Bank of Baroda, Dena Bank, etc., were violating the FEMA Guidelines for opening of accounts and categorically mentioned that the Patna Branch of ICICI Bank Ltd. had opened some fictitious accounts which were opened by fraudsters and hence, an advisory note was issued to the branch concerned on December 2007 for its irregularities. The Finance Minister even mentioned that in the year 2008 ICICI Bank Ltd. was also warned for alleged irregular dealings in securities in Hong Kong. Hence, the respondent sought such advisory note as issued by RBI to ICICI Bank. The Central Information Commissioner in the impugned order considered the RBI Master Circular dated 1-7-2009 issued to all the commercial banks giving

various directions and finally held as under: (*S.S. Vohra case*[4], SCC OnLine CIC paras 17-18)

> "*17.* It has been contended by the counsel on behalf of ICICI Bank Ltd. that an advisory note is prepared after reliance on documents such as inspection reports, scrutiny reports, etc. and hence, will contain the contents of those documents too which are otherwise exempt from disclosure. We have already expressed our view in express terms that whether or not an advisory note shall be disclosed under the RTI Act will have to be determined on case-by-case basis. In some other case, for example, there may be a situation where some contents of the advisory note may have to be severed to such an extent that details of inspection reports, etc. can be separated from the note and then be provided to the RTI applicant. Section 10 of the RTI Act leaves it open to decide each case on its merits after having satisfied ourselves whether an advisory note needs to be provided as it is or whether some of its contents may be severed since they may be exempted per se under the RTI Act. However, we find no reason, whatsoever, to apply Section 10 of the RTI Act in order to severe the contents of the advisory note issued by RBI to ICICI Bank Ltd. as the matter has already been placed on the floor of the Lok Sabha by the Hon'ble Finance Minister.
>
> *18.* This is a matter of concern since it involves the violation of policy guidelines initiated by RBI and affects the public at large. Transparency cannot be brought overnight in any system and one can hope to witness accountability in a system only when its end users are well educated, well informed and well aware. If the customers of commercial banks will remain oblivious to the violations of RBI guidelines and standards which such banks regularly commit, then eventually the whole financial system of the country would be at a monumental loss. This can only be prevented by suo motu disclosure of such information as the penalty orders are already in public domain."

79. Similarly, in another case the respondent Jayantilal N. Mistry sought information from CPIO, RBI in respect of a cooperative bank viz. Saraspur Nagrik Sahkari Bank Ltd. related to inspection report, which was denied by CPIO on the ground that the information contained therein was received by RBI in a fiduciary capacity and is exempt under Section 8(1)(*e*) of the RTI Act. CIC directed the petitioner to furnish that information since RBI expressed its willingness to disclose a summary of substantive part of the inspection report to the respondent. While disposing of the appeal CIC observed: (*Jayantilal case*[2], SCC OnLine CIC)

> "... '*21.* Before parting with this appeal, we would like to record our observations that in a rapidly unfolding economic scenario, there are public institutions, both in the banking and non-banking sector, whose activities have not served public interest. On the contrary, some such institutions may have attempted to defraud the public of their moneys

4 *S.S. Vohra* v. *RBI*, 2011 SCC OnLine CIC 8882
2 *Jayantilal N. Mistry* v. *RBI*, 2011 SCC OnLine CIC 15841

kept with such institutions in trust. RBI being the Central Bank is one of the instrumentalities available to the public which as a regulator can inspect such institutions and initiate remedial measures where necessary. It is important that the general public, particularly, the shareholders and the depositors of such institutions are kept aware of RBI's appraisal of the functioning of such institutions and taken into confidence about the remedial actions initiated in specific cases. This will serve the public interest. RBI would, therefore, be well advised to be proactive in disclosing information to the public in general and the information seekers under the RTI Act, in particular. The provisions of Section 10(1) of the RTI Act can, therefore, be judiciously used when necessary to adhere to this objective.' (*Ravin Ranchchodlal case*[2], SCC OnLine CIC para 21)"

80. In another case, where the respondent P.P. Kapoor sought information, inter alia, about the details of default in loans taken from public sector banks by industrialists, out of the list of defaulters, top 100 defaulters, names of the businessmen, firm name, principal amount, interest amount, date of default and date of availing the loan, etc. The said information was denied by CPIO mainly on the basis that it was held in fiduciary capacity and was exempt from disclosure of such information. Allowing the appeal, CIC directed for the disclosure of such information. CIC in the impugned order has rightly observed as under: (*P.P. Kapoor case*[6], SCC OnLine CIC)

> "I wish the Government and its instrumentalities would remember that all information held by them is owned by citizens, who are sovereign. Further, it is often seen that banks and financial institutions continue to provide loans to industrialists despite their default in repayment of an earlier loan. This Court in *U.P. Financial Corpn.* v. *Gem Cap (India) (P) Ltd.*[23] has noted that: (SCC pp. 305-06, para 10)
>
> > '*10.* ... Promoting industrialisation at the cost of public funds does not serve the public interest, it merely amounts to transferring public money to private account.'
>
> Such practices have led citizens to believe that defaulters can get away and play fraud on public funds. There is no doubt that information regarding top industrialists who have defaulted in repayment of loans must be brought to citizens' knowledge; there is certainly a larger public interest that would be served on disclosure of the same. In fact, information about industrialists who are loan defaulters of the country may put pressure on such persons to pay their dues. This would have the impact of alerting citizens about those who are defaulting in payments and could also have some impact in shaming them. RBI had by its Circular DBOD No. BC/CIS/47/20.16.002/94 dated 23-4-1994 directed all banks to send a report on their defaulters, which it would share with all banks and financial institutions, with the following objectives:

2 *Jayantilal N. Mistry* v. *RBI*, 2011 SCC OnLine CIC 15841
6 *P.P. Kapoor* v. *RBI*, 2011 SCC OnLine CIC 16444
23 (1993) 2 SCC 299 : AIR 1993 SC 1435

(*1*) To alert banks and financial institutions (FIs) and to put them on guard against borrowers who have defaulted in their dues to lending institutions;

(*2*) To make public the names of the borrowers who have defaulted and against whom suits have been filed by banks/financial institutions."

81. At this juncture, we may refer to the decision of this Court in *Mardia Chemicals Ltd.* v. *Union of India*[24], wherein this Court while considering the validity of the SARFAESI Act and recovery of non-performing assets by banks and financial institutions in India, held: (SCC p. 355, para 66)

"*66.* ... it may be observed that though the transaction may have a character of a private contract yet the question of great importance behind such transactions as a whole having far-reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions, more particularly when financing is through banks and financial institutions utilising the money of the people in general, namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact on the socio-economic drive of the country."

82. In rest of the cases, CIC has considered elaborately the information sought for and passed orders which in our opinion do not suffer from any error of law, irrationality or arbitrariness.

83. We have, therefore, given our anxious consideration to the matter and came to the conclusion that the Central Information Commissioner has passed the impugned orders[2,4,5,6,7 & 8] giving valid reasons and the said orders, therefore, need no interference by this Court.

84. There is no merit in all these cases and hence, they are dismissed.

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24 (2004) 4 SCC 311
2 *Jayantilal N. Mistry* v. *RBI*, 2011 SCC OnLine CIC 15841
4 *S.S. Vohra* v. *RBI*, 2011 SCC OnLine CIC 8882
5 *Kishanlal Mittal* v. *NABARD*, 2011 SCC OnLine CIC 16327
6 *P.P. Kapoor* v. *RBI*, 2011 SCC OnLine CIC 16444
7 *Subhash Chandra Agrawal* v. *RBI*, 2011 SCC OnLine CIC 16596
8 *Raja M. Shanmugam* v. *RBI*, 2011 SCC OnLine CIC 17727

(2020) 2 Supreme Court Cases 338

2019
Nov. 14

(BEFORE RANJAN GOGOI, C.J. AND SANJAY KISHAN KAUL AND K.M. JOSEPH, JJ.)

YASHWANT SINHA AND OTHERS .. Petitioners;

Versus

3-Judge Bench

CENTRAL BUREAU OF INVESTIGATION THROUGH ITS DIRECTOR AND ANOTHER .. Respondents.

Review Petition (Crl.) No. 46 of 2019 in Writ Petition (Crl.) No. 298 of 2018† with MA No. 58 of 2019 in Writ Petition (Crl.) No. 225 of 2018, Review Petition (Crl.) No. 122 of 2019 in Writ Petition (Crl.) No. 297 of 2018, MA No. 403 of 2019 in Writ Petition (Crl.) No. 298 of 2018, Review Petition (Crl.) No. 719 of 2019 in Writ Petition (C) No. 1205 of 2018 and Contempt Petition (Crl.) No. 3 of 2019 in Review Petition (Crl.) No. 46 of 2019 in Writ Petition (Crl.) No. 298 of 2018, decided on November 14, 2019

A. **Constitution of India — Arts. 32, 136, 137 and 226 — Judicial review — Disputes involving government contracts — Issues relating to pricing — Held, *per Gogoi, C.J. and Kaul, J.*, determination of pricing is not the function of courts, particularly in defence contracts — Such issues cannot be dealt with by courts on mere suspicion of persons approaching it — Held, *per K.M. Joseph, J. (concurring)*, judicial review does not permit reappreciation of materials — Court cannot sit in judgment over wisdom of Government**

— Administrative Law — Judicial Review — Exclusion of Judicial Review — Price fixation — Government Contracts and Tenders — Formation of Government Contract — Offer/Acceptance and Consideration — Price fixation — Scope of judicial review

B. **Constitution of India — Arts. 32, 136, 137, 226 and 227 — Scope of judicial review under Art. 32 — Litigant claiming different adjudication process separate from and beyond purview of provision of law invoked, Art. 32 in present case — Impermissibility of — Practice and Procedure — Generally**

C. **Administrative Law — Administrative Action — Administrative or Executive Function — Generally — Nature and Scope — Decision-making process — Debate and expert opinion envisaged as part of decision-making process — Final decision always vests with competent authority — If every different opinion were to be treated as requiring compliance prior to execution of contract, that would defeat very purpose of debate in decision-making process**

— Government Contracts and Tenders — General Principles Governing Government Contracts/Tenders — Applicability of Arts. 14 and 298 of the Constitution — Norms for Valid State Action/Exercise of discretionary power — Extent of Freedom of Contract of Government — Judicial Review — Exclusion of Judicial Review — Generally

† Arising from the Judgment and Order in *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, (2019) 3 SCC 25 [Supreme Court, Writ Petition (Crl.) No. 298 of 2018, dt. 14-12-2018]

D. **Constitution of India — Arts. 32, 136, 137, 226 and 227 — Relief — Errors in original judgment due to misinterpretation of sentences/recording of statement of one of the parties — Correction of original judgment, permitted**

E. **Criminal Procedure Code, 1973 — Ss. 340 and 195 — Inquiry into allegations of reliance on false documents/making of false statement by Government before Court in relation to purchase of Rafale aircraft — Declined, as no grounds made out therefor — Moreover, held, *per K.M. Joseph, J. (concurring)*, such exercise would be futile in view of S. 17-A of the Prevention of Corruption Act, 1988**

— Public Accountability, Vigilance and Prevention of Corruption — Prevention of Corruption Act, 1988, S. 17-A

F. **Constitution of India — Art. 137 — Review — Dispute relating to contract for purchase of Rafale aircraft — Allegation that Government relied on false documents — Not made out, as there was error due to misinterpretation of sentences/in recording statement of Government, and not statement of a falsehood/nor reliance on false documents by Government — Plea that CAG Report was non-existent, also declined in view of correction of mistake — Original judgment directed to be corrected accordingly and review petitions rejected — Clarified, that as rejection of prayer for registration of FIR and investigation came within purview of rejection of the writ petition in toto, the same also did not warrant any review**

— Once aspects viz. (a) Decision-making process, (b) Pricing, and (c) Offsets were examined on merits, prayer for registration of FIR and investigation by CBI came within purview of such examination — Observations in relation to Reliance Industries were made in generic sense — No ground made out for review — Petitions dismissed — Emphasised that original decision based within contours of Art. 32 of the Constitution

— Held, *per K.M. Joseph, J. (concurring)*, there were no palpable errors in original judgment, hence review petitions deserve to be rejected — However, judgment rendered in *Manohar Lal Sharma*, (2019) 3 SCC 25 would not bar CBI from taking action on complaint filed by petitioners as per law subject to obtaining previous approval from competent authorities under S. 17-A of the Prevention of Corruption Act, 1988

These review petitions have been filed against the judgment in *Manohar Lal Sharma*, (2019) 3 SCC 25 contending availability of new materials and non-consideration of remedies prayed for in proper context. Along with these petitions an application under Section 340 CrPC was also filed to direct registration of FIR as alleged offence comes under the Prevention of Corruption Act, 1988. An interlocutory application was also filed on behalf of the Union of India for correcting some portions of the original judgment.

Dismissing the review petitions, the Supreme Court

Held :

Per Gogoi, C.J. and Kaul, J. (K.M. Joseph, J. concurring)

On hearing the learned counsel for the parties, the confusion arose on account of two portions of the paragraph referring to both what had been and what was proposed to be done. Regardless, it was to complete the sequence of facts and was not the rationale for the Supreme Court's conclusion. (Para 5)

Thus, the prayer is accepted and the sentence in para 26 to the following effect: (*Manohar Lal Sharma case*, SCC p. 35)

> "The pricing details have, however, been shared with the Comptroller and Auditor General (hereinafter referred to as "CAG"), and the report of CAG has been examined by the Public Accounts Committee (hereafter referred to as "PAC"). Only a redacted portion of the report was placed before Parliament and is in public domain."

should be replaced by what has been set out hereinafter:

> "The Government has already shared the pricing details with the CAG. The report of the CAG is examined by the PAC in the usual course of business. Only a redacted version of the report is placed before Parliament and is in public domain." (Paras 6 and 7)

Manohar Lal Sharma v. *Narendra Damodardas Modi*, (2019) 3 SCC 25; *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, 2018 SCC OnLine SC 2278, *referred to*

In the course of the review petitions, it was canvassed that reliance had been placed by the Government on patently false documents. One of the aspects is the same as has been dealt with in order passed today on the application for correction and, thus, does not call for any further discussion. (Paras 13, 11 and 12)

Manohar Lal Sharma v. *Narendra Damodardas Modi*, (2019) 3 SCC 25; *Yashwant Sinha* v. *CBI*, (2019) 6 SCC 1; *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, 2018 SCC OnLine SC 1920, *referred to*

The other aspect sought to be raised specifically in Review Petition No. 46 of 2019 is that the prayer made by the petitioner was for registration of an FIR and investigation by CBI, which has not been dealt with and the contract has been reviewed prematurely by the Judiciary without the benefit of investigation and inquiry into the disputed questions of facts. (Para 14)

This is not considered to be a fair submission for the reason that all counsel, including counsel representing the petitioners in this matter addressed elaborate submissions on all the three aspects viz. "Decision-Making Process", "Pricing" and "Offsets". No doubt that there was a prayer made for registration of FIR and further investigation but then once the three aspects had been examined on merits, and no infirmity was found, it was not considered appropriate to issue any directions, as prayed for by the petitioners which automatically covered the direction for registration of FIR, prayed for. (Para 15)

Insofar as the aspect of pricing is concerned, the Court satisfied itself with the material made available. It is not the function of the Court to determine the prices nor for that matter can such aspects be dealt with on mere suspicion of persons who decide to approach the Court. The internal mechanism of such pricing would take care of the situation. On the perusal of documents it is found that one cannot compare apples and oranges. Thus, the pricing of the basic aircraft had to be compared which was competitively marginally lower. As to what should be loaded on the aircraft or not and what further pricing should be added has to be left to the best judgment of the competent authorities. (Para 16)

A plea was also raised about the "non-existent CAG Report" but then at the cost of repetition it is stated that this formed part of the order for correction that has been passed aforesaid. (Para 17)

It was the petitioners' decision to have invoked the jurisdiction of the Court under Article 32 of the Constitution of India fully conscious of the limitation of the contours of the scrutiny and not to take recourse to other remedies as may be available. The petitioners cannot be permitted to state that having so taken recourse to this remedy, they want an adjudication process which is really different from what is envisaged under the provisions invoked by them. (Para 18)

