REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO.184 OF 2014

SUBRAMANIAN SWAMY ...PETITIONER(S)

VERSUS

UNION OF INDIA,
MINISTRY OF LAW & ORS. ...RESPONDENT(S)

WITH

WRIT PETITION (CRIMINAL) NO. 8 OF 2015

WRIT PETITION (CRIMINAL) NO. 19 OF 2015

WRIT PETITION (CRIMINAL) NO. 56 OF 2015

WRIT PETITION (CRIMINAL) NO. 64 OF 2015

WRIT PETITION (CRIMINAL) NO. 62 OF 2015

WRIT PETITION (CRIMINAL) NO. 63 OF 2015

WRIT PETITION (CRIMINAL) NO. 67 OF 2015

WRIT PETITION (CRIMINAL) NO. 79 OF 2015

WRIT PETITION (CRIMINAL) NO. 73 OF 2015

WRIT PETITION (CRIMINAL) NO. 82 OF 2015

WRIT PETITION (CRIMINAL) NO. 77 OF 2015

WRIT PETITION (CRIMINAL) NO. 91 OF 2015

WRIT PETITION (CRIMINAL) NO. 98 OF 2015

WRIT PETITION (CRIMINAL) NO. 106 OF 2015

WRIT PETITION (CRIMINAL) NO. 96 OF 2015

WRIT PETITION (CRIMINAL) NO. 110 OF 2015

WRIT PETITION (CRIMINAL) NO. 121 OF 2015

WRIT PETITION (CRIMINAL) NO. 120 OF 2015

WRIT PETITION (CRIMINAL) NO. 117 OF 2015

WRIT PETITION (CRIMINAL) NO. 118 OF 2015

WRIT PETITION (CRIMINAL) NO. 116 OF 2015

WRIT PETITION (CRIMINAL) NO. 119 OF 2015

TRANSFER PETITION (CRIMINAL) NOS. 102-105 OF 2015

TRANSFER PETITION (CRIMINAL) NOS. 94-101 OF 2015

J U D G M E N T

Dipak Misra, J.

This batch of writ petitions preferred under Article 32 of the Constitution of India exposits cavil in its quintessential conceptuality and percipient discord between venerated and exalted right of freedom of speech and expression of an individual, exploring manifold and multilayered, limitless, unbounded and unfettered spectrums, and the controls, restrictions and constrictions, under the assumed power of "reasonableness" ingrained in the statutory provisions relating to criminal law to reviver and uphold one's reputation. The assertion by the Union of India and the complainants is that the reasonable restrictions are based on the paradigms and parameters of the Constitution that are structured and pedestaled on the doctrine of non-absoluteness of any fundamental right, cultural and social ethos, need and feel of the time, for every right engulfs and incorporates duty to respect other's right and ensure mutual compatibility and conviviality of the individuals based on collective harmony and conceptual grace of eventual social

order; and the asseveration on the part of the petitioners is that freedom of thought and expression cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of individual reputation and of societal harmony, for the said aspects are to be treated as things of the past, a symbol of colonial era where the ruler ruled over the subjects and vanquished concepts of resistance; and, in any case, the individual grievances pertaining to reputation can be agitated in civil courts and thus, there is a remedy and viewed from a prismatic perspective, there is no justification to keep the provision of defamation in criminal law alive as it creates a concavity and unreasonable restriction in individual freedom and further progressively mars voice of criticism and dissent which are necessitous for the growth of genuine advancement and a matured democracy.

2. The structural architecture of these writ petitions has a history, although not in any remote past, but, in the recent times. In this batch of writ petitions, we are required to dwell upon the constitutional validity of Sections 499 and 500 of

the Indian Penal Code, 1860 (for short, 'IPC') and Sections 199(1) to 199(4) of the Code of Criminal Procedure, 1973 (for short, "CrPC"). It is necessary to note here that when the Writ Petition (Crl) No. 184 of 2014 was taken up for consideration, Dr. Subramanian Swamy, the petitioner appearing in-person, had drawn our attention to paragraph 28 of the decision in ***R. Rajagopal alias R.R. Gopal and another v. State of T.N. and others***[1] which reads as follows:-

> "In all this discussion, we may clarify, we have not gone into the impact of Article 19(1)(a) read with clause (2) thereof on Sections 499 and 500 of the Indian Penal Code. That may have to await a proper case."