Insofar as the decision-making process is concerned, on the basis of certain documents obtained, the petitioners sought to contend that there was contradictory material. It is, however, found that there were undoubtedly opinions expressed in the course of the decision-making process, which may be different from the decision taken, but then any decision-making process envisages debates and expert opinion and the final call is with the competent authority, which so exercised it. (Para 19)

It does appear that the endeavour of the petitioners is to construe themselves as an appellate authority to determine each aspect of the contract and call upon the Court to do the same. This is not the jurisdiction to be exercised. All aspects were considered by the competent authority and the different views expressed, considered and dealt with. It would well-nigh become impossible for different opinions to be set out in the record if each opinion was to be construed as to be complied with before the contract was entered into. It would defeat the very purpose of debate in the decision-making process. (Para 20)

Insofar as the aforesaid pleas are concerned, it has also been contended that some aspects were not available to the petitioner at the time of the decision and had come to light subsequently by their "sourcing" information. It is declined to, once again, embark on an elaborate exercise of analysing each clause, perusing what may be the different opinions, then taking a call whether a final decision should or should not have been taken in such technical matters. (Para 21)

An aspect also sought to be emphasised was that the Court had misconstrued that all the Reliance Industries were of one group since the two brothers held two different groups and the earlier arrangement was with the Company of the other brother. That may be so, but in observations made, this aspect was referred to in a generic sense more so as the decision of whom to engage as the offset partner was a matter left to the suppliers and much cannot be made out of it. (Para 22)

It is for the aforesaid reasons also that it is also found that there was no ground made out for initiating prosecution under Section 340 CrPC. (Para 23)

The review petitions are without any merit and are accordingly dismissed, once again, re-emphasising that the original decision was based within the contours of Article 32 of the Constitution of India. (Para 24)

Per K.M. Joseph, J. (concurring)

As far as the judicial review of the award of the contract is concerned, apart from the fact that a review does not permit reappreciation of the materials, there is the aspect of the petitioner seeking judicial review approaching the court late in the day. There is also the aspect relating to the court's jurisdiction not extending to permit it to sit in judgment over the wisdom of the Government of the day, particularly in matters relating to purchase of the goods involved in this case. Therefore, in regard to review, sought in relation to the findings relating to the judicial review, they cannot be found to be suffering from palpable errors. (Para 96)

From the standpoint of the jurisdiction in judicial review proceedings and under Article 32 of the Constitution, as also absence of any substantial material to show to be a case of commercial favouritism, it may be true that the findings other than which have been referred to may not disclose a palpable error. The Court's lack of experience of what is technically feasible, as noted by the Court, has weighed with it. (Para 103)

The petitioners may not be justified in approaching the Supreme Court seeking the relief of registration of an FIR and investigation on the same as such. This is for the reason that one of the exceptions where immediate registration of FIR may not be resorted to, would be a case pointing fingers at a public figure and raising the allegation of corruption. The Supreme Court also has permitted preliminary inquiry when there is delay, laches in initiating criminal prosecution, for example, over three months. A preliminary inquiry, it is to be noticed in para 120.7 of *Lalita Kumari*, (2014) 2 SCC 1, is to be completed within seven days. (Para 114)

Lalita Kumari v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524, *followed*

P. Sirajuddin v. *State of Madras*, (1970) 1 SCC 595 : 1970 SCC (Cri) 240, *considered*

The petitioners have not sought the relief of a preliminary inquiry being conducted. Even assuming that a smaller relief than one sought could be granted, there is yet another seemingly insuperable obstacle. (Para 115)

It is in this context apposite to notice that the complaint, which has been filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018, moved before Respondent 1 CBI, is done after Section 17-A was inserted. The complaint is dated 4-10-2018. Para 5 sets out the relief which is sought in the complaint which is to register an FIR under various provisions. (Para 117)

The petitioners have filed the complaint fully knowing that Section 17-A of the Prevention of Corruption Act, 1988 [as inserted in 2018] constituted a bar to any inquiry or enquiry or investigation unless there was previous approval. In fact, a request is made to at least take the first step of seeking permission under Section 17-A of the 2018 Act. Writ Petition (Criminal) No. 298 of 2018 was filed on 24-10-2018 and the complaint is based on non-registration of the FIR. There is no challenge to Section 17-A. Under the law, as it stood, both on the date of filing the petition and even as of today, Section 17-A continues to be on the statute book and it constitutes a bar to any inquiry or enquiry or investigation. The petitioners themselves, in the complaint, request to seek approval in terms of Section 17-A but when it comes to the relief sought in the writ petition, there was no relief claimed in this behalf. (Para 118)

Even proceeding on the basis that on the petitioners' complaint, an FIR must be registered as it purports to disclose cognizable offences and the Court must so direct, will it not be a futile exercise having regard to Section 17-A. Though otherwise the petitioners in Writ Petition (Criminal) No. 298 of 2018 may have made out a case, having regard to the law actually laid down in *Lalita Kumari*, (2014) 2 SCC 1, and more importantly, Section 17-A of the Prevention of Corruption Act, 1988 in a review petition, the petitioners cannot succeed. However, the judgment sought to be reviewed, would not stand in the way of the first respondent in Writ Petition (Criminal) No. 298 of 2018 from taking action on Ext. P-1, complaint in accordance with law and subject to the first respondent

obtaining previous approval under Section 17-A of the Prevention of Corruption Act, 1988. (Para 119)

Lalita Kumari v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524, *referred to*

Yashwant Sinha v. *CBI*, (2020) 2 SCC 392 (1), *cited*

G. **Contempt of Court — Criminal Contempt — Misreporting of judgments/Misattribution of factual findings to court — Attribution of factual findings not recorded by court — Deprecated — Admonished, courts are not to be dragged into political discourse — On facts, proceedings dropped as contemnor tendered unconditional apology — However, caution issued to contemnor to be careful in future — Contempt of Courts Act, 1971, S. 2(c)**

Along with these review petitions, a contempt petition was also filed against *RG* for falsely attributing the Supreme Court about his allegations against the Prime Minister of India.

Held :

Per Gogoi, C.J. and Kaul, J. (K.M. Joseph, J. concurring)

It is unfortunate that without verification or even perusing as to what is the order passed, the contemnor deemed it appropriate to make statements as if the Supreme Court had given an imprimatur to his allegations against the Prime Minister, which was far from the truth. This was not one sentence or a one off observation but a repeated statement in different manners conveying the same. No doubt the contemnor should have been far more careful. (Para 30)

The matter was compounded by filing a 20-page affidavit with a large number of documents annexed rather than simply accepting the mistake and giving an unconditional apology. Better wisdom dawned on the counsel only during the course of arguments thereafter when a subsequent affidavit dated 8-5-2019 was filed. It is believed that persons holding such important positions in the political spectrum must be more careful. As to what should be his campaign line is for a political person to consider. However, no court should be dragged into this political discourse valid or invalid, while attributing aspects to the Court which had never been held by the Court. Certainly the contemnor needs to be more careful in future. (Para 31)

However, in view of the subsequent affidavit, better sense having prevailed, these proceedings would not be continued further and, thus, the contempt proceedings stand closed with a word of caution for the contemnor to be more careful in future. (Para 32)

Yashwant Sinha v. *CBI*, (2020) 2 SCC 392 (2), *cited*

H. **Public Accountability, Vigilance and Prevention of Corruption — Prevention of Corruption Act, 1988 — S. 17-A (as inserted in 2018) — Scope of, stated**

Held :

Per K.M. Joseph, J. (concurring)

In terms of Section 17-A, no police officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done by a public servant where the offence alleged is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions *without previous approval*, inter alia, of the authority competent to remove the public servant from his office

at the time when the offence was alleged to have been committed. In respect of the public servant, who is involved in this case, it is clause (*c*), which is applicable. Unless, therefore, there is previous approval, there could be neither inquiry or enquiry or investigation. (Para 117)

I. **Criminal Trial — Investigation — Generally — Powers of investigating officer in cognizable case, summed up — Nature of investigation in cognizable case vis-à-vis judicial review by writ court — Difference between — Criminal Procedure Code, 1973, S. 157**

Held :

Per K.M. Joseph, J. (concurring)

It is one thing to say that with the limited judicial review, available to the Court, it did not find merit in the case of the petitioners regarding failure to follow the DPP, presence of over-pricing, violation of Offset Guidelines to favour a party, and another thing to direct action on a complaint in terms of the law laid down by the Supreme Court. It is obvious that the Supreme Court was not satisfied with the material which was placed to justify a decision in favour of the petitioners. It is also apparent that the Court has reminded itself of the fact that it was neither appropriate nor within the experience of the Court to step into the arena. It is equally indisputable that the entire findings are to be viewed from the standpoint of the nature of the jurisdiction it exercised. There are no such restrictions and limitations on an officer investigating a case under the law. Present a case, making out the commission of cognizable offence, starting with the lodging of the FIR after, no doubt, making a preliminary inquiry where it is necessary, the fullest of amplitude of powers under the law, no doubt, are available to the officer. The discovery of facts by the officer carrying out an investigation, is completely different from findings of facts given in judicial review by a court. The entire proceedings are completely different. (Para 100)

In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case. (Para 104)

King Emperor v. *Khwaja Nazir Ahmad*, 1944 SCC OnLine PC 29 : (1943-44) 71 IA 203 : AIR 1945 PC 18, *relied on*

There is a clear-cut and well-demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved by the executive through the Police Department, the superintendence over which vests in the State Government. It is the bounden duty of the executive to investigate, if an offence is alleged, and bring the offender to book. Once it investigates and finds an offence having been committed, it is its duty to collect evidence for the purpose of proving the offence. (Para 105)

M.C. Abraham v. *State of Maharashtra*, (2003) 2 SCC 649 : 2003 SCC (Cri) 628, *affirmed*

State of Bihar v. *J.A.C. Saldanha*, (1980) 1 SCC 554 : 1980 SCC (Cri) 272, *cited*

The police officer is endowed with wide powers. Nothing that constricted or limited the Supreme Court in the impugned judgment, applies to an officer who has undertaken an investigation into the commission of a cognizable offence. In fact, in this case, Respondent 1 CBI is the premiere investigating agency of the country. It is equipped to undertake all forms of investigations, be it technical or otherwise. The factors which concerned the Supreme Court can be recapitulated to bring out the true role of an investigator. The Supreme Court held, it is neither appropriate nor within the Court's experience to step into what is technically feasible or not. No such limitation applies to an investigator of a cognizable offence. What is important is that it is the duty of the investigating officer to collect all material, be it technical or otherwise, and thereafter, submit an appropriate report to the court concerned, be it a final report or challan depending upon the materials unearthed. The Supreme Court relied on absence of substantial material. This is not a restriction on the investigating officer. Far from it, the very purpose of conducting an investigation on a complaint of a cognizable offence being committed, is to find material. There can be no dispute that Respondent 1 is the premiere investigating agency in the country which assumedly employs state of the art techniques of investigation. Professionalism of the highest quality, which embraces within it, uncompromising independence and neutrality, is expected of it. Again, the restriction which underlies the impugned judgment is the limited scope of judicial review and also the writ jurisdiction under Article 32 of the Constitution. It is clear as a mountain stream that both these considerations are totally irrelevant for an officer who has before him a complaint making out the commission of a cognizable offence. (Para 106)

J. **Criminal Trial — Investigation — Preliminary enquiry — Preliminary inquiry by investigating officer, when required and its scope — Summarised — Criminal Procedure Code, 1973, S. 157**

Held :

Per K.M. Joseph, J. (concurring)

However, the directions contained in para 120 of the Constitution Bench decision in *Lalita Kumari*, (2014) 2 SCC 1, must be further appreciated. In this case, the petitioners in Writ Petition (Criminal) No. 298 of 2018, have indeed moved an elaborate written complaint before the first respondent CBI. The complaint that is made, attempts to make out the commission of a cognizable offence under the Prevention of Corruption Act. Para 120.1 of *Lalita Kumari case*, declares that registration of FIR is mandatory if information discloses commission of a cognizable offence. The Constitution Bench debarred any preliminary inquiry in such a situation. It is apposite that para 120.5 is noticed at this stage. In *Lalita Kumari case* it was held that the scope of the preliminary inquiry is not to verify the veracity or otherwise of the information received but it is only to ascertain whether the information reveals any cognizable offence. Coming back to para 120.2, it is laid down that if the information does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not. It is beyond dispute that the offences which are mentioned in the complaint filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018 are cognizable offences. Again, coming back to para 120.3 in *Lalita Kumari case* read with paras 120.2 and 120.5, if the

inquiry discloses commission of a cognizable offence, the FIR must be registered. Where, however, the preliminary inquiry ends in closing the complaint, the first informant must be informed in writing forthwith and not later than a week. That apart, reasons, in brief, must also be disclosed. (Para 107)

Lalita Kumari v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524, *followed*

Corruption cases are one of the categories of cases where a preliminary inquiry may be conducted. Also, cases where there is abnormal delay or laches in initiating criminal prosecution, for example, over three months' delay in reporting the matter without satisfactorily explaining the reasons for the delay. Medical negligence cases, matrimonial disputes, commercial offences are also cases in which a preliminary inquiry may be made. As can be noticed that medical negligence cases constitute an exception to the general rule which provides for mandatory registration of FIR in respect of all cognizable offences. In *Lalita Kumari case*, in clear terms, held that it will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint. (Paras 108 and 109)

Lalita Kumari v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524, *followed*

Jacob Mathew v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369, *considered*

Bolam v. *Friern Hospital Management Committee*, (1957) 1 WLR 582; *CBI* v. *Tapan Kumar Singh*, (2003) 6 SCC 175 : 2003 SCC (Cri) 1305, *cited*

In the context of offences related to corruption, the Court in *Lalita Kumari case* has expressed a need for a preliminary inquiry before proceeding against public servants. (Paras 110 and 111)

Lalita Kumari v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524, *followed*

P. Sirajuddin v. *State of Madras*, (1970) 1 SCC 595 : 1970 SCC (Cri) 240, *considered*

K. **Constitution of India — Art. 137 — Review — Exercise of jurisdiction — General principles, summed up — Equally wide in civil and criminal proceedings — It is patterned on Or. 47 R. 1 CPC in civil cases — "Error" when qualifies to be "error apparent on face of record", stressed — "Record" meaning of, reiterated**

— Criminal Trial — Recall/Review — Supreme Court Rules, 2013 — Ors. 47 and 48 — Supreme Court Rules, 1966 — Or. 40 — Words and Phrases — "Error", "error apparent on face of record", "record" — Meanings of

Held :

Per K.M. Joseph, J. (concurring)

A perusal Article 137 would show that the jurisdiction of the Supreme Court, to entertain a review petition in a civil matter, is patterned on the power of the court under Order 47 Rule 1 CPC. The power to review is in Article 137 and it is equally wide in all proceedings. The substantive power is derived from Article 137 and is as wide for criminal as for civil proceedings. (Paras 52 and 54)

"Record" means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the Judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous. If the expression "record" is read to mean, in its semantic sweep, any material even later brought on record, with the leave of the court, it will embrace subsequent events, new light and other grounds which

is found in Order 47 Rule 1 CPC. There is no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source. (Para 54)

P.N. Eswara Iyer v. *Supreme Court of India*, (1980) 4 SCC 680; *Suthendraraja* v. *State*, (1999) 9 SCC 323 : 2000 SCC (Cri) 463, *relied on*

Undoubtedly, any error to be an error on the face of the record, cannot be one which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions or if the error requires lengthy and complicated arguments to establish it, a writ of certiorari would not lie. This principle is equally applicable to a review petition. (Para 72)

Satyanarayan Laxminarayan Hegde v. *Millikarjun Bhavanappa Tirumale*, AIR 1960 SC 137, *relied on*

Justice above all. While a review petition has not been understood as an appeal in disguise and a mere erroneous decision may not justify a review, a decision which betrays an error which is apparent, does entitle the court to exercise its jurisdiction under Article 137 of the Constitution. The Founding Fathers were conscious that the Supreme Court was the final Court. There are two values, which in any system of law, may collide. On the one hand, recognising that men are not infallible and the courts are manned by men, who are prone to err, there must be a safety valve to check the possibility of grave injustice being reached to a litigant, consequent upon an error, which is palpable or as a result of relevant material despite due diligence by a litigant not being made available or other sufficient reason. The other value which is ever-present in the mind of the law giver, is, there must be finality to litigation. Be it judgments of a final court, if it becomes vulnerable to indiscriminate reopening, unless a strong ground exists, which itself is based on manifest error disclosed by the judgment or the other two grounds mentioned in Order 47 CPC in a civil matter, it would spawn considerable inequity. (Para 73)

The anxiety of the Supreme Court that the consideration of rendering justice remain uppermost in the mind of the Court, has led to the Constitution Bench judgment in *Rupa Ashok Hurra*, (2002) 4 SCC 388. It is in the said case that the concept of a curative petition was devised to empower a litigant to seek a reconsideration of a matter wherein the review petition also is unsuccessful. Certain steps have been laid down in this regard which stand incorporated in the Supreme Court Rules, 2013 (in Part IV Order 48 thereof). (Para 71)

Rupa Ashok Hurra v. *Ashok Hurra*, (2002) 4 SCC 388, *relied on*

It must be noticed that the principle well settled in regard to jurisdiction in review, is that a review is not an appeal in disguise. The applicant, in a review, is, on most occasions, told off the gates, by pointing out that his remedy lay in pursuing an appeal. In the case of a decision rendered by the Supreme Court, it is to be noticed that the underpinning based on availability of an appeal, is not available as the Supreme Court is the final Court and no appeal lies. (Paras 56 to 70, 74, 92 and 93)

Moran Mar Basselios Catholicos v. *Mar Poulose Athanasius*, AIR 1954 SC 526; *Northern India Caterers (India) Ltd.* v. *Governor of Delhi*, (1980) 2 SCC 167 : 1980 SCC (Tax) 222; *S. Nagaraj* v. *State of Karnataka*, 1993 Supp (4) SCC 595 : 1994 SCC (L&S) 320; *Usha Bharti* v. *State of U.P.*, (2014) 7 SCC 663; *Vikram Singh* v. *State of Punjab*, (2017) 8 SCC 518 : (2017) 3 SCC (Cri) 641; *Mukesh* v. *State (NCT of Delhi)*, (2018) 8 SCC 149 : (2018) 3 SCC (Cri) 531, *relied on*

Haridas Das v. *Usha Rani Banik*, (2006) 4 SCC 78; *State of W.B.* v. *Kamal Sengupta*, (2008) 8 SCC 612 : (2008) 2 SCC (L&S) 735; *Sow Chandra Kante* v. *Sk. Habib*, (1975) 1 SCC 674 : 1975 SCC (Cri) 305 : 1975 SCC (L&S) 184 : 1975 SCC (Tax) 200; *Girdhari Lal Gupta* v. *D.H. Mehta*, (1971) 3 SCC 189 : 1971 SCC (Cri) 279; *Deo Narain Singh* v. *Daddan Singh*, 1986 Supp SCC 530; *Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*, (1979) 4 SCC 389; *Lily Thomas* v. *Union of India*, (2000) 6 SCC 224 : 2000 SCC (Cri) 1056; *Haryana State Industrial Development Corpn. Ltd.* v. *Mawasi*, (2012) 7 SCC 200 : (2012) 4 SCC (Civ) 172; *Kamlesh Verma* v. *Mayawati*, (2013) 8 SCC 320 : (2013) 3 SCC (Civ) 782 : (2013) 4 SCC (Cri) 265 : (2014) 1 SCC (L&S) 96, *affirmed*

Jain Studios Ltd. v. *Shin Satellite Public Co. Ltd.*, (2006) 5 SCC 501, *distinguished*

Usha Rani Banik v. *Haridas Das*, Review Petition No. 76 of 2002, order dated 14-11-2003 (Gau), *held, reversed*

Manohar Lal Sharma v. *Narendra Damodardas Modi*, 2018 SCC OnLine SC 2278; *Shin Satellite Public Co. Ltd.* v. *Jain Studios Ltd.*, (2006) 2 SCC 628, *referred to*

Rekanti Chinna Govinda Chettiar v. *S. Varadappa Chettiar*, 1939 SCC OnLine Mad 228 : AIR 1940 Mad 17; *R.* v. *Northumberland Compensation Appeal Tribunal, ex p Shaw*, (1952) 1 KB 338 (CA); *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845 : (1965) 1 SCR 933; *O.N. Mohindroo* v. *District Judge, Delhi*, (1971) 3 SCC 5; *Prithwi Chand Lal Choudhury* v. *Sukhraj Rai*, 1940 SCC OnLine FC 8 : AIR 1941 FC 1; *Rajunder Narain Rae* v. *Bijai Govind Sing*, 1839 SCC OnLine PC 6 : (1837-41) 2 Moo IA 181 : 18 ER 269 : (1836) 1 Moo PC 117 : 12 ER 757 : 1 Sar 175; *Chhajju Ram* v. *Neki*, 1922 SCC OnLine PC 11 : (1921-22) 49 IA 144; *Union of India* v. *Sandur Manganese & Iron Ores Ltd.*, (2013) 8 SCC 337 : (2013) 3 SCC (Civ) 797, *cited*

The fact that no appeal lies from the judgment of the Supreme Court may not, however, result in the jurisdiction of the Court under Article 137 of the Constitution being enlarged. However, when the Court is invited to exercise its power of review, this aspect may also be borne in mind viz. that unlike the other courts from which an appeal may be provided either under the Constitution or other laws, or by special leave under Article 136 of the Constitution, no appeal lies from the judgment of the Supreme Court, and it is in that sense, the final Court. The underlying assumption for the principle that a review is not an appeal in disguise, being that the decision is appealable, is really not available in regard to a decision rendered by the Supreme Court, is all that is being pointed out. (Para 76)

A review petition is maintainable if the impugned judgment discloses an error apparent on the face of the record. Unlike a proceeding in certiorari jurisdiction, wherein the error must not only be apparent on the face of the record, it must be an error of law, which must be apparent on the face of the record, for granting review under Article 137 of the Constitution read with Order 47 Rule 1 CPC, the error can be an error of fact or of law. No doubt, it must be apparent on the face of record. Such an error has been described as a palpable error or glaring omission. As to what constitutes an error apparent on the face of record, is a matter to be found in the context of the facts of each case. (Para 77)

Hari Vishnu Kamath v. *Syed Ahmad Ishaque*, AIR 1955 SC 233, *relied on*

Batuk K. Vyas v. *Salim M. Merchant*, 1952 SCC OnLine Bom 46 : AIR 1953 Bom 133, *cited*

If the relevant law is ignored or an inapplicable law forms the foundation for the judgment, it would provide a ground for review. If a court is oblivious to the relevant statutory provisions, the judgment would, in fact, be *per incuriam*. No doubt, the concept of per incuriam is apposite in the context of its value as the precedent but

as between the parties, certainly it would be open to urge that a judgment rendered, in ignorance of the applicable law, must be reviewed. The judgment, in such a case, becomes open to review as it would betray a clear error in the decision. (Para 78)

Girdhari Lal Gupta v. *D.H. Mehta*, (1971) 3 SCC 189 : 1971 SCC (Cri) 279; *Deo Narain Singh* v. *Daddan Singh*, 1986 Supp SCC 530, *affirmed*

As regards fresh material forming basis for review, it must be of such nature that it is relevant and it undermines the verdict. This is apart from the requirement that it could not be produced despite due diligence. (Para 79)

The dismissal of a special leave petition takes place at two levels. In the first place, the Court may dismiss or reject a special leave petition at the admission stage. Ordinarily, no reasons accompany such a decision. In matters where a special leave petition is dismissed after notice is issued, also reasons may not be given ordinarily. Several elements enter into the consideration of the Supreme Court where a special leave petition is dismissed. The task for a review applicant becomes formidable as reasons are not given. An error apparent on the face of the record becomes difficult to establish. In a writ petition where pleadings are exchanged and reasons are given in support of the verdict, a self-evident error is detected without much argument. No doubt, a court, in review, does not reappreciate and correct a mere erroneous decision. That reappreciation is tabooed, is not the same as holding that a court will not appreciate the case as reflected in the pleadings and the law by which the court is governed. (Para 80)

L. **Civil Procedure Code, 1908 — S. 11 Expln. V — Res judicata — Remedies — Silence of decree regarding relief — Effect of — Such relief must be treated as having been declined — Practice and Procedure — Res Judicata**

M. **Courts, Tribunals and Judiciary — Judicial Process — Approach/Bases for judicial decision — Strict Adherence to Constitution/Valid Statutes/Rules and Judicial Precedents — Duty of court, while deciding case — Consideration of claim and relief sought, application of relevant statute and following law laid down by superior courts — Necessity of — Any decision rendered without applying law and/or binding judgment amenable to review jurisdiction — Practice and Procedure — Review/Recall**

Held :

Per K.M. Joseph, J. (concurring)

Where a party institutes a proceeding, if the proceeding is of a civil nature, there would be a cause of action. There would be reliefs sought on the basis of the cause of action. Materials are produced both in support and against the claim. The court thereafter renders a judgment either accepting the case or rejecting the case. When the court rejects the case, it necessarily involves refusing to grant the relief sought for by the plaintiff/petitioner. It may transpire that the petitioner may not press for certain reliefs. The court may, after applying its mind to the case, find that the petitioner is not entitled to the relief and decline the prayers sought. It may also happen that the court does refer to the reliefs sought but thereafter does not undertake any discussion regarding the case for the relief sought and proceeds to non-suit the party. (Para 85)

A judgment may be silent in regard to a relief which is sought by a party. It is apposite, in this regard, to notice Section 11 CPC. If a decree is silent, as regards any relief which is claimed by the plaintiff, Explanation V to Section 11 declares that the relief must be treated as declined. No doubt, if the relief is expressly refused, then also, the matter would become res judicata. (Paras 86 and 87)

No doubt, if the relief is expressly refused, then also, the matter would become res judicata. It is, therefore, of vital importance that when a case is decided, the Court considers the claim and the relief sought, applies the statute which is applicable and the law which is laid down particularly when it is by a Constitution Bench in deciding the case. Just as, in the case of a judgment, where the applicable statute, not being applied, would result in a judgment which becomes amenable to be corrected in review, there can be no reason why when a binding judgment of the Supreme Court, which is enlisted by the party, is ignored, it should have a different consequence. In fact, since a review under Article 137 of the Constitution, in a civil matter, is to be exercised, based on what is contained in Order 47 Rule 1 CPC, the Explanation therein, may shed some light. The Explanation which was inserted by the 1976 Act, following the recommendations of the Law Commission of India, in its 54th Report, declares that the law is laid down by a superior court reversing an earlier decision, on a question of law, will not be a ground for the review of a judgment. (Para 87)

The Law Commission, in fact, in the said Report reasoned that adopting the view taken by the Kerala High Court in *Pathrose*, 1968 SCC OnLine Ker 67 that a later judgment would amount to discovery of new and important matter, and in any case an error on the face of the record, would keep alive the possibility of review indefinitely. This impliedly would mean that when a court decides a case, it must follow judgments which are binding on it. This is not to say that a smaller Bench of the Supreme Court, if it entertains serious doubts about the correctness of an earlier judgment, may not consider referring the matter to a larger Bench. However, as long as it does not undertake any such exercise, it cannot refuse to follow the judgment and that too of a Constitution Bench. Any such refusal to follow the decision binding on it, would undoubtedly disclose an error which would be palpable being self-evident. (Para 88)

Pathrose v. *Kuttan*, 1968 SCC OnLine Ker 67 : AIR 1969 Ker 186, *explained*

G-D/63335/C

Advocates who appeared in this case :

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Prashant Bhushan, Arun Shourie and Manohar Lal Sharma, Petitioners-in-Person.

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4. (2019) 3 SCC 25, *Manohar Lal Sharma* v. *Narendra Damodardas Modi* 352*g-h*, 353*d-e*, 354*d*, 360*e*, 360*g*, 382*e*
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The Judgments of the Court* were delivered by

SANJAY KISHAN KAUL, J. (*for Gogoi, C.J. and himself; K.M. Joseph, J. concurring*)—

(IA No. 63168 of 2019 — Exemption from filing OT, IA No. 71678 of 2019 — Exemption from filing OT and IA No. 66253 of 2019 — Exemption from filing OT)

1. Allowed subject to just exception.

MA No. 58 of 2019 in WP (Crl.) No. 225 of 2018 (PIL-W) (IA No. 182576 of 2018 — Correction of mistakes in the judgment)

2. The Union of India has filed the present application seeking correction of what they claim to be an error, in two sentences in para 26 of the judgment delivered by this Court on 14-12-2018[1]. This error is stated to be on account

* **Ed.**: Kaul J. delivered the Judgment of the Court for Ranjan Gogoi, C.J. and himself. K.M. Joseph, J. delivered a concurring opinion.

1 *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, (2019) 3 SCC 25

of a misinterpretation of some sentences in a note handed over to this Court in a sealed cover.

3. The Court had asked vide order dated 31-10-2018[2] to be apprised of the details/cost as also any advantage, which may have accrued on that account, in the procurement of the 36 Rafale fighter jets. The confidential note in the relevant portions stated as under:

> "The Government has already shared the pricing details with the CAG. The report of the CAG is examined by the PAC. Only a redacted version of the report is placed before Parliament and in public domain."

4. It is the submission of the learned Attorney General that the first sentence referred to the sharing of the price details with the CAG. But the second sentence qua the PAC referred to the process and not what had already transpired. However, in the judgment this portion had been understood as if it was already so done.

5. On hearing the learned counsel for the parties, we are of the view that the confusion arose on account of two portions of the paragraph referring to both what had been and what was proposed to be done. Regardless, what we noted was to complete the sequence of facts and was not the rationale for our conclusion.

6. We are, thus, inclined to accept the prayer and the sentence in para 26 to the following effect: (*Manohar Lal Sharma case*[1], SCC p. 35)

> "*26.* … The pricing details have, however, been shared with the Comptroller and Auditor General (hereinafter referred to as "CAG"), and the report of CAG has been examined by the Public Accounts Committee (hereafter referred to as "PAC"). Only a redacted portion of the report was placed before Parliament and is in public domain."

should be replaced by what we have set out hereinafter:

> "*26.* … The Government has already shared the pricing details with the CAG. The report of the CAG is examined by the PAC in the usual course of business. Only a redacted version of the report is placed before Parliament and is in public domain."

7. The prayer is accordingly allowed. The application stands disposed of.

2 *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, 2018 SCC OnLine SC 2278
1 *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, (2019) 3 SCC 25

RP (Crl.) No. 46 of 2019 in WP (Crl.) No. 298 of 2018, RP (Crl.) No. 122 of 2019 in WP (Crl.) No. 297 of 2018 (PIL-W), MA No. 403 of 2019 in WP (Crl.) No. 298 of 2018 (PIL-W)

(IA No. 29248 of 2019 — Initiating criminal proceedings under Section 340 CrPC)

RP (C) No. 719 of 2019 in WP (C) No. 1205 of 2018 (PIL-W)

8. The review petitions were listed for hearing in Court and elaborate submissions were made by the learned counsel for the parties.

9. We may note that insofar as the preliminary objection raised by the Attorney General is concerned qua certain documents sought to be produced by the petitioners, that aspect was dealt with by our order dated 10-4-2019[3] and the said preliminary objection was overruled.

10. We cannot lose sight of the fact that unless there is an error apparent on the face of the record, these review applications are not required to be entertained. We may also note that the application under Section 340 of the Code of Criminal Procedure, 1973 partly emanates from an aspect which has been dealt with in our order passed today on the application for correction of the order filed by the Union of India.

11. We have elaborately dealt with the pleas of the learned counsel for the parties in our order dated 14-12-2018[1] under the heads of "Decision-Making Process", "Pricing" and "Offsets". However, before proceeding to deal with these aspects we had set out the contours of the scrutiny in matters of such a nature. It is in that context we had opined that the extent of permissible judicial review in matters of contract, procurement, etc. would vary with the subject-matter of the contract and that there cannot be a uniform standard of depth of judicial review which could be understood as an across the board principle to apply to all cases of award of work or procurement of goods/material. In fact, when two of these writ petitions were listed before the Court on 10-10-2018[4], we had embarked on a limited enquiry despite the fact that we were not satisfied with the adequacy of the averments and the material in the writ petitions. It was the object of the Court to satisfy itself with the correctness of the decision-making process.