3. Dr. Swamy had also drawn our attention to the observations made in ***N. Ravi and others v. Union of India and others***[2], which are to the following effect:-

> "Strictly speaking on withdrawal of the complaints, the prayer about the validity of Section 499 has also become academic, but having regard to the importance of the question, we are of the view, in

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1 (1994) 6 SCC 632

2 (2007) 15 SCC 631

> agreement with the learned counsel for the petitioners, that the validity aspect deserves to be examined. In this view, we issue rule, insofar as prayer (a) is concerned."

4. On the aforesaid plinth, a mansion of argument was sought to be built, and that is why we have used the term 'history'. Regard being had to the importance of the matter, we had asked Mr. K. Parasaran and Mr. T.R. Andhyarujina, learned senior counsel to assist the Court and they have assisted with all the devotion and assiduousness at their command.

5. We feel obliged to state at the beginning that we shall refer to the provisions under challenge, record the submissions of the learned counsel for the parties, dwell upon the concepts of 'defamation' and 'reputation', delve into the glorious idea of "freedom of speech and expression" and conception of "reasonable restrictions" under the constitutional scheme and x-ray the perception of the Court as regards reputation, and appreciate the essential anatomy of the provisions and thereafter record our conclusions.

Despite our commitment to the chronology, there is still room for deviation, may be at times being essential in view of overlapping of ideas and authorities.

6. Sections 499 of the IPC provides for defamation and Section 500 IPC for punishment in respect of the said offence. The said provisions read as follows:-

> "**Section 499. Defamation**.— Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the case hereinafter expected to defame that person.
>
> Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.
>
> Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.
>
> Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.
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> Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation

directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

First Exception.—Imputation of truth which public good requires to be made or published – It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—Public conduct of public servants.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Fourth Exception.—Publication of reports of proceedings of Courts – It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an inquiry in open Court

preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned – It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a partly, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Sixth Exception. —Merits of public performance – It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be substituted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Seventh Exception.—Censure passed in good faith by person having lawful authority over another – It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with mat other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Eighth Exception.—Accusation preferred in good faith to authorised person – It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority

over that person with respect to the subject-matter of accusation.

Ninth Exception.—Imputation made in good faith by person for protection of his or other's interests – It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Tenth Exception.—Caution intended for good of person to whom conveyed or for public good – It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Section 500. Punishment for defamation.— Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both."

Section 199 CrPC provides for prosecution for defamation. It is apposite to reproduce the said provision in entirety. It is as follows:-

"**199. Prosecution for defamation**.—

(1) No Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is

from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf.

(2) Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code (45 of 1860) is alleged to have been committed against a person who, at the time of such commission, is the President of India, the Vice-President of India, the Government of a State, the Administrator of a Union territory or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions a Court of Session may take cognizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor.

(3) Every complaint referred to in sub-section (2) shall set forth the facts which constitute the offence alleged, the nature of such offence and such other particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him.

(4) No complaint under sub-section (2) shall be made by the Public Prosecutor except with the previous sanction—

(a) of the State Government, in the case of a person who is or has been the Governor of that State or a Minister of that Government;

(b) of the State Government, in the case of any other public servant employed in connection with the affairs of the State;

(c) of the Central Government, in any other case.

(5) No Court of Session shall take cognizance of an offence under sub-section (2) unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

(6) Nothing in this section shall affect the right of the person against whom the offence is alleged to have been committed, to make a complaint in respect of that offence before a Magistrate having jurisdiction or the power of such Magistrate to take cognizance of the offence upon such complaint."

It may be stated that the aforesaid provision came into existence in the present incarnation after introduction of Section 199(2) to (5) by the Code of Criminal Procedure (Amendment) Act, 1955 on 10th August, 1955.

7. The constitutionality of the aforesaid provisions have been challenged on many a score and from many an angle by different counsel appearing for the writ petitioners who belong to different walks of life. First, we shall record the submissions in their essential facets of the learned counsel for the petitioners, the contentions advanced by the learned

Attorney General and the Additional Solicitor General in defence of the provisions and thereafter the arguments put forth by the learned Amicus Curiae. We may immediately state that the effort would be to record the submissions in fullest, may be sans elaborations and individualistically crafted and sculptured nuances during the oral hearings.

8. **Submissions of Mr. P.P. Rao and Ms. Mahalakshmi Pavani**

i. The right to uninhibited freedom of speech conferred by Article 19(1)(a) is basic and vital for the sustenance of parliamentary democracy, which is a part of the basic structure of the Constitution. The "reasonable restrictions" are those which are meant to prevent the expression of a thought which is intrinsically dangerous to public interest and would not include anything else. The enabling power in Article 19(2) to impose reasonable restrictions on the right conferred by Article 19(1)(a) is intended to safeguard the interests of the State and the general public and not of any individual, and, therefore, Article 19(2) cannot be regarded as the source of authority for Section 499 of IPC which makes

defamation of any person an offence. That apart, Article 19(2), being an exception to Article 19(1)(a), needs to be construed narrowly and it cannot constrict the liberal interpretation warranted to be placed on Article 19 (1)(a) of the Constitution. The schematic intendment in clause (2) of Article 19 is founded on the fundamental tenet of interests of the State and the public in general and hence, regard being had to the nature of fundamental rights and scope of reasonable restrictions to be imposed thereon, the exception has to be understood applying the principle of *noscitur a sociis* and excluding criminal defamation.

ii. It is to be borne in mind that defamation of an individual by another individual is a civil wrong or tort, pure and simple for which the common law remedy is an action for damages. It has to be kept in mind that fundamental rights are conferred in the public interest and defamation of any person by another person is unconnected with the fundamental right conferred in the public interest by Article 19(1)(a) and, therefore, Section 499 is outside the scope of Article 19(2) of the Constitution. Right to one's reputation which has been

held to be a facet of Article 21 is basically vis-à-vis the State, and hence, Article 19(2) cannot be invoked to serve the private interest of an individual. That apart, crime means an offence against the society of which the State is the custodian. Considering the scope of Article 19(1)(a) and Article19(2), defamation of any person by private person cannot be treated as a "crime", for it does not subserve any public interest.

iii. Section 499 of IPC *ex facie* infringes free speech and it is a serious inhibition on the fundamental right conferred by Article 19(1)(a) and hence, cannot be regarded as a reasonable restriction in a democratic republic. A restriction that goes beyond the requirement of public interest cannot be considered as a reasonable restriction and would be arbitrary. Additionally, when the provision even goes to the extent of speaking of truth as an offence punishable with imprisonment, it deserves to be declared unconstitutional, for it defeats the cherished value as enshrined under Article 51-A(b) which is associated with the national struggle of freedom. The added requirement of the accused having to prove that the statement made by him was for the public good

is unwarranted and travels beyond the limits of reasonableness because the words "public good" are quite vague as they do not provide any objective standard or norm or guidance as a consequence the provisions do not meet the test of reasonable restriction and eventually they have the chilling effect on the freedom of speech.

iv. "Reasonableness" is not a static concept, and it may vary from time to time. What is considered reasonable at one point of time may become arbitrary and unreasonable at a subsequent point of time. The colonial law has become unreasonable and arbitrary in independent India which is a sovereign, democratic republic and it is a well known concept that provisions once held to be reasonable, become unreasonable with the passage of time.

v. The Explanations and Exceptions appended to the main provision contained in Section 499 IPC, in case the constitutionality of the said Section is upheld, are to be interpreted with contextual purpose regard being had to the broad canvas they occupy and the sea change that has taken place in the society.

vi. The words like “company”, “association” or “collection of persons as such” as used in Explanation 2 should exclude each other because different words used in the Section must be given different meanings and it is appropriate that they are not given meanings by which an indefinite multitude can launch criminal cases in the name of class action or common right to reputation.

vii. Section 199(2) CrPC provides a different procedure for certain category of person and Court of Session to be the Court of first instance, and thereby it creates two kinds of procedures, one having the advantage over the other. This classification is impermissible as it affects the equality clause. That apart, it also uses the State machinery by launching of the prosecution through the Public Prosecutor, which enables the State to take a different route to curb the right of freedom of speech and expression.

9. **Contentions advanced by Dr. Rajeev Dhawan**

i. Free Speech which is guaranteed by Article 19(1)(a) and made subject to certain limitations in Article 19(2) is essential

to a democracy, for democracy is fundamentally based on free debate and open discussion, and a citizen has the right to exercise his right to free speech in a democracy by discerning the information and eventually making a choice and, if it is curtailed by taking recourse to colonial laws of defamation, the cherished value under the Constitution would be in peril and, therefore, the provisions pertaining to criminal action which create a dent in free speech are unconstitutional.