12. We cannot lose sight of the fact that we are dealing with a contract for aircrafts, which was pending before different Governments for quite some time and the necessity for those aircrafts has never been in dispute. We had, thus, concluded in para 36 noticing that other than the aforesaid three aspects, that too to a limited extent, this Court did not consider it appropriate to embark on a roving and fishing enquiry. We were, however, cautious to note that this was in the context of the writ petition filed under Article 32 of the Constitution of India, the jurisdiction invoked.

3 *Yashwant Sinha* v. *CBI*, (2019) 6 SCC 1
1 *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, (2019) 3 SCC 25
4 *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, 2018 SCC OnLine SC 1920

13. In the course of the review petitions, it was canvassed before us that reliance had been placed by the Government on patently false documents. One of the aspects is the same as has been dealt with by our order passed today on the application for correction and, thus, does not call for any further discussion.

14. The other aspect sought to be raised specifically in Review Petition No. 46 of 2019 is that the prayer made by the petitioner was for registration of an FIR and investigation by CBI, which has not been dealt with and the contract has been reviewed prematurely by the Judiciary without the benefit of investigation and inquiry into the disputed questions of facts.

15. We do not consider this to be a fair submission for the reason that all counsel, including counsel representing the petitioners in this matter addressed elaborate submissions on all the aforesaid three aspects. No doubt that there was a prayer made for registration of FIR and further investigation but then once we had examined the three aspects on merits we did not consider it appropriate to issue any directions, as prayed for by the petitioners which automatically covered the direction for registration of FIR, prayed for.

16. Insofar as the aspect of pricing is concerned, the Court satisfied itself with the material made available. It is not the function of this Court to determine the prices nor for that matter can such aspects be dealt with on mere suspicion of persons who decide to approach the Court. The internal mechanism of such pricing would take care of the situation. On the perusal of documents we had found that one cannot compare apples and oranges. Thus, the pricing of the basic aircraft had to be compared which was competitively marginally lower. As to what should be loaded on the aircraft or not and what further pricing should be added has to be left to the best judgment of the competent authorities.

17. We have noted aforesaid that a plea was also raised about the "non-existent CAG Report" but then at the cost of repetition we state that this formed part of the order for correction we have passed aforesaid.

18. It was the petitioners' decision to have invoked the jurisdiction of this Court under Article 32 of the Constitution of India fully conscious of the limitation of the contours of the scrutiny and not to take recourse to other remedies as may be available. The petitioners cannot be permitted to state that having so taken recourse to this remedy, they want an adjudication process which is really different from what is envisaged under the provisions invoked by them.

19. Insofar as the decision-making process is concerned, on the basis of certain documents obtained, the petitioners sought to contend that there was contradictory material. We, however, found that there were undoubtedly opinions expressed in the course of the decision-making process, which may be different from the decision taken, but then any decision-making process envisages debates and expert opinion and the final call is with the competent authority, which so exercised it. In this context reference was made to: (*a*) Acceptance of Necessity (AON) granted by the Defence Acquisition Council (DAC) not being available prior to the contract which would have determined the necessity and quantity of aircrafts; (*b*) absence of Sovereign Guarantee

granted by France despite requirement of the Defence Procurement Procedure (DPP); (*c*) the oversight of objections of three expert members of the Indian Negotiating Team (INT) regarding certain increase in the benchmark price; and (*d*) the induction of Reliance Aerostructure Ltd. (RAL) as an offset partner.

20. It does appear that the endeavour of the petitioners is to construe themselves as an appellate authority to determine each aspect of the contract and call upon the Court to do the same. We do not believe this to be the jurisdiction to be exercised. All aspects were considered by the competent authority and the different views expressed, considered and dealt with. It would well-nigh become impossible for different opinions to be set out in the record if each opinion was to be construed as to be complied with before the contract was entered into. It would defeat the very purpose of debate in the decision-making process.

21. Insofar as the aforesaid pleas are concerned, it has also been contended that some aspects were not available to the petitioner at the time of the decision and had come to light subsequently by their "sourcing" information. We decline to, once again, embark on an elaborate exercise of analysing each clause, perusing what may be the different opinions, then taking a call whether a final decision should or should not have been taken in such technical matters.

22. An aspect also sought to be emphasised was that this Court had misconstrued that all the Reliance Industries were of one group since the two brothers held two different groups and the earlier arrangement was with the Company of the other brother. That may be so, but in our observation this aspect was referred to in a generic sense more so as the decision of whom to engage as the offset partner was a matter left to the suppliers and we do not think that much can be made out of it.

23. It is for the aforesaid reasons also that we find that there was no ground made out for initiating prosecution under Section 340 CrPC.

24. We are, thus, of the view that the review petitions are without any merit and are accordingly dismissed, once again, re-emphasising that our original decision was based within the contours of Article 32 of the Constitution of India.

Contempt Petition (Crl.) No. 3 of 2019 in RP (Crl.) No. 46 of 2019 in WP (Crl.) No. 298 of 2018 (PIL-W)

25. The contempt petition emanates from an allegation against Mr Rahul Gandhi, the then President of the Indian National Congress, on account of utterances made in the presence of several media persons on 10-4-2019 by him alleging that the Supreme Court had held that "*Chowkidar* (Mr Narendra Modi, Prime Minister) is a thief". The Supreme Court was also attributed to having held in consonance with what his discourse was i.e. that the Prime Minister of India stole money from the Air Force and gave it to Mr Anil Ambani and that the Supreme Court had admitted that Mr Modi had indulged in corruption. It was stated that the Supreme Court had said that the *Chowkidar* is a thief.

26. On notice being issued, reply-affidavit dated 22-4-2019 was filed averring that the comments were made on the basis of a bona fide belief and general understanding of the order even though the contemnor had not himself had the opportunity to see, read or analyse the order at that stage. It was further averred that there had not been the slightest intention to insinuate anything regarding the Supreme Court proceedings in any manner as the statements had been made by the contemnor in a "rhetorical flourish in the heat of the moment" and that his statement has been used and misused by his political opponents to project that he had deliberately attributed the utterances to the Supreme Court. In that context, it was averred that "nothing could be farther from my mind. It is also clear that no court would ever do that and hence the unfortunate references (for which I express regret) to the Court order and to the political slogan in juxtaposition the same breath in the heat of political campaigning ought not to be construed as suggesting that the Court had given any finding or conclusion on that issue."

27. The acceptance of such an affidavit was opposed by the petitioner, a BJP Member of Parliament, in the contempt petition. It was stated that instead of expression of any remorse or apology, attempt was made to justify the contemptuous statement as having been made in the heat of the moment.

28. On arguments having taken place in this context, and realising the seriousness of the matter and the inadequacy of the affidavit, the learned counsel for the contemnor took liberty to file an additional affidavit. Vide order dated 30-4-2019[5], this Court left the admissibility and acceptance of such an affidavit to be considered on the subsequent date. An additional affidavit was filed on 8-5-2019 stating that the contemnor held this Court in the highest esteem and respect and never intended to interfere with the process of administration of justice. An unconditional apology was tendered by him by stating that the attributions were entirely unintentional, non-wilful and inadvertent.

29. The matter was, once again, addressed by the learned counsel. We have given our thoughtful consideration to this issue.

30. We must note that it is unfortunate that without verification or even perusing as to what is the order passed, the contemnor deemed it appropriate to make statements as if this Court had given an imprimatur to his allegations against the Prime Minister, which was far from the truth. This was not one sentence or a one off observation but a repeated statement in different manners conveying the same. No doubt the contemnor should have been far more careful.

31. The matter was compounded by filing a 20-page affidavit with a large number of documents annexed rather than simply accepting the mistake and giving an unconditional apology. Better wisdom dawned on the counsel only during the course of arguments thereafter when a subsequent affidavit dated 8-5-2019 was filed. We do believe that persons holding such important positions in the political spectrum must be more careful. As to what should be

5 *Yashwant Sinha* v. *CBI*, (2020) 2 SCC 392 (2)

his campaign line is for a political person to consider. However, this Court or for that matter no court should be dragged into this political discourse valid or invalid, while attributing aspects to the Court which had never been held by the Court. Certainly Mr Gandhi needs to be more careful in future.

32. However, in view of the subsequent affidavit, better sense having prevailed, we would not like to continue these proceedings further and, thus, close the contempt proceedings with a word of caution for the contemnor to be more careful in future.

IA No. 69008 of 2019 — Clarification/Direction, IA No. 69006 of 2019 — Intervention application, IA No. 71047 of 2019 — Production of records and IA No. 69009 of 2019 — Stay application

33. In view of the orders passed above, these applications do not survive for consideration and the same are disposed of. Any other pending applications also stand disposed of.

K.M. JOSEPH, J. (*concurring*)— I have perused the order proposed by my learned Brother Sanjay Kishan Kaul, J. While I agree with the final decision subject to certain aspects considered by me, I would, by my separate opinion, give my reasons, which are as hereunder.

35. The common judgment in four writ petitions has generated three review petitions, a contempt petition and a petition under Section 340 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC", for short) and an application seeking correction.

36. Review Petition (Criminal) No. 46 of 2019 is filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018. In the said writ petition, relief sought, inter alia, was to register an FIR and to investigate the complaint which was made by the petitioners and to submit periodic status reports. The reliefs, as are made in the clauses (*a*) to (*e*) of the prayer, read as follows:

> "(*a*) Issue writ of mandamus or any other appropriate writ directing Respondent 1 to register an FIR on the complaint that was made by the petitioners on 4-10-2018.
>
> (*b*) Issue writ of mandamus or any other appropriate writ directing Respondent 1 to investigate the offences disclosed in the said complaint in a time-bound manner and to submit periodic status reports to the Court.
>
> (*c*) Issue writ of mandamus or any other appropriate writ directing Respondent 2 to cease and desist from influencing or intimidating in any way the officials that would investigate the offences disclosed in the complaint.
>
> (*d*) Issue writ of mandamus or any other appropriate writ directing Respondent 1 and Respondent 2 to not transfer the CBI officials tasked with investigation of the offences mentioned in the complaint.
>
> (*e*) Issue writ of mandamus or any other appropriate writ to ensure that the relevant records are not destroyed or tampered with and are transferred to CBI."

37. Review Petition (Criminal) No. 122 of 2019 is filed by the petitioner in Writ Petition (Criminal) No. 297 of 2018. The reliefs sought in the said writ petition are as follows:

"(*a*) to constitute a Special Investigating Team (SIT) under the supervision of the Hon'ble Supreme Court with the following mandate:

(*i*) To investigate the reasons for cancellation of earlier deal for the purchase of 126 Rafale Fighter Jets.

(*ii*) As to how the figure of 36 Fighter Jets was arrived at without the formalities associated with such a highly sensitive defence procurement.

(*iii*) To look into the alterations made by Respondent 2 about the pricing of the Rafale Fighter Jets in view of the earlier price of Rs 526 crores per Fighter Jet along with requisite equipments, services and weapons and Rs 670 crores without associated equipments, weapons, India-specific enhancements, maintenance support and services; which resulted into the escalation of price of each Fighter Jet from Rs 526 crores to more than 1500 crores.

(*iv*) To investigate as to how a novice company viz. Reliance Defence came in picture of this highly sensitive defence deal involving Rs 59,000 crores without having any kind of experience and expertise in making of Fighter Jets.

(*v*) As to why the name of "Hindustan Aeronautics Ltd." was removed from the deal?

(*vi*) As to whether the decision of purchase of only 36 Rafale Fighter Jets instead of 126 was a compromise with the security of the country or not?

(*vii*) Whether Reliance Defence or its sister concern or any other individual or intermediary company has/have influenced the decision-making of the purchase of Rafale Fighter Jets at substantially higher prices in the backdrop of the statement given by the then President of French Republic and the investment made by Reliance Entertainment into Julie Gayet's Firm Rouge International was made with a purpose to influence the decision of removal of the HAL and induction of Reliance Defence as partner of the Dassault.

(*b*) To terminate/cancel the inter-governmental agreement with the Government of French Republic signed on 23-9-2016 for the purchase of 36 Rafale Fighter Jets and to give direction to Respondent 3 to lodge an FIR and to report the progress of investigation to this Hon'ble Court.

(*c*) To restore the earlier deal for the purchase of 126 Rafale Fighter Jets which was cancelled on 24-6-2015 by the Government of India.

(*d*) To bar the Dassault Reliance Aerospace Ltd. (DRAL) from handling/manufacturing the Rafale Fighter Jets.

(*e*) To direct Respondents 1 & 2 to propose the public sector company Hindustan Aeronautics Ltd. as the Indian Offset Partner of Dassault."

38. Review Petition (Criminal) No. 719 of 2019 has been filed again by a sole petitioner in Writ Petition (Criminal) No. 1205 of 2018. The reliefs sought in the said writ petition are as follows:

"(*a*) Issue an appropriate writ or order or direction directing the respondents to file the details of the agreement entered into between the Union of India and Government of France with regard to the purchase of 36 Rafale Fighter Jets in a sealed envelope.

(*b*) Issue an appropriate writ or order or direction directing the respondents to furnish in a sealed envelope the information with regard to the present cost of Rafale Fighter Jets and also the earlier cost of the Rafale Fighter Jets during the regime of UPA Government.

(*c*) Issue an appropriate writ or order or direction directing the respondents to furnish any other information in sealed envelope before the Hon'ble Supreme Court with regard to the controversy erupted in the purchase of Rafale Fighter Jets."

The impugned judgment

39. The three writ petitions, as also writ petition in which no review is filed, came to be dismissed. This Court has referred to the reliefs which have been sought in the four writ petitions. This Court referred to the parameters of judicial review. The extent of permissible judicial review of contracts, procurement, etc., was found to vary with the subject-matter of the contract. It was further observed that the scrutiny of the challenges before the Court, will have to be made keeping in mind the confines of national security, the subject of procurement being crucial to the nation's sovereignty.

40. The findings of this Court in para 15 throw light on the controversy as was understood by the Court. Para 15 reads as follows: (*Manohar Lal Sharma case*[1], SCC pp. 31-32, para 15)

"*15.* It is in the backdrop of the above facts *and the somewhat constricted power of judicial review that, we have held, would be available in the present matter that we now proceed to scrutinise the controversy raised in the writ petitions which raise three broad areas of concern, namely, (i) the decision-making process; (ii) difference in pricing; and (iii) the choice of IOP*." (emphasis supplied)

41. Thereafter, this Court had proceeded to consider the decision-making process, pricing and offsets and did not find in favour of the petitioners. It is after the discussion, as aforesaid, it is to be noted that this Court finally concluded as follows: (*Manohar Lal Sharma case*[1], SCC p. 38, paras 35-36)

"*35. Once again, it is neither appropriate nor within the experience of this Court to step into this arena of what is technically feasible or not. The point remains that DPP 2013 envisages that the vendor/OEM will choose its own IOPs.* In this process, the role of the Government is not envisaged and, thus, mere press interviews or suggestions cannot form the basis for judicial review by this Court, especially when there is categorical denial

1 *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, (2019) 3 SCC 25

of the statements made in the Press, by both the sides. *We do not find any substantial material on record to show that this is a case of commercial favouritism to any party by the Indian Government, as the option to choose IOP does not rest with the Indian Government.*

Conclusion

36. In view of our findings on all the three aspects, and having heard the matter in detail, we find no reason for any intervention by this Court on the sensitive issue of purchase of 36 defence aircrafts by the Indian Government. *Perception of individuals cannot be the basis of a fishing and roving enquiry by this Court, especially in such matters. We, thus, dismiss all the writ petitions, leaving it to the parties to bear their own costs. We, however, make it clear that our views as above are primarily from the standpoint of the exercise of the jurisdiction under Article 32 of the Constitution of India which has been invoked in the present group of cases.*" (emphasis supplied)

42. Upon consideration of the review petitions and applications, by order dated 26-2-2019[6], prayer for hearing in the open court was allowed. We have heard the learned counsel. We heard the parties in Review Petition (Criminal) No. 46 of 2019, the learned Attorney General and the learned Solicitor General.

43. As far as the petitioners in Review Petition (Criminal) No. 46 of 2019 are concerned, the complaint appears to be that this Court has totally overlooked the relief sought in Writ Petition (Criminal) No. 298 of 2018.