ii. Free speech encapsulates the right to circulate one's independent view and not to join in a chorus or sing the same song. It includes the right of propagation of ideas, and the freedom of speech and expression cannot brook restriction and definitely not criminal prosecution which is an anathema to free speech. Free speech has priority over other rights and whenever and wherever conflict emerges between the freedom of speech and other interest, the right of freedom of expression can neither be suppressed nor curtailed unless such freedom endangers community interest and that apart the said danger should have immediate and proximate nexus with expression.

iii. Reasonable restriction is founded on the principle of reasonableness which is an essential facet of constitutional law and one of the structural principles of the constitution is that if the restriction invades and infringes the fundamental right in an excessive manner, such a restriction cannot be treated to have passed the test of reasonableness. The language employed in Sections 499 and 500 IPC is clearly demonstrative of infringement in excess and hence, the provisions cannot be granted the protection of Article 19(2) of the Constitution. Freedom of expression is quintessential to the sustenance of democracy which requires debate, transparency and criticism and dissemination of information and the prosecution in criminal law pertaining to defamation strikes at the very root of democracy, for it disallows the people to have their intelligent judgment. The intent of the criminal law relating to defamation cannot be the lone test to adjudge the constitutionality of the provisions and it is absolutely imperative to apply the "effect doctrine" for the purpose of understanding its impact on the right of freedom of speech and expression, and if it, in the ultimate

eventuality, affects the sacrosanct right of freedom, it is *ultra vires*. The basic concept of "effect doctrine" would not come in the category of exercise of power, that is, use or abuse of power but in the compartment of direct effect and inevitable result of law that abridges the fundamental right.

iv. Reasonable restriction cannot assume any disproportionate characteristic in the name of reasonableness, for the concept of reasonableness, as a constitutional vehicle, conceives of the doctrine of proportionality. The Constitution requires the legislature to maintain a balance between the eventual adverse effects and the purpose it intends to achieve and as the provisions under assail do not meet the test of proportionality or least restrictive measure, they do not withstand the litmus test as postulated under Article 19(2) of the Constitution.

v. The provisions under assail being pre-constitutional, statutory provisions are to be examined with deeper scrutiny and, therefore, when the freedom of speech is treated as a monumental socially progressive value in a democratic set up

at the international level, the restrictive provisions deserve to be declared as unconstitutional as they create an unacceptable remora in the growth of an individual. That apart, societal perception having undergone a great change, the constitutional right has to be given a pietistic position and analysed in these parameters, the colonial law meant to invite people to litigate should be allowed a timely extinction.

vi. Section 199(2) to (4) CrPC protects civil servants and creates a separate class and said classification has no rationale and this distinction has no basis to withstand the constitutional scrutiny. Differential treatment granted to them is an unacceptable discrimination and for the said reason, provisions contained in Section 199(2) to (4) CrPC are liable to be struck down.

vii. Section 499 IPC read in conjunction with Explanation IV provides a storehouse of criteria for judging reputation and it allows a greater width and discretion without any guidance and hence, the provision is arbitrary and unreasonable. There is no justification to enable a company or association or

collection of persons to have the benefit of defamation in the criminal law. Similarly, there is no justification for any criminal defamation to save reputation of dead persons and for allowing his legal heirs to prosecute on the ground that it is intended to be hurtful to the feelings of his family and other near relatives.

viii. The provision relating to defamation under Section 499 IPC does not recognize truth as an absolute defence but qualifies that if anything is imputed which is even true concerning any person, it has to be for the "public good". If a truthful statement is made and truth being the first basic character of justice, to restrict the principle of truth only to public good is nothing but an irrational restriction on the free speech. The concept of "good faith" has been made intrinsic to certain Exceptions and that really scuttles the freedom of speech and freedom of thought and expression and thereby it invites the discomfort to Article 19(1)(a). The words "good faith" and "public good" have to meet the test of reasonableness and proportionality which would include

honest opinion with due care and attention and the concept of reasonable restriction has to be narrowed to the sphere of *mala fide* and reckless disregard. When the concept of defamation is put in the compartment of criminal offence by attributing a collective colour to it, it stifles the dissenting voices and does not tolerate any criticism that affects the foundation of popular and vibrant democracy which is a basic feature of the Constitution. Quite apart from that, the concepts of information, ideas, criticisms and disclosures are not only the need of the hour but also have imperatives; and in such a climate, to retain defamation as a criminal offence will tantamount to allow a hollowness to remain which will eventually have a chilling effect on the freedom of speech and expression that shall lead to a frozen democracy.

10. **Arguments of Mr. Datar, learned Senior Counsel**

i. Freedom of thought and expression includes a dissent because disagreement or expression of a contrary opinion has significant constitutional value which is engrafted under

Article 19(1)(a) and also is an acceptable pillar for a free and harmonious society.

ii. Control of free speech by the majority is not an acceptable principle and, therefore, the provision pertaining to defamation is fundamentally a notion of the majority to arrest and cripple freedom of thought and expression which makes the provision unconstitutional. Criminal prosecution as envisaged under Section 499 Cr.P.C. cannot be based on the principle of the State to take appropriate steps when an offence of this nature is committed, for an offence of this nature is really not an offence against the State, because it does not encompass the ultimate facet of criminal prosecution which is meant for "protection of the society as a whole".

iii. Reputation at its best can be equated with an element of personal security or a significant part of one's life and unification of virtues which makes the person proud to protect such private interest but that cannot be regarded as a justification to whittle down freedom of speech and

expression which subserves the public interest. The language in which Section 499 IPC is couched does not incorporate the seriousness test which has the potentiality of provoking breach of peace by instigating people as a consequence of the public interest is endangered but, on the contrary, it subserves only the private interest and as it caters to individual revenge or acrimony which in the ultimate eventuate, makes imposed silence to rule over eloquent free speech.

iv. Though reputation has been treated to be a facet of Article 21 of the Constitution, yet the scheme of the said Article is quite different and a distinction is required to be drawn for protection of reputation under Article 21 and enabling the private complainant to move the criminal court for his sense of self-worth. The individual reputation can very well be agitated in a civil court. But fear of a complainant who on the slightest pretext, can file criminal prosecution, that too, on the base of subjective notion, the fundamental value of freedom of speech and expression gets paralysed and

the resultant effect is that Sections 499 and 500 IPC cause unnecessary discomfort to Article 19(1)(a) and also to Article 14 of the Constitution.

v. The purpose of criminal prosecution is not concerned with repairing individual injury, especially, reputation or vindicating or protecting the reputation of an individual. The purpose of such law has to be the ultimate protection of the society. Quintessentially, the provision cannot cater to individual whims and notions about one's reputation, for it is done at the cost of freedom of speech in the society which is impermissible. The restriction as engrafted under Article 19(2) has to be justified on the bedrock of necessity of the collective interest. The nature of Exceptions carved out and the manner in which they are engrafted really act as obstruction and are an impediment to the freedom of speech and expression and such hindrances are inconceivable when appreciated and tested on the parameters of international democratic values that have become paramount as a globally accepted democratic culture.

11. **Arguments on behalf of Mr. Aruneshwar Gupta**

i. Defamation is injury or damage to reputation which is a metaphysical property. Criminal prosecution was entertained in defamation cases because of the erroneous doctrine of 'malice in law or intended imputation or presumption by law of the existence of malice', when the said doctrine has been kept out of criminal jurisprudence, the enactments based on the said doctrine cannot be allowed to survive. Once there is no presumption of malice by law, the thought, idea and concept of '*per se* malicious or *per s*e defamatory', and the basis and foundation of defamation becomes non-existent and is eroded and the criminal content in defamation in Article 19(2) has to be severed from the civil content in it.

ii. The reputation of every person does not have any specific identifiable existence for it is perceived differently, at different times, by different persons associated, related, concerned for affected by it, who, in turn, are acting with their multi-dimensional personality for multiple reasons and

prejudices and as such, they are bereft of any social impact or criminal element in it.

iii. On a reading of Sections 499 & 500 IPC and Section 199 CrPC, it is manifest that there is presumption of facts as a matter of law and that alone makes the provision arbitrary and once the foundation is unreasonable and arbitrary, the provisions deserve to be declared *ultra vires* Articles 14, 19 and 21 of the Constitution.