44. The first respondent is the Central Bureau of Investigation (CBI) and the second respondent is the Union of India in Writ Petition (Criminal) No. 298 of 2018. The substance of the writ petition is that after following the due process under the Defence Procurement Procedure (DPP), to procure Advanced Fighter Aircrafts, and as per the authority under the DPP, the IAF Service Headquarters, after a widely consultative process with multiple institutions, prepared Services Qualitative Requirements (SQR), specifying the number of aircrafts required as 126. There was the recommendation of the Committee that Make in India by Hindustan Aeronautics Ltd. (HAL), a public sector enterprise, under a Transfer Technology Agreement, should be the mode of procurement. The Defence Acquisition Council granted the mandatory Acceptance of Necessity (AON). A Request for Proposal (RFP) was, accordingly, issued. There were six vendors. In 2011, it was announced that Dassault's Rafale and Eurofighter GmbH Typhoon met the IAF requirements. In March of 2014, a work share agreement was entered into between Dassault Aviation and HAL. Accordingly, HAL would do 70% of the work on 108 planes. On 25-3-2015, it is alleged that Dassault was in the final stages of negotiations with India for 126 aircrafts and HAL was to be the partner of Dassault.

45. It was the further case of the petitioners that a new deal was, however, inexplicably negotiated and announced by the Prime Minister without following the due procedure. Number of aircrafts was reduced to 36. This involved complete violation of all laid down Defence Procurement Procedure.

6 *Yashwant Sinha* v. *CBI*, (2020) 2 SCC 392 (1)

There are various allegations made against the deal to purchase 36 planes in place of 126. In particular, there is reference to Mr Anil Ambani not owning any company engaged in manufacture of products and services mentioned in the list of products and services eligible for discharge of offset obligations. A company was incorporated as Reliance Defence Ltd. on 28-3-2015, just twelve days before the new deal was suddenly announced on 10-4-2015. There is also the case that DPP was bypassed for collateral considerations. In the complaint lodged with CBI, there is reference to the Prevention of Corruption Act, 1988, as it stood prior to amendment. Their request is to register an FIR under the provisions which are mentioned therein which fall under the Prevention of Corruption Act, 1988 and to investigate the matter. Other reliefs are already referred to.

46. The petitioners in the said case, premise their case on the judgment of this Court in *Lalita Kumari* v. *State of U.P.*[7] It is their case that though reference was made to the relief at the beginning of the judgment, thereafter, this Court focused only on the merits of the matter in terms of the powers available to it under judicial review. Reliefs sought in other writ petitions were focused upon. The only prayers of the petitioners in Writ Petition (Criminal) No. 298 of 2018, as noticed, was a direction to follow the command of *Lalita Kumari*[7] and to register an FIR as they have filed a complaint which is produced along with writ petition and as no action was taken as mandated by the Constitution Bench of this Court, they have approached this Court. The error is apparent in not even considering the impact of the Constitution Bench and requires to be redressed through the review petition. The petitioners also, undoubtedly, point out that there was suppression of facts by the respondents. This Court was sought to be misled. There is also a case that the petitioners have obtained documents which suggest that there were parallel negotiations being undertaken by the Prime Minister's Office (PMO) which was strenuously objected to by the Indian Negotiating Team (INT). The statement in the judgment that the pricing details have been shared with the Comptroller and Auditor General of India (CAG) and the Report of the CAG has been examined by the Public Accounts Committee (PAC) and that only a redacted portion of the Report was placed before Parliament, are pointed out to be patently false. It is primarily in regard to the same that an application is filed purporting to be under Section 340 CrPC. There is an application for correction and there is complaint of wholesale suppression of facts. Errors are also referred to.

47. The stand of the Government of India is that the review petitions are meritless. This Court has elaborately considered the matter and found that there was nothing wrong. It is the case of the Government that the impugned judgment addresses contentions of the petitioners on compelling principles with regard to the scope of the judicial inquiry in cases involving the security and defence of the nation and it lays down the correct law. It is pointed out that there is no grave error apparent on the face of record. Reliance is placed on judgment of this Court in *Mukesh* v. *State (NCT of Delhi)*[8]. A fishing inquiry is impermissible. There was additional benefit to the country as a result of the

7 (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524
8 (2018) 8 SCC 149 : (2018) 3 SCC (Cri) 531

deal which is sought to be questioned. Reliance is placed on the findings of the CAG. It is contended that the CAG has conclusively held that the basis of the benchmark by the INT was unrealistic.

48. The CAG has held that 36 Rafale aircrafts deal was 2.86% lower than the audit aligned price. Regarding the offset guidelines being amended initially to benefit an industrial group, it is stoutly denied. The waiver of sovereignty/ bank guarantee in Government to Government agreements is pointed out to be not unusual. Support is sought to be drawn from the Report of the CAG, inter alia, finding that the French Government was made equally responsible to fulfil its obligations. The production and delivery schedule are monitored by High-level Committee with representatives of both Governments of France and India.

49. As far as mandate of *Lalita Kumari*[7], not being followed is concerned, it is stated that disclosing prima facie that a cognizable offence is committed is mandatory, which is lacking in the present case especially once this Court has concluded that on decision-making process, pricing and Indian Offset Partners, there was no reason to intervene. Once this Court has held that perception of individuals cannot be the basis for a fishing and roving inquiry, no cognizable offence is made out prima facie so as to order registration of an FIR. There is no concealment of facts or false presentation of facts.

Contours of review jurisdiction

50. Article 137 of the Constitution confers jurisdiction on the Supreme Court of India to exercise power of review. It reads as follows:

> "**137.** ***Review of judgments or orders by the Supreme Court.***—Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

51. Rules have been made known as the Supreme Court Rules, 2013. Order 47 of the said Rules, deals with review (In the Supreme Court Rules, 1966, it was contained in Order 40) and it reads as follows:

> "**ORDER 47**
>
> REVIEW
>
> **1.** The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.
>
> The application for review shall be accompanied by a certificate of the Advocate-on-Record certifying that it is the first application for review and is based on the grounds admissible under the Rules.
>
> **2.** An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review.

7 *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524

3. Unless otherwise ordered by the court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

4. Where on an application for review the court reverses or modifies its former decision in the case on the ground of mistake of law or fact, the court, may, if it thinks fit in the interests of justice to do so, direct the refund to the petitioner of the court fee paid on the application in whole or in part, as it may think fit.

5. Where an application for review of any judgment and order has been made and disposed of, no further application for review shall be entertained in the same matter."

52. Thus, a perusal of the same would show that the jurisdiction of this Court, to entertain a review petition in a civil matter, is patterned on the power of the Court under Order 47 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC", for short).

53. Order 47 Rule 1 CPC, reads as follows:

"**ORDER 47**

REVIEW

1. ***Application for review of judgment.***—(1) Any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is allowed, or

(*c*) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Explanation.—The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."

54. It will be noticed that in criminal matters, review lies on an error apparent on the face of record being established. However, it is necessary to notice what a Constitution Bench of this Court laid down in *P.N. Eswara Iyer* v. *Supreme Court of India*[9]: (SCC p. 695, paras 34-35)

> "*34*. The rule [Ed.: Order 40 Rule 1 of the Supreme Court Rules], on its face, affords a wider set of grounds for review for orders in *civil proceedings*, but limits the ground vis-à-vis *criminal proceedings* to "errors apparent *on the face* of the record". If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the rules could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. *Supposing an accused is sentenced to death by the Supreme Court and the "deceased" shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in Article 137 and it is equally wide in all proceedings. The rule merely canalises the flow from the reservoir of power*. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here "record" means any material which is already on record or may, with the permission of the court, be brought on record. *If justice summons the Judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous.*
>
> *35*. The purpose is plain, the language is elastic and interpretation of a necessary power must naturally be expansive. *The substantive power is derived from Article 137 and is as wide for criminal as for civil proceedings.* Even the difference in phraseology in the rule (Order 40 Rule 2) must, therefore, be read to encompass the same area and not to engraft an artificial divergence productive of anomaly. *If the expression "record" is read to mean, in its semantic sweep, any material even later brought on record, with the leave of the court, it will embrace subsequent events, new light and other grounds which we find in Order 47 Rule 1 CPC. We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source*." (emphasis supplied)

55. In *Suthendraraja* v. *State*[10], referring to the judgment in *P.N. Eswara Iyer*[9], it was, inter alia, held that the scope of review was widened considerably by the pronouncement.

56. In *Haridas Das* v. *Usha Rani Banik*[11], the question arose out of an appeal in the High Court, wherein the High Court accepted[12] the prayer for review. This Court held as follows: (SCC p. 82, para 13)

9 (1980) 4 SCC 680
10 (1999) 9 SCC 323 : 2000 SCC (Cri) 463
11 (2006) 4 SCC 78
12 *Usha Rani Banik* v. *Haridas Das*, Review Petition No. 76 of 2002, order dated 14-11-2003 (Gau)

"*13*. … The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant *to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict*. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. *Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection*." (emphasis supplied)

57. *Jain Studios Ltd.* v. *Shin Satellite Public Co. Ltd.*[13] involved an order passed by the Judge in Chambers. It was sought to review the order passed which is reported in *Shin Satellite Public Co. Ltd.* v. *Jain Studios Ltd.*[14]. In the arbitration petition which was the main matter, there was a prayer to appoint an arbitrator by the review petitioner. The same was heard and rejected. The learned Judge, in the said circumstances, held as follows: (*Jain Studios Ltd. case*[13], SCC pp. 504-05, para 11)

"*11*. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that *virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court*. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases." (emphasis supplied)

58. In *State of W.B.* v. *Kamal Sengupta*[15], this Court, inter alia, held as follows: (SCC p. 633, para 21)

"*21*. At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or *evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words,*

13 (2006) 5 SCC 501
14 (2006) 2 SCC 628
15 (2008) 8 SCC 612 : (2008) 2 SCC (L&S) 735

mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier." (emphasis supplied)

59. In *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*[16], the question, which fell for consideration was, whether misconception of the court about a concession by the counsel, furnished a ground for review. A court may pronounce a judgment on the basis that a concession had been made by the counsel when none had been made. The court may also misapprehend the terms of the concession or the scope of a concession. When such misconception underscores a judgment, whether review would lie? Answering the said question, this Court proceeded to hold as follows: (AIR p. 543, para 36)

"*36.* … Patanjali Sastri, J. (as he then was) sitting singly in the Madras High Court definitely took the view in *Rekanti Chinna Govinda Chettiar* v. *S. Varadappa Chettiar*[17] that a misconception by the court of a concession made by the advocate or of the attitude taken up by the party appears to be a ground analogous to the grounds set forth in the first part of the review section and affords a good and cogent ground for review. The learned Attorney General contends that this affidavit and the letters accompanying it cannot be said to be part of "the record" within the meaning of Order 47 Rule 1.

We see no reason to construe the word "record" in the very restricted sense as was done by Denning, L.J., in R. v. *Northumberland Compensation Appeal Tribunal, ex p Shaw*[18] *KB at pp. 351-52 which was a case of certiorari and include within that term only the document which initiates the proceedings, the pleadings and the adjudication and exclude the evidence and other parts of the record.*

Further, when the error complained of is that the court assumed that a concession had been made when none had in fact been made or that the court misconceived the terms of the concession or the scope and extent of it, it will not generally appear on the record but will have to be brought before the court by way of an affidavit as suggested by the Privy Council as well as by this Court and this can only be done by way of review. The cases to which reference has been made indicate that the misconception of the court must be regarded as sufficient reason analogous to an error on the face of the record. In our opinion it is permissible to rely on the affidavit as an additional ground for review of the judgment." (emphasis supplied)

60. It is pertinent to notice that this Court did not confine the word "record" in the narrow sense in which it was interpreted as in the case of an application of writ of certiorari. This Court also sanctioned support being

16 AIR 1954 SC 526
17 1939 SCC OnLine Mad 228 : AIR 1940 Mad 17
18 (1952) 1 KB 338 (CA)

drawn from an affidavit by the counsel in this regard, as additional ground for review. Misconception by a court, was found embraced within the scope of the expression "sufficient reasons".

61. Non-advertence to the particular provision of the statute, which was pertinent and relevant to the lis, was held to be a ground to seek review. In *Girdhari Lal Gupta* v. *D.H. Mehta*[19], this Court held as follows: (SCC p. 192, para 15)

> "*15*. The learned counsel for the respondent State urges that this is not a case fit for review because it is only a case of mistaken judgment. *But we are unable to agree with this submission because at the time of the arguments our attention was not drawn specifically to Section 23-C(2) and the light it throws on the interpretation of sub-section (1).*" (emphasis supplied)

62. Also, see in this regard, judgment in *Deo Narain Singh* v. *Daddan Singh*[20] where finding that this Court had decided the case on the basis of a statute, which was inapplicable in the facts, review was granted.

63. In *Sow Chandra Kante* v. *Sk. Habib*[21], the judgment involved a request to review the decision of this Court refusing special leave to appeal in a matter, this Court held as follows: (SCC p. 675, para 1)

> "*1*. … A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. *A mere repetition, through different counsel, of old and overruled arguments*, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient." (emphasis supplied)

64. Two documents, which were part of the record, were considered by the Judicial Commissioner to allow review by the High Court. This Court, in appeal, in the judgment in *Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*[22], found as follows: (SCC p. 390, para 4)

> "*4*. In the present case both the grounds on which the review was allowed were hardly grounds for review. That the two documents which were part of the record were not considered by the court at the time of issue of a writ under Article 226 cannot be a ground for review especially *when the two documents were not even relied upon by the parties in the affidavits filed before the Court in the proceedings under Article 226*. Again that several instead of one writ petition should have been filed is a mere question of procedure which certainly would not justify a review. We are, therefore, of the view that the Judicial Commissioner acted without jurisdiction in allowing the review. The order of the Judicial Commissioner

19 (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162 : (1971) 3 SCR 748
20 1986 Supp SCC 530
21 (1975) 1 SCC 674 : 1975 SCC (Cri) 305 : 1975 SCC (L&S) 184 : 1975 SCC (Tax) 200
22 (1979) 4 SCC 389

dated 7-12-1967 is accordingly set aside and the order dated 25-5-1965, is restored. The appeal is allowed but without costs." (emphasis supplied)

65. *Northern India Caterers (India) Ltd.* v. *Governor of Delhi*[23] was a case which fell to be considered under Article 137 of the Constitution of India. The relevant discussion is found in paras 8 and 9. They read as follows: (SCC pp. 171-72)

"*8*. It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so (*Sajjan Singh* v. *State of Rajasthan*[24] SCR at p. 948). For instance, if the attention of the court is not drawn to a material statutory provision during the original hearing, the court will review its judgment (*Girdhari Lal Gupta* v. *D.H. Mehta*[19] SCR at p. 750). The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: *O.N. Mohindroo* v. *District Judge, Delhi*[25] SCR at p. 27. Power to review its judgments has been conferred on the Supreme Court by Article 137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Article 145. In a civil proceeding, an application for review is entertained only on a ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure, and in a criminal proceeding on the ground of an error apparent on the face of the record (Order 40 Rule 1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility" (*Sow Chandra Kante* v. *Sk. Habib*[21]).

9. Now, besides the fact that most of the legal material so assiduously collected and placed before us by the learned Additional Solicitor General, who has now been entrusted to appear for the respondent, was never brought to our attention when the appeals were heard, we may also examine whether the judgment suffers from an error apparent on the face of the record. Such an error exists if of two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record."

23 (1980) 2 SCC 167 : 1980 SCC (Tax) 222
24 AIR 1965 SC 845 : (1965) 1 SCR 933
19 (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162 : (1971) 3 SCR 748
25 (1971) 3 SCC 5 : (1971) 2 SCR 11
21 (1975) 1 SCC 674 : 1975 SCC (Cri) 305 : 1975 SCC (L&S) 184 : 1975 SCC (Tax) 200

66. Question in the said case arose under the Bengal Finance (Sales Tax) Act, 1941. The case was based on new material sought to be adduced by the Revenue to establish that the transaction amounted to a sale.