12. **Submissions of Mr. Anup J. Bhambhani**

i. The restrictions imposed under Article 19(2) on the fundamental right to free speech and expression as contained in Article 19(1)(a) should be reasonable in substance as well as in procedure. The procedural provisions applicable to complaints alleging criminal defamation under Sections 499 and 500 IPC do not pass the test of reasonableness as envisaged under Article 19(2) of the Constitution. That apart, in the absence of any definition of the crime of defamation in a precise manner, it is hit by the principle of "void for vagueness", for the Constitution of India does not permit to

include all categories of situations for constituting offence without making it clear what is prohibited and what is permitted.

ii. The procedural safeguards can only stand the test of reasonableness if the Exceptions to Section 499 IPC are taken into consideration at the time of summoning of the accused and if it is ensured that all material facts are brought on record at that stage. But on a plain reading of the provision that is not permissible and hence, the provision is *ultra vires* as the procedure enshrined affects the basic marrow of the fundamental right pertaining to freedom of speech and expression.

iii. Section 199(1) CrPC which is intended to be a restriction on who may file a criminal complaint under Section 499/500 IPC has to be narrowly construed so as to confer a meaning to the words "person aggrieved" that would not in its width, include a person other than the victim, for that indirectly would affect the procedural safeguard which eventually affects the substantive right.

iv. The essential ingredients of the offence under Section 499 IPC which include making or publishing any imputation concerning any person and that the said imputation must have been made with an intention to harm or having reason to believe that the imputation will harm the reputation of a person should not be allowed to have a free play to permit multiple points of territorial jurisdiction for the prosecution of a single offensive matter as that would place an unreasonable fetter on the exercise of right of free speech and expression of a person by oppressive litigation.

13. **Arguments of Mr. Sanjay R. Hegde**

i. The architecture of the Section as envisioned by its draftsmen criminalises speech that harms reputation and then provides Exceptions to such speech in certain specific circumstances. The concept of defamation as a crime remained unchallenged even during the drafting of the constitutional guarantees of free speech. In fact, the Parliament further re-affirmed its intent, when the First Constitutional Amendment Act was passed, primarily to

overcome judgments of this Court that provided expansive definitions of the fundamental rights of free speech and property. With the passage of time, the manner of transmission of speech has changed with the coming of modern means of communication and the same is not under the speaker's control. The provisions when judged on the touchstone of Articles 14 and 19(2) do not meet the test inasmuch as they are absolutely vague and unreasonable. Section 499 IPC, as it stands, one may consider an opinion, and, another may call it defamation and, therefore, the word "defamation" is extremely wide which makes it unreasonable.

ii. Section 199(2) by which a "Court of Session may take cognizance of such offence, without the case being committed to it upon a complaint in writing made by the Public Prosecutor", when any offence falling under Chapter XXI of the IPC is alleged to have been committed against "any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions", if appositely appreciated deprives the

accused of an appeal to the Court of Session and brings in the State machinery to prosecute a grievance which would be otherwise personal to the concerned public servant.

iii. In terms of the press, criminal defamation has a chilling effect which leads to suppress a permissible campaign. The threat of prosecution alone is enough to suppress the truth being published, and also the investigating journalism which is necessary in a democracy.

iv. If the Court is not inclined to strike down Section 499 IPC, at least in relation to criminal complaints arising out of media report where the members of the media are prosecuted, a procedure akin to the decision in ***Jacob Mathew v. State of Punjab and another***[3] should be adopted. To elaborate, a similar mechanism may be devised for media professional, either through statutory bodies like the Press Council of India or non-statutory bodies like the News Broadcasting Standards Authority which may be given the power to recommend

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3 2005 (6) SCC 1

prosecutions in cases of grossly negligent or malicious reporting made with ulterior motives.

PROPONEMENTS IN OPPUGNATION

14. **Submissions of Mr. Mukul Rohatgi, learned Attorney General for India**

i. Article 19(2) must be read as a part of the freedom of speech and expression as envisaged under Article 19(1)(a), for the freedom of speech as a right cannot be understood in isolation. The freedom of speech is a robust right but nonetheless, not unrestricted or heedless. Even though the Courts have often drawn the difference between free speech under the U.S. Constitution and that under the Indian Constitution, yet even in the United States, where free speech is regarded as the most robust, it is not absolute. The restrictions have not been left to the courts to carve out but have been exhaustively set out in Article 19(2). It is for the legislature to determine the restrictions to impose and the courts have been entrusted with the task of determining the reasonableness and in the present case, the right to free

speech under Article 19(1)(a) is itself conditioned/qualified by the restrictions contained in Article 19(2) which includes "defamation" as one of the grounds of restriction and the term "defamation" has to include criminal defamation, and there is nothing to suggest its exclusion. Article 19(2) has to be perceived as an integral part of the right to free speech as Article 19(1)(a) is not a standalone right and, therefore, it cannot be said that there is an unbridled right to free, much less defamatory speech.

ii. The submission that defamation being only protective of individual cases between two individuals or a group of individuals and no State action is involved, cannot be elevated to the status of a fundamental right, is without much substance inasmuch as Article 19(2) represents varied social community interest. That apart, contextual meaning of the term "defamation"; and if the grounds of exception under Article 19(2) are analysed, each of them represent a public interest and so does defamation, for its principal object is to preserve reputation as a shared value of the collective.

iii. The stand that criminal defamation under Section 499 IPC smothers the freedom of speech and expression or is a threat to every dissent and puts private wrong at the level of public wrong, is totally incorrect. The legal theorists and thinkers have made a subtle distinction between private and public wrong and it has been clearly stated that public wrong affects not only the victim but injures the public and ultimately concerns the polity as a whole and tested on that count, criminalization of defamation or damage to reputation is meant to subserve basic harmony in polity.

iv. Right to reputation is an insegregable part of Article 21 of the Constitution. A person's reputation is an inseparable element of an individual's personality and it cannot be allowed to be tarnished in the name of right to freedom of speech and expression because right to free speech does not mean right to offend. Reputation of a person is neither metaphysical nor a property in terms of mundane assets but an integral part of his sublime frame and a dent in it is a rupture of a person's dignity, negates and infringes fundamental values of citizenry right. Thus viewed, the right

enshrined under Article 19(1)(a) cannot allowed to brush away the right engrafted under Article 21, but there has to be balancing of rights.

v. In many a country, criminal defamation does not infringe the freedom of speech. The submission that protection of reputation can be sufficiently achieved by taking recourse to civil law cannot be a ground to declare Section 499/500 IPC as unconstitutional. It is to be borne in mind that the criminal law and the civil law operate in different spheres and aspects and in societal connotations have different perceptions. Monetary damage in civil law cannot be said to be the only panacea; and permitting an individual to initiate criminal action as provided under the law against the person making a defamatory remark does not affect the constitutional right to freedom of speech and in no case ushers in anarchy. That apart, mitigation of a grievance by an individual can be provided under a valid law and the remedy under the civil law and criminal law being different, both are constitutionally permissible and hence, the provisions pertaining to defamation under the IPC do not

cause any kind of discomfort to any of the provisions of the Constitution. In addition to this, it can be said that civil remedy for defamation is not always adequate. The value of freedom of speech cannot be allowed to have the comatosing effect on individual dignity, which is also an integral part under Article 21 of the Constitution.

vi. It is a misconception that injury to reputation can adequately be compensated in monetary terms. Reputation which encapsules self-respect, honour and dignity can never be compensated in terms of money. Even if reputation is thought of as a form of property, it cannot be construed solely as property. Property is not a part of individual personality and dignity, whereas reputation is, and, therefore, the stand that the damage caused to a person's reputation should be compensated by money and that the same is realizable by way of obtaining a decree from the civil court is not justified and regard being had to that, criminal defamation is constitutionally permissible.

vii. The State is under an obligation to protect human dignity of every individual. Simultaneously, freedom of speech has its constitutional sanctity; and in such a situation, balancing of rights is imperative and, therefore, the Court should not declare the law relating to criminal defamation as unconstitutional on the ground of freedom of speech and expression as it is neither an absolute right nor can it confer allowance to the people to cause harm to the reputation of others. The apprehension of abuse of law, or for that matter, abuse of a provision of law would not invalidate the legislation. Possibility of abuse, as is well settled, does not offend Article 14 of the Constitution. A distinction has to be drawn between the provision in a statute and vulnerability of the action taken under such a provision.

viii. The provisions have stood the test of time after the Constitution has come into existence and the concept ingrained in the term "reputation" has not been diluted but, on the contrary, has become an essential constituent of Article 21. That apart, the ten Exceptions provide reasonable

safeguards to the provision and, therefore, it can never be said that the provision suffers from lack of guidance thereby inviting the frown of Article 14 of the Constitution.

ix. The words "some person aggrieved" used in Section 199(1) CrPC deserve a strict construction so as to prevent misuse of the law of criminal defamation. It should be the duty of the court taking cognizance to ensure that the complainant is the person aggrieved. The court may refer to earlier authorities and clarify the concept of "some person aggrieved" and explain the words in the present context. Similarly, the grievance that the provisions give room for filing of multiple complaints at various places is not correct as the concept of territorial jurisdiction is controlled by CrPC.

15. **Submissions by Mr. P.S. Narsimha, learned Additional Solicitor