67. The foundations, which underlie the review jurisdiction, have been examined by this Court at some length in *S. Nagaraj* v. *State of Karnataka*[26]: (SCC pp. 618-20, paras 18-19)

> "*18.* Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the court. In Administrative Law the scope is still wider. Technicalities apart if the court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which one of us (Sahai, J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue.
>
> *19. Review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility.* Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. *Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice.* In *Prithwi Chand Lal Choudhury* v. *Sukhraj Rai*[27] AIR FC at p. 2 the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in *Rajunder Narain*

26 1993 Supp (4) SCC 595 : 1994 SCC (L&S) 320
27 1940 SCC OnLine FC 8 : AIR 1941 FC 1

Rae v. *Bijai Govind Sing*[28] that an order made by the court was final and could not be altered: (*Rajunder Narain Rae case*[28], SCC OnLine PC)

> ' *... nevertheless, if by misprision in embodying the judgments, errors have been introduced, these courts possess, by common law, the same power which the courts of record and statute have of rectifying the mistakes which have crept in. .... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies.*'

Basis for exercise of the power was stated in the same decision as under:

> 'It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard.'

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (*c*) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order 40 had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order 47 Rule 1 of the Civil Procedure Code. The expression, "for any other sufficient reason" in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. *Apart from Order 40 Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice.*" (emphasis supplied)

28 1839 SCC OnLine PC 6 : (1837-41) 2 Moo IA 181 : 18 ER 269 also *see* (1836) 1 Moo PC 117 : 12 ER 757 : 1 Sar 175

68. The decision in *S. Nagaraj case*[26], has been followed in various judgments of this Court (see *Lily Thomas* v. *Union of India*[29]; *Haryana State Industrial Development Corpn. Ltd.* v. *Mawasi*[30]; *Kamlesh Verma* v. *Mayawati*[31]; *Usha Bharti* v. *State of U.P.*[32] and *Vikram Singh* v. *State of Punjab*[33]).

69. In *Kamlesh Verma*[31], this Court in para 20, laid down its conclusions, which reads as follows: (SCC pp. 333-34)

"*Summary of the principles*

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(*i*) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(*ii*) Mistake or error apparent on the face of the record;

(*iii*) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in *Chhajju Ram* v. *Neki*[34] and approved by this Court in *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*[16] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in *Union of India* v. *Sandur Manganese & Iron Ores Ltd.*[35]

20.2. When the review will not be maintainable:

(*i*) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(*ii*) Minor mistakes of inconsequential import.

(*iii*) Review proceedings cannot be equated with the original hearing of the case.

(*iv*) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(*v*) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

26 *S. Nagaraj* v. *State of Karnataka*, 1993 Supp (4) SCC 595 : 1994 SCC (L&S) 320
29 (2000) 6 SCC 224 : 2000 SCC (Cri) 1056
30 (2012) 7 SCC 200 : (2012) 4 SCC (Civ) 172
31 (2013) 8 SCC 320 : (2013) 3 SCC (Civ) 782 : (2013) 4 SCC (Cri) 265 : (2014) 1 SCC (L&S) 96
32 (2014) 7 SCC 663
33 (2017) 8 SCC 518 : (2017) 3 SCC (Cri) 641
34 1922 SCC OnLine PC 11 : (1921-22) 49 IA 144
16 AIR 1954 SC 526
35 (2013) 8 SCC 337 : (2013) 3 SCC (Civ) 797

(*vi*) The mere possibility of two views on the subject cannot be a ground for review.

(*vii*) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(*viii*) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(*ix*) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

70. In a very recent judgment, in fact, relied upon by the Union of India viz. *Mukesh*[8], in a review petition in a criminal appeal, this Court reiterated that a review is not rehearing of an original matter. Even establishing another possible view would not suffice (see *Vikram Singh*[33], which was relied upon).

71. The anxiety of this Court that the consideration of rendering justice remain uppermost in the mind of the Court, has led to the Constitution Bench judgment in *Rupa Ashok Hurra* v. *Ashok Hurra*[36]. It is in the said case that the concept of a curative petition was devised to empower a litigant to seek a reconsideration of a matter wherein the review petition also is unsuccessful. Certain steps have been laid down in this regard which stand incorporated in the Supreme Court Rules, 2013 (in Part IV Order 48 thereof).

72. Undoubtedly, any error to be an error on the face of the record, cannot be one which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions or if the error requires lengthy and complicated arguments to establish it, a writ of certiorari would not lie (see *Satyanarayan Laxminarayan Hegde* v. *Millikarjun Bhavanappa Tirumale*[37]). This principle is equally applicable to a review petition also.

73. On a conspectus of the above decisions, the following conclusions appeared to be inevitable and they also provide the premise for review: Justice above all. While a review petition has not been understood as an appeal in disguise and a mere erroneous decision may not justify a review, a decision which betrays an error which is apparent, does entitle the court to exercise its jurisdiction under Article 137 of the Constitution. The Founding Fathers were conscious that this Court was the final Court. There are two values, which in any system of law, may collide. On the one hand, recognising that men are not infallible and the courts are manned by men, who are prone to err, there must be a safety valve to check the possibility of grave injustice being reached to a litigant, consequent upon an error, which is palpable or as a result of relevant material despite due diligence by a litigant not being made available or other sufficient reason. The other value which is ever-present in the mind of the law

8 *Mukesh* v. *State (NCT of Delhi)*, (2018) 8 SCC 149 : (2018) 3 SCC (Cri) 531
33 *Vikram Singh* v. *State of Punjab*, (2017) 8 SCC 518 : (2017) 3 SCC (Cri) 641
36 (2002) 4 SCC 388
37 AIR 1960 SC 137

giver, is, there must be finality to litigation. Be it judgments of a final court, if it becomes vulnerable to indiscriminate reopening, unless a strong ground exists, which itself is based on manifest error disclosed by the judgment or the other two grounds mentioned in Order 47 CPC in a civil matter, it would spawn considerable inequity.

74. It must be noticed that the principle well settled in regard to jurisdiction in review, is that a review is not an appeal in disguise. The applicant, in a review, is, on most occasions, told off the gates, by pointing out that his remedy lay in pursuing an appeal. In the case of a decision rendered by this Court, it is to be noticed that the underpinning based on availability of an appeal, is not available as this Court is the final Court and no appeal lies.

75. It is no doubt true that by the Supreme Court Rules, 2013, certain powers are conferred on the Registrar as also on the Judge holding Court in Chambers and appeals, indeed, are provided in respect of certain orders passed by the Registrar.

76. The fact that no appeal lies from the judgment of this Court may not, however, result in the jurisdiction of this Court under Article 137 of the Constitution being enlarged. However, when the Court is invited to exercise its power of review, this aspect may also be borne in mind viz. that unlike the other courts from which an appeal may be provided either under the Constitution or other laws, or by special leave under Article 136 of the Constitution, no appeal lies from the judgment of this Court, and it is in that sense, the final Court. The underlying assumption for the principle that a review is not an appeal in disguise, *being that the decision is* appealable, is really not available in regard to a decision rendered by this Court, is all that is being pointed out.

77. A review petition is maintainable if the impugned judgment discloses an error apparent on the face of the record. Unlike a proceeding in certiorari jurisdiction, wherein the error must not only be apparent on the face of the record, it must be an error of law, which must be apparent on the face of the record, for granting review under Article 137 of the Constitution read with Order 47 Rule 1 CPC, the error can be an error of fact or of law. No doubt, it must be apparent on the face of record. Such an error has been described as a palpable error or glaring omission. As to what constitutes an error apparent on the face of record, is a matter to be found in the context of the facts of each case. It is worthwhile to refer to the following discussion in this regard by this Court in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*[38], wherein this Court held as follows: (AIR p. 244, para 23)

> "*23*. It may therefore be taken as settled that a writ of "certiorari" could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. *The real difficulty with reference to this matter,*

38 AIR 1955 SC 233

however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? The learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated.

Mr Pathak for the first respondent contended on the strength of certain observations of Chagla, C.J. in *Batuk K. Vyas* v. *Salim M. Merchant*[39] *that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.*" (emphasis supplied)

78. The view of this Court, in *Girdhari Lal Gupta*[19] as also in *Deo Narain Singh*[20], has been noticed to be that if the relevant law is ignored or an inapplicable law forms the foundation for the judgment, it would provide a ground for review. If a court is oblivious to the relevant statutory provisions, the judgment would, in fact, be *per incuriam*. No doubt, the concept of per incuriam is apposite in the context of its value as the precedent but as between the parties, certainly it would be open to urge that a judgment rendered, in ignorance of the applicable law, must be reviewed. The judgment, in such a case, becomes open to review as it would betray a clear error in the decision.

79. As regards fresh material forming basis for review, it must be of such nature that it is relevant and it undermines the verdict. This is apart from the requirement that it could not be produced despite due diligence.

80. The dismissal of a special leave petition takes place at two levels. In the first place, the Court may dismiss or reject a special leave petition at the admission stage. Ordinarily, no reasons accompany such a decision. In matters where a special leave petition is dismissed after notice is issued, also reasons may not be given ordinarily. Several elements enter into the consideration of this Court where a special leave petition is dismissed. The task for a review applicant becomes formidable as reasons are not given. An error apparent on the face of the record becomes difficult to establish. In a writ petition where pleadings are exchanged and reasons are given in support of the verdict, a self-evident error is detected without much argument. No doubt, a court, in

39 1952 SCC OnLine Bom 46 : AIR 1953 Bom 133
19 *Girdhari Lal Gupta* v. *D.H. Mehta*, (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162 : (1971) 3 SCR 748
20 *Deo Narain Singh* v. *Daddan Singh*, 1986 Supp SCC 530

review, does not reappreciate and correct a mere erroneous decision. That reappreciation is tabooed, is not the same as holding that a court will not appreciate the case as reflected in the pleadings and the law by which the court is governed.

81. In this case, the short point, which this Court is called upon to consider, is the effect of the impugned judgment not dealing with a binding decision rendered by a Constitution Bench which was relied upon by the petitioners in Writ Petition (Criminal) No. 298 of 2018 and rendered in *Lalita Kumari*[7]. It is apposite that I set out what this Court, speaking through the aforesaid Constitution Bench judgment, has laid down in para 120: (SCC p. 61)

"*Conclusion/Directions*

120. In view of the aforesaid discussion, we hold:

120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(*a*) *Matrimonial disputes/family disputes*

(*b*) *Commercial offences*

(*c*) *Medical negligence cases*

(*d*) *Corruption cases*

7 *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524

(*e*) *Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.*

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above." (emphasis supplied)

82. It is their contention, therefore, that the writ petition came to be clubbed along with other writ petitions. This Court proceeded to undertake judicial review of the processes which led to the decision to purchase 36 planes going back on the earlier decision which was to purchase 126 planes.

83. According to the petitioners, therefore, this Court committed a clear error in not focusing on the relief sought in their writ petition which was based on the Constitution Bench judgment of this Court which was binding on a Bench of lesser strength (three). All this Court is being asked to do, according to the petitioners, having regard to the law binding on it, is to direct the registration of the FIR. There is also relief sought to submit reports in the same.

84. The procedure, which is to be adopted by the authorities, has been elaborated upon. There can be no escape from the mandatory procedure laid down by this Court.

85. Where a party institutes a proceeding, if the proceeding is of a civil nature, there would be a cause of action. There would be reliefs sought on the basis of the cause of action. Materials are produced both in support and against the claim. The court thereafter renders a judgment either accepting the case or rejecting the case. When the court rejects the case, it necessarily involves refusing to grant the relief sought for by the plaintiff/petitioner. It may transpire that the petitioner may not press for certain reliefs. The court may, after applying its mind to the case, find that the petitioner is not entitled to the relief and decline the prayers sought. It may also happen that the court does refer to the reliefs sought but thereafter does not undertake any discussion regarding the case for the relief sought and proceeds to non-suit the party. It is clear that in this case, it is the last aspect which is revealed by the judgment sought to be reviewed.

86. A judgment may be silent in regard to a relief which is sought by a party. It is apposite, in this regard, to notice Section 11 CPC. If a decree is silent, as regards any relief which is claimed by the plaintiff, Explanation V to Section 11 declares that the relief must be treated as declined. The Explanation reads as follows:

> "***11. Res judicata.***— * * *
>
> *Explanation V.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused."

87. No doubt, if the relief is expressly refused, then also, the matter would become res judicata. It is, therefore, of vital importance that when a case is decided, the Court considers the claim and the relief sought, applies the statute which is applicable and the law which is laid down particularly when it is by a Constitution Bench in deciding the case. Just as, in the case of a judgment, where the applicable statute, not being applied, would result in a judgment which becomes amenable to be corrected in review, there can be no reason why when a binding judgment of this Court, which is enlisted by the party, is ignored, it should have a different consequence. In fact, since a review under Article 137 of the Constitution, in a civil matter, is to be exercised, based on what is contained in Order 47 Rule 1 CPC, the Explanation therein, may shed some light. The Explanation which was inserted by the 1976 Act, following the recommendations of the Law Commission of India, in its 54th Report, declares that the law is laid down by a superior court reversing an earlier decision, on a question of law, will not be a ground for the review of a judgment.

88. The Law Commission, in fact, in the said Report reasoned that adopting the view taken by the Kerala High Court in *Pathrose* v. *Kuttan*[40] that a later judgment would amount to discovery of new and important matter, and in any case an error on the face of the record, would keep alive the possibility of review indefinitely. *This impliedly would mean that when a court decides a case, it must follow judgments which are binding on it.* This is not to say that a smaller Bench of this Court, if it entertains serious doubts about the correctness of an earlier judgment, may not consider referring the matter to a larger Bench. However, as long as it does not undertake any such exercise, it cannot refuse to follow the judgment and that too of a Constitution Bench. Any such refusal to follow the decision binding on it, would undoubtedly disclose an error which would be palpable being self-evident.

89. In this case, when this Court rendered the judgment, sought to be reviewed, the judgment of the Constitution Bench in *Lalita Kumari*[7], undoubtedly, held the field having been rendered on 12-11-2013. The said judgment was, indeed, pressed before the Court.

40 1968 SCC OnLine Ker 67 : AIR 1969 Ker 186
7 *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524

90. To put it in other words, having regard to the relief sought by the petitioners, the dismissal of the writ petition would be, according to the petitioners, in the teeth of a binding judgment of this Court. Just as in the case of a binding statute being ignored and giving rise to the right to file a review, neither on logic nor in law would the refusal to follow a binding judgment, qualify for a different treatment if a review is filed. Be it a civil or a criminal matter, an error apparent on the face of the record, furnishes a ground for review.

91. This is not a case where an old argument is being repeated in the sense that after it has been considered and rejected, it is re-echoed in review. It is an argument which was undoubtedly pressed in the original innings. It is not the fault of the party if the court chose not even to touch upon it. No doubt, it may be different in a case where a ground or relief sought is ignored and it is found justified otherwise. But where a ground, which is based on principles laid down by a Constitution Bench of this Court, is not dealt with at all and it is complained of in review, it will rob the review jurisdiction of the very purpose it is intended to serve, if the complaint otherwise meritorious, is not heeded to.

92. A learned Single Judge, in an arbitration request, turned down a plea to appoint a person as arbitrator. In review, the request was sought to be resurrected. It was in this context that a learned Single Judge of this Court, sitting in Chambers, in the decision reported in *Jain Studios Ltd.*[13], laid down that once such a relief was refused in the main matter, no review petition would lie. However, following the said judgment, this Court, in the decision in *Kamlesh Verma*[31], summarising the principle, came to declare in para 20.2(*ix*), that review is not maintainable when the same relief sought at the time of arguing the main matter, has been negatived.

93. With regard to the said principle, the context in which it was laid down in the decision by a learned Single Judge in *Jain Studios Ltd.*[13], has already been noted. The said principle, as stated, cannot be treated as one that is cast in stone to apply irrespective of facts. Illustrations come to the fore where it is better related to the factual context and not as an immutable axiom not admitting of exceptions. Take a case where a writ of mandamus is sought for after a demand is made. The demand is placed on record and is not even controverted. In the main proceeding, mandamus is refused on the ground that there is no demand. It amounts to denial of relief. But the verdict is clearly afflicted with palpable error, and if the complaint is made in a review about the denial of relief on a ground which is patently untenable, certainly, a review would lie. There can be many other examples where the denial of relief is palpably wrong and self-evident. It is different, if on an appreciation of evidence or applying the law, and where two views are possible, relief is refused. In fact, broadly, denial of relief can occur in two situations. There are situations where the grant of relief

13 *Jain Studios Ltd.* v. *Shin Satellite Public Co. Ltd.*, (2006) 5 SCC 501

31 *Kamlesh Verma* v. *Mayawati*, (2013) 8 SCC 320 : (2013) 3 SCC (Civ) 782 : (2013) 4 SCC (Cri) 265 : (2014) 1 SCC (L&S) 96

itself is discretionary. There are other situations where if a certain set of facts are established, the appellant-plaintiff cannot be told off the gates. A defendant, who appeals against a time-barred suit being decreed, establishes that a suit is time-barred, and the facts, as stated in the judgment itself, unerringly point to such premise. If still, the appellate court decrees the suit and denies relief to the appellant-defendant, can it be said that a review will not lie? The answer can only be that a review will lie.

94. To test the hypothesis that on the facts this Court was wrong and manifestly so in declining in not following the dicta of the Constitution Bench in *Lalita Kumari*[7], a reverse process of reasoning can be employed to appreciate the matter further. Can it be said that refusing to follow a Constitution Bench, laying down the response of the officers to a complaint alleging the commission of a cognizable offence, has not been observed in its breach? If the review petition, in other words, is rejected, in substance this Court would be upholding its judgment which when placed side-by-side with the pronouncement of the Constitution Bench in *Lalita Kumari*[7], the two judgments cannot be squared. It must co-exist despite the patent departure, the impugned judgment manifests from the law laid down by the Constitution Bench. But that being impossible, the Constitution Bench must prevail and the impugned judgment stand overwhelmed to the extent it is inconsistent. It may be true that in view of the fact that four writ petitions were heard together, this Court has proceeded to focus on the merits of the matters itself undoubtedly from the standpoint of the limited judicial review which it could undertake in a matter of the nature in question. On the basis of the said exercise, the Court has concluded that there were no materials for the Court to interfere. But this is a far cry from holding that it will not follow the mandate of the Constitution Bench of this Court in regard to the steps to be undertaken by the officer on receipt of a complaint purporting to make out the commission of a cognizable offence. This Court may declare that it was non-suiting the petitioners seeking judicial review, having regard to the absence of materials which would have justified holding the award of the contract in question vulnerable. It would not mean that it is either precluded or that it was not duty-bound to still direct that the law laid down by the Constitution Bench in *Lalita Kumari*[7] be conformed to.

95. If the complaint of the petitioner does make out the commission of the cognizable offence and FIR is to be registered and matter investigated, it will be no answer to suggest that this Court, has approved of the matter in judicial review proceedings under Article 32 of the Constitution and making it clear that entire exercise must be viewed from the prism of the limited judicial review the Court undertakes in such proceedings and this Court would end up paying less than lip service to the law laid down by the Constitution Bench in *Lalita Kumari*[7].

7 *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524

96. As far as the judicial review of the award of the contract is concerned, apart from the fact that a review does not permit reappreciation of the materials, there is the aspect of the petitioner seeking judicial review approaching the court late in the day. There is also the aspect relating to the court's jurisdiction not extending to permit it to sit in judgment over the wisdom of the Government of the day, particularly in matters relating to purchase of the goods involved in this case. Therefore, in regard to review, sought in relation to the findings relating to the judicial review, they cannot be found to be suffering from palpable errors.

97. Though, the stand of the Government of India has been noticed, which is the second respondent in Writ Petition (Criminal) No. 298 of 2018, the party, which has a say in the matter or rather a duty in the matter in terms of the law laid down by this Court in *Lalita Kumari*[7], is the first respondent viz. the Central Bureau of Investigation (CBI) before which the petitioners have moved the Ext. P-1 complaint. It is quite clear that the first respondent, the premiere investigating agency in the country, is expected to act completely independent of the Government of the day. The Government of India cannot speak on behalf of the first respondent. Whatever that be, the fact remains that a decision in terms of what is laid down in *Lalita Kumari*[7], is to be taken.

98. One objection, which has apparently weighed with my learned and noble Brother, is that, this Court, having dealt with the merits of the case, there could be no occasion for directing the compliance in terms of *Lalita Kumari*[7] by the first respondent. Reasoning of the Court has been noticed. This Court has approached the matter proclaiming that it was doing so in the context of somewhat constricted power of judicial review. It is further made clear that the Court found that it is neither appropriate nor is it within the experience of this Court to step into the arena of what is technically feasible. This Court also did not find any substantial material on record to show it to be a case of commercial favouritism to any party by the Indian Government as the option to choose the IOP did not rest with the Indian Government. In the concluding paragraph, it was clearly mentioned that the Court's views were primarily from the standpoint of exercise of jurisdiction under Article 32 of the Constitution, which was invoked in this case.

99. The question would, therefore arise, whether in such circumstances, the relief sought in Writ Petition (Criminal) No. 298 of 2018, seeking compliance with *Lalita Kumari*[7], was wrongly declined. Differently put, the question would arise whether the petitioners, having participated in the proceedings and inviting the Court to pronounce on the merits as well and cannot persuade the Court to take a different view on the merits, could still ask the Court to find an error and that too a grave error in not heeding to the prayer in Writ Petition (Criminal) No. 298 of 2018.

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100. As noticed earlier, it is one thing to say that with the limited judicial review, available to the Court, it did not find merit in the case of the petitioners regarding failure to follow the DPP, presence of over-pricing, violation of Offset Guidelines to favour a party, and another thing to direct action on a complaint in terms of the law laid down by this Court. It is obvious that this Court was not satisfied with the material which was placed to justify a decision in favour of the petitioners. It is also apparent that the Court has reminded itself of the fact that it was neither appropriate nor within the experience of the Court to step into the arena. It is equally indisputable that the entire findings are to be viewed from the standpoint of the nature of the jurisdiction it exercised. There are no such restrictions and limitations on an officer investigating a case under the law. Present a case, making out the commission of cognizable offence, starting with the lodging of the FIR after, no doubt, making a preliminary inquiry where it is necessary, the fullest of amplitude of powers under the law, no doubt, are available to the officer. The discovery of facts by the officer carrying out an investigation, is completely different from findings of facts given in judicial review by a court. The entire proceedings are completely different.

101. In the impugned judgment, under the heading "Offsets", there is, at para 29, reference to the complaint that favouring the Indian Business Group, has resulted in an offence being committed under the Prevention of Corruption Act. This Court extracted Clause 4.3 of the Offset Clause which provides that OEM/Vendor, Tier-1 Sub-Vendor will be free to select the Indian Offset Partner for implementing the offset obligation provided it has not been barred from doing business with the Ministry of Defence. This Court dealt with the same contentions in para 34 of the impugned judgment, which reads as follows: (*Manohar Lal Sharma case*[1], SCC p. 37)

> "*34*. It is no doubt true that the company, Reliance Aerostructure Ltd., has come into being in the recent past, but the press release suggests that there was possibly an arrangement between the parent Reliance Company and Dassault starting from the year 2012. As to what transpired between the two corporates would be a matter best left to them, being matters of their commercial interests, as perceived by them. There has been a categorical denial, from every side, of the interview given by the former French President seeking to suggest that it is the Indian Government which had given no option to the French Government in the matter. On the basis of materials available before us, this appears contrary to the clause in DPP 2013 dealing with IOPs which has been extracted above. Thus, the commercial arrangement, in our view, itself does not assign any role to the Indian Government, at this stage, with respect to the engagement of IOP. Such matter is seemingly left to the commercial decision of Dassault. That is the reason why it has been stated that the role of the Indian Government would start only when the vendor/OEM submits a formal proposal, in the prescribed manner, indicating details of IOPs and products for offset discharge. As far as the role of HAL, insofar as the procurement

1 *Manohar Lal Sharma* v. *Narendra Damodardas Modi*, (2019) 3 SCC 25

of 36 aircrafts is concerned, there is no specific role envisaged. In fact, the suggestion of the Government seems to be that there were some contractual problems and Dassault was circumspect about HAL carrying out the contractual obligation, which is also stated to be responsible for the non-conclusion of the earlier contract."

102. The very first statement in para 34 would appear to point to the Court taking into account Press Release suggesting that there was possibly an arrangement between the parent Reliance Company and Dassault starting from the year 2012. It is stated as to what transpired between the two corporates would be best left to them. In this regard, in the review petition, it is pointed out that this Court has grossly erred in confusing Reliance Industries of which Mr Mukesh Ambani is the Chairman with that of Reliance Infrastructure of which Mr Anil Ambani is the Chairman. It is further contended that Mr Anil Ambani's Reliance Infrastructure is the parent company of Reliance Aerostructure Ltd. (RAL), which is the beneficiary of the Offset Contract, and there is no possibility of any arrangement between Reliance Infrastructure Ltd. with Dassault Aviation in 2012. There appears to be considerable merit in the case of the petitioners that in this regard, this Court had fallen into clear error that there was possibly an arrangement between the parent Reliance Company and Dassault dated back to the year 2012. The parent Reliance Company which was referred in the judgment is Reliance Industries which is a completely different corporate body from Reliance Infrastructure which appears, according to the petitioners, to be the parent company of RAL. Thereafter, there is reference to the denial of the interview by the Former French President. It is further noted that on the basis of the materials, the commercial arrangement does not assign any role to the Indian Government at this stage with reference to the arrangement of the IOP. After making certain observations about HAL and role of the Indian Government starting only when the vendor/OEM submitted a formal proposal, this Court went on to make the observation contained in para 35 which has already been extracted.

103. From the standpoint of the jurisdiction in judicial review proceedings and under Article 32 of the Constitution, as also absence of any substantial material to show to be a case of commercial favouritism, it may be true that the findings other than which have been referred to may not disclose a palpable error. This Court's lack of experience of what is technically feasible, as noted by the Court, has weighed with it.

Powers of police officer wider and different from that of writ court

104. The "statutory right of the police to investigate about a cognizable offence" is well settled. In *King Emperor* v. *Khwaja Nazir Ahmad*[41], the Privy Council has, inter alia, held as follows: (SCC OnLine PC)

> "In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and

41 1944 SCC OnLine PC 29 : (1943-44) 71 IA 203 : AIR 1945 PC 18

it would as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under Section 491 CrPC to give directions in the nature of *habeas corpus*. In such a case as the present, however, the court's functions begin when a charge is preferred before it and not until then."

105. Following the same, this Court in *M.C. Abraham* v. *State of Maharashtra*[42], held as follows: (SCC p. 657, para 13)

"*13*. This Court held in *J.A.C. Saldanha*[43] that there is a clear-cut and well-demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved by the executive through the Police Department, the superintendence over which vests in the State Government. It is the bounden duty of the executive to investigate, if an offence is alleged, and bring the offender to book. Once it investigates and finds an offence having been committed, it is its duty to collect evidence for the purpose of proving the offence."

106. The police officer is endowed with wide powers. Nothing that constricted or limited this Court in the impugned judgment, applies to an officer who has undertaken an investigation into the commission of a cognizable offence. In fact, in this case, the first respondent CBI is the premiere investigation agency of the country. It is equipped to undertake all forms of investigations, be it technical or otherwise. The factors which concerned this Court can be recapitulated to bring out the true role of an investigator. This Court held, it is neither appropriate nor within the Court's experience to step into what is technically feasible or not. No such limitation applies to an investigator of a cognizable offence. What is important is that it is the duty of the investigating officer to collect all material, be it technical or otherwise, and thereafter, submit an appropriate report to the court concerned, be it a final report or challan depending upon the materials unearthed. This Court relied on absence of substantial material. This is not a restriction on the investigating officer. Far from it, the very purpose of conducting an investigation on a complaint of a cognizable offence being committed, is to find material. There can be no dispute that the first respondent is the premiere investigating agency in the country which assumedly employs state of the art techniques of investigation. Professionalism of the highest quality, which embraces within it, uncompromising independence and neutrality, is expected of it. Again, the restriction which underlies the impugned judgment is the limited scope of judicial review and also the writ jurisdiction under Article 32 of

42 (2003) 2 SCC 649 : 2003 SCC (Cri) 628
43 *State of Bihar* v. *J.A.C. Saldanha*, (1980) 1 SCC 554 : 1980 SCC (Cri) 272

the Constitution. It is clear as a mountain stream that both these considerations are totally irrelevant for an officer who has before him a complaint making out the commission of a cognizable offence.

107. However, the directions contained in para 120 of the Constitution Bench decision in *Lalita Kumari*[7] must be further appreciated. In this case, the petitioners in Writ Petition (Criminal) No. 298 of 2018, have indeed moved an elaborate written complaint before the first respondent CBI. The complaint that is made, attempts to make out the commission of a cognizable offence under the Prevention of Corruption Act. Para 120.1 of *Lalita Kumari*[7], declares that registration of FIR is mandatory if information discloses commission of a cognizable offence. The Constitution Bench debarred any preliminary inquiry in such a situation. It is apposite that para 120.5 is noticed at this stage. This Court held that the scope of the preliminary inquiry is not to verify the veracity or otherwise of the information received but it is only to ascertain whether the information reveals any cognizable offence. Coming back to para 120.2, it is laid down by this Court that if the information does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not. It is beyond dispute that the offences which are mentioned in the complaint filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018 are cognizable offences. Again, coming back to para 120.3 in *Lalita Kumari*[7] read with paras 120.2 and 120.5, if the inquiry discloses commission of a cognizable offence, the FIR must be registered. Where, however, the preliminary inquiry ends in closing the complaint, the first informant must be informed in writing forthwith and not later than a week. That apart, reasons, in brief, must also be disclosed.

108. Para 120.6 deals with the type of cases in which preliminary inquiry may be made. Corruption cases are one of the categories of cases where a preliminary inquiry may be conducted. Also, cases where there is abnormal delay or laches in initiating criminal prosecution, for example over three months' delay in reporting the matter without satisfactorily explaining the reasons for the delay. As can be noticed from para 120.6, medical negligence cases, matrimonial disputes, commercial offences are also cases in which a preliminary inquiry may be made. In order to appreciate the scope of para 120.6, it is necessary to advert to paras 115 to 119, which read as follows: (*Lalita Kumari*[7], SCC pp. 59-60)

> "*Exceptions*
>
> *115.* Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and

7 *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524

inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

116. In the context of medical negligence cases, in *Jacob Mathew*[44], it was held by this Court as under: (SCC p. 35, paras 51-52)

> '*51*. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.
>
> *52*. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the *Bolam*[45] test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.'

117. In the context of offences relating to corruption, this Court in P. Sirajuddin[46] *expressed the need for a preliminary inquiry before proceeding against public servants.*

118. Similarly, in *Tapan Kumar Singh*[47], this Court has validated a preliminary inquiry prior to registering an FIR only on the ground that

44 *Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369
45 *Bolam* v. *Friern Hospital Management Committee*, (1957) 1 WLR 582
46 *P. Sirajuddin* v. *State of Madras*, (1970) 1 SCC 595 : 1970 SCC (Cri) 240
47 *CBI* v. *Tapan Kumar Singh*, (2003) 6 SCC 175 : 2003 SCC (Cri) 1305

at the time the first information is received, the same does not disclose a cognizable offence.

119. Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR." (emphasis supplied)

109. As can be noticed that medical negligence cases constitute an exception to the general rule which provides for mandatory registration of FIR in respect of all cognizable offences. The Court, in clear terms, held that it will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint. It relied on a decision of this Court in *Jacob Mathew* v. *State of Punjab*[44].

110. In para 117 of *Lalita Kumari*[7], this Court referred to the decision in *P. Sirajuddin* v. *State of Madras*[46] and took the view that in the context of offences related to corruption in the said decision, the Court has expressed a need for a preliminary inquiry before proceeding against public servants.

111. In *P. Sirajuddin*[46], relied upon by the Constitution Bench in *Lalita Kumari*[7], what this Court has held, and which has apparently been relied upon by the Constitution Bench though not expressly referred to is the following statement contained in para 17: (*P. Sirajuddin case*[46], SCC p. 601)

"*17. … Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer*. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not

44 (2005) 6 SCC 1 : 2005 SCC (Cri) 1369
7 *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524
46 (1970) 1 SCC 595 : 1970 SCC (Cri) 240

only to the officer in particular but to the department he belonged to, in general." (emphasis supplied)

112. In *Lalita Kumari*[7], one of the contentions which was pressed before the Court was that in certain situations, preliminary inquiry is necessary. In this regard, attention of the Court was drawn to CBI Crime Manual. The following paragraphs of *Lalita Kumari*[7] may be noticed, which read as follows: (SCC pp. 50-51, paras 89-92)

"*89*. Besides, the learned Senior Counsel relied on the special procedures prescribed under the CBI Manual to be read into Section 154. It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that CBI is constituted under a special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derives its power to investigate from this Act.

90. It may be submitted that Sections 4(2) and 5 of the Code permit special procedures to be followed for special Acts. Section 4 of the Code lays down as under:

'**4.** ***Trial of offences under the Indian Penal Code and other laws***.—(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.'

It is thus clear that for the offences under the laws other than IPC, different provisions can be laid down under a special Act to regulate the investigation, inquiry, trial, etc. of those offences. Section 4(2) of the Code protects such special provisions.

91. Moreover, Section 5 of the Code lays down as under:

'**5.** ***Saving***.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.'

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Thus, special provisions contained in the DSPE Act relating to the powers of CBI are protected also by Section 5 of the Code.

92. In view of the above specific provisions in the Code, the powers of CBI under the DSPE Act, cannot be equated with the powers of the regular State Police under the Code."

113. It is thereafter that under the caption "Exceptions", the Constitution Bench has proceeded to deal with offences relating to corruption as already noted and contained in para 117 of *Lalita Kumari*[7], which has already been extracted. Chapter 8 of the CBI Crime Manual deals with complaints and source of information. Chapter 9 deals with preliminary enquiries. Clause 8.6 of Chapter 8 provides for the categories of complaints which are to be considered fit for verification. It provides, inter alia, complaints pertaining to subject-matters which fall within the purview of CBI, either received from official channels or from well-established and recognised organisations *or from individuals who are known and who can be traced and examined.* Undoubtedly, petitioners are known and can be traced and examined. A complaint against a Minister or a former Minister of the Union Government is to be put up before the Director of CBI. The complaints which are registered for verification, with the approval of the competent authority, would only be subjected to secret verification. Clause 9.1 of Chapter 9 contemplates that when a complaint is received, inter alia, after verification and which may after verification indicate serious misconduct on the part of the public servant but is not adequate to justify registration of a regular case, under the provisions of Section 154 CrPC, a preliminary inquiry may be registered after obtaining approval of the competent authority. Clause 9.1 also, no doubt, deals with cases entrusted by this Court and the High Courts. The Manual further contemplates that the preliminary inquiry will result either in registration of regular cases or departmental action inter alia.

114. The Constitution Bench in *Lalita Kumari*[7], had before it, the CBI Crime Manual. It also considered the decision of this Court in *P. Sirajuddin*[46] which declared the necessity for preliminary inquiry in offences relating to corruption. Therefore, the petitioners may not be justified in approaching this Court seeking the relief of registration of an FIR and investigation on the same as such. This is for the reason that one of the exceptions where immediate registration of FIR may not be resorted to, would be a case pointing fingers at a public figure and raising the allegation of corruption. This Court also has permitted preliminary inquiry when there is delay, laches in initiating criminal prosecution, for example, over three months. A preliminary inquiry, it is to be noticed in para 120.7, is to be completed within seven days.

115. The petitioners have not sought the relief of a preliminary inquiry being conducted. Even assuming that a smaller relief than one sought could be granted, there is yet another seemingly insuperable obstacle.

7 *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524
46 *P. Sirajuddin* v. *State of Madras*, (1970) 1 SCC 595 : 1970 SCC (Cri) 240

116. In the year 2018, the Prevention of Corruption (Amendment) Act, 2018 (hereinafter referred to as "the 2018 Act", for short) was brought into force on 26-7-2018. Thereunder, Section 17-A, a new section was inserted, which reads as follows:

> "**17-A.** ***Enquiry or inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.***—*(1) No police officer shall conduct any enquiry or inquiry or investigation* into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—
>
> (*a*) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;
>
> (*b*) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;
>
> (*c*) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:
>
> Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:
>
> Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month." (emphasis supplied)

117. In terms of Section 17-A, no police officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done by a public servant where the offence alleged is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions *without previous approval*, inter alia, of the authority competent to remove the public servant from his office at the time when the offence was alleged to have been committed. In respect of the public servant, who is involved in this case, it is clause (*c*), which is applicable. Unless, therefore, there is previous approval, there could be neither inquiry or enquiry or investigation. It is in this context apposite to notice that the complaint, which has been filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018, moved before the first respondent CBI, is done after Section 17-A was inserted. The complaint is dated 4-10-2018. Para 5 sets out the relief which is sought in the complaint which is to register an FIR under various provisions. Paras 6 and 7 of the complaint are relevant in the context of Section 17-A, which read as follows:

"6. We are also aware that recently, Section 17-A of the Act has been brought in by way of an amendment to introduce the requirement of prior permission of the Government for investigation or inquiry under the Prevention of Corruption Act.

7. We are also aware that this will place you in the peculiar situation, of having to ask the accused himself, for permission to investigate a case against him. We realise that your hands are tied in this matter, but we request you to at least take the first step, of seeking permission of the Government under Section 17-A of the Prevention of Corruption Act for investigating this offence and under which, "*the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month*"." (emphasis supplied)

118. Therefore, the petitioners have filed the complaint fully knowing that Section 17-A constituted a bar to any inquiry or enquiry or investigation unless there was previous approval. In fact, a request is made to at least take the first step of seeking permission under Section 17-A of the 2018 Act. Writ Petition (Criminal) No. 298 of 2018 was filed on 24-10-2018 and the complaint is based on non-registration of the FIR. There is no challenge to Section 17-A. Under the law, as it stood, both on the date of filing the petition and even as of today, Section 17-A continues to be on the statute book and it constitutes a bar to any inquiry or enquiry or investigation. The petitioners themselves, in the complaint, request to seek approval in terms of Section 17-A but when it comes to the relief sought in the writ petition, there was no relief claimed in this behalf.

119. Even proceeding on the basis that on petitioners' complaint, an FIR must be registered as it purports to disclose cognizable offences and the Court must so direct, will it not be a futile exercise having regard to Section 17-A. I am, therefore, of the view that though otherwise the petitioners in Writ Petition (Criminal) No. 298 of 2018 may have made out a case, having regard to the law actually laid down in *Lalita Kumari*[7], and more importantly, Section 17-A of the Prevention of Corruption Act, in a review petition, the petitioners cannot succeed. However, it is *my view* that the judgment sought to be reviewed, would not stand in the way of the first respondent in Writ Petition (Criminal) No. 298 of 2018 from taking action on Ext. P-1, complaint in accordance with law and subject to first respondent obtaining previous approval under Section 17-A of the Prevention of Corruption Act.

120. Subject as hereinbefore stated, in regard to the other petitions and applications, I agree with the proposed order of Brother Sanjay Kishan Kaul, J.

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7 *Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524

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(BEFORE N.V. RAMANA AND S. ABDUL NAZEER, JJ.)

INSTITUTE OF COMPANIES SECRETARIES OF INDIA .. Appellant;

Versus

PARAS JAIN .. Respondent.

Civil Appeal No. 5665 of 2014†, decided on April 11, 2019

A. **Human and Civil Rights — Right to Information Act, 2005 — S. 27 — Candidate's re-examination of answer scripts for Company Secretaries examination — Fee payable under RTI Rules vis-à-vis Rules or Guidelines framed by Institute of Company Secretaries — Applicability**

— Held, guidelines of appellant, framed by its statutory council, to govern modalities of its day-to-day concerns and to effectuate smooth functioning of its responsibilities under Company Secretaries Act, providing much more than under RTI Act, such as re-evaluation and re-totalling of answer scripts — Guideline 3 of appellant does not take away from R. 4 of RTI Rules, which also facilitates inspection and certified copies of answer scripts — Existence of these two avenues not mutually exclusive and it is up to candidate to choose either of routes — When candidate seeks information under RTI Act, payment has to be sought under RTI Rules, for information sought under Institute Guidelines, Institute at liberty to charge candidates as per its guidelines — Company Secretaries Act, 1980 — Ss. 7, 15, 15-A and 17 — Guideline, Rules and Procedures for Providing Inspection and/or Supply of Certified Copy(ies) of Answer Book(s) to Students, framed by Examination Committee of Statutory Council of Institute of Company Secretaries — Human and Civil Rights — Right to Information, Confidential Information and Data Protection — Right to Information (Regulation of Fee and Cost) Rules, 2005, R. 4 (Paras 10 to 12)

B. **Constitution of India — Art. 226 — Quashment of Guideline 3 of Guidelines framed by Institute of Company Secretaries for Providing Inspection/Supply of Answer Books to Students in Company Secretaries examination despite no prayer being made to that effect on behest of respondent — Quashing of Guideline 3 unwarranted — Impugned order of Division Bench of High Court partly set aside insofar as it quashed Guideline 3 (Para 13)**

C. **Human and Civil Rights — Right to Information Act, 2005 — S. 27 — On appellant's submission that owing to nominal fee fixed under RTI Act, dissemination of information by appellant has become financially burdensome**

— Held, it is left open to appellant if it wants to make a representation to Government for enhancing fee prescribed under RTI Act — Until there was any change in prescribed fee under RTI, appellant would continue to be bound by it (see also Shortnote A) — Right to Information, Confidential Information and

† Arising from the Judgment and Order in *Paras Jain* v. *ICSI*, 2014 SCC OnLine Del 7671 (Delhi High Court, LPA No. 275 of 2014, dt. 22-4-2014)

Data Protection — Right to Information (Regulation of Fee and Cost) Rules, 2005, R. 4 (Para 14)

Paras Jain v. *ICSI*, 2014 SCC OnLine Del 7671, *reversed*

Paras Jain v. *ICSI*, 2014 SCC OnLine Del 7672, *referred to*

SB-D/62516/S

Advocates who appeared in this case :

Vikas Mehta (Advocate-on-Record), Adith, Vasanth Bharani and R.D. Makheeja, Advocates, for the Appellant;

Prashant Bhushan (Advocate-on-Record) (not present), Pranav Sachdeva and Ms Neha Rathi, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. 2014 SCC OnLine Del 7672, *Paras Jain* v. *ICSI* 791*f-g*
2. 2014 SCC OnLine Del 7671, *Paras Jain* v. *ICSI* **(reversed)** 791*c*, 793*e-f*

ORDER

1. This appeal is directed against the order dated 22-4-2014[1] of the Delhi High Court wherein, while allowing the letters patent appeal, filed by the respondent herein, it set aside Guideline 3 notified by the statutory council of appellant Institute of Companies Secretaries of India and directed it to charge fee prescribed as per Rule 4 of the Right to Information (Regulation of Fee and Cost) Rules, 2005.

2. The factual matrix of the case is that the respondent appeared in the final examination for Company Secretary conducted by the appellant in December 2012. On being unsuccessful in qualifying the examination, the respondent made an application under the Right to Information Act for inspection of his answer sheets and subsequently, sought certified copies of the same from the appellant. The appellant thereafter has demanded Rs 500 per answer sheet payable for supply of certified copy(ies) of answer book(s) and Rs 450 per answer book for providing inspection thereof respectively as per Guideline 3 notified by the statutory council of the appellant. It is to be noted that the respondent obtained the said information under the Right to Information Act, 2005.

3. Being aggrieved by the demand made by the appellant, the respondent preferred a writ petition before the Delhi High Court wherein the learned Single Judge dismissed[2] the petition. A letters patent appeal was thereafter preferred by the respondent wherein, the Division Bench quashed Guideline 3 notified by the appellant and held that the appellant can charge only the prescribed fee under Rule 4, the Right to Information (Regulation of Fee and Cost) Rules, 2005.

4. The short issue before us is when the answer scripts of the appellant's examination are sought whether the fee prescribed under Rule 4 of the Right to Information (Regulation of Fee and Cost) Rules, 2005 payable or that under

1 *Paras Jain* v. *ICSI*, 2014 SCC OnLine Del 7671

2 *Paras Jain* v. *ICSI*, 2014 SCC OnLine Del 7672

Guideline 3 of the Guideline, Rules and Procedures for Providing Inspection and/or Supply of Certified Copy(ies) of Answer Book(s) to Students, framed by the Examination Committee of the appellant's statutory council at its 148th meeting held on 14-8-2013.

5. The learned counsel appearing on behalf of the appellant argued that it is undisputed that the Right to Information Act, 2005 is applicable to the appellant. However, in light of specific guidelines formulated under the Company Secretaries Act, 1980, the same should be applicable and not that which is provided under the Right to Information Act. He further contends that owing to quashing of Guideline 3 by the Division Bench of the Delhi High Court, the appellant cannot collect any amount of fee except the one prescribed under Rule 4, the Right to Information (Regulation of Fee and Cost) Rules, 2005, which adds to financial strain on the appellant.

6. On the other hand, the learned counsel appearing on behalf of the respondent submitted that any candidate who seeks his answer scripts under the Right to Information Act, 2005 can only be charged under Rule 4, the Right to Information (Regulation of Fee and Cost) Rules, 2005. Further, the learned counsel submits that the candidates must have a choice to seek the answer scripts either by the avenue under the Right to Information Act or under the Guidelines of the appellant framed by the Examination Committee of statutory council under the Company Secretaries Act, 1980.

7. Having heard the learned counsel appearing for the parties and we have also meticulously perused the record.

8. The appellant is governed by the provisions of the Company Secretaries Act, 1980 and under Sections 15, 15-A and 17, the Examination Committee of the statutory council has framed Guideline 3 providing an avenue to the candidates to either inspect their answer scripts or seek certified copies of the same on payment of the stipulated fees. Guideline 3 stipulates payment of Rs 500 for obtaining certified copies and Rs 450 for seeking inspection of the same:

> "3. Fee of Rs 500 per subject/answer books payable for supply of certified copy(ies) of answer book(s) and Rs 450 per answer book for providing inspection thereof respectively. The fee shall be paid through demand draft drawn in favour of "The Institute of Company Secretaries of India", payable at New Delhi."

9. On the contrary, Rule 4, the Right to Information (Regulation of Fee and Cost) Rules, 2005 stipulates:

> "**4.** For providing the information under sub-section (1) of Section 7, the fee shall be charged by way of cash against proper receipt or by demand draft or banker's cheque or Indian Postal Order payable to the Accounts Officer of the public authority at the following rates—
>
> (*a*) *rupees two for each page (in A-4 or A-3 size paper) created or copied*;
>
> (*b*) actual charge or cost price of a copy in larger size paper;

(*c*) actual cost or price for samples or models; and

(*d*) *for inspection of records, no fee for the first hour; and a fee of rupees five for each subsequent hour (or fraction thereof).*" (emphasis supplied)

10. Thus, it is clear that the avenue for seeking certified copies as well as inspection is provided both in the Right to Information Act as well as the statutory guidelines of the appellant.

11. We are cognizant of the fact that guidelines of the appellant, framed by its statutory council, are to govern the modalities of its day-to-day concerns and to effectuate smooth functioning of its responsibilities under the Company Secretaries Act, 1980. The guidelines of the appellant may provide for much more than what is provided under the Right to Information Act, such as re-evaluation, re-totalling of answer scripts.

12. Be that as it may, Guideline 3 of the appellant does not take away from Rule 4, the Right to Information (Regulation of Fee and Cost) Rules, 2005 which also entitles the candidates to seek inspection and certified copies of their answer scripts. In our opinion, the existence of these two avenues is not mutually exclusive and it is up to the candidate to choose either of the routes. Thus, if a candidate seeks information under the provisions of the Right to Information Act, then payment has to be sought under the Rules therein, however, if the information is sought under the guidelines of the appellant, then the appellant is at liberty to charge the candidates as per its guidelines.

13. The appellant has submitted that the Division Bench of the Delhi High Court erred in quashing Guideline 3 which is affecting not only the appellant but also the candidates. Taking into consideration the fact that such quashing was done despite no prayer being made to that effect on behest of the respondent, we hold that quashing of Guideline 3 was unwarranted. It is to this limited extent that we allow the appeal and set aside the impugned order[1] of the Division Bench of the Delhi High Court whereby it quashed Guideline 3.

14. The learned counsel appearing for the appellant further submitted that owing to nominal fee fixed under the Right to Information Act, the dissemination of information by the appellant has become financially burdensome and he wants to make a representation to the Government for enhancing the fee prescribed under the Right to Information Act. It is left open to him to make such a representation.

15. The appeal is disposed of in the aforestated terms and pending applications, if any, shall also stand disposed of.

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1 *Paras Jain* v. *ICSI*, 2014 SCC OnLine Del 7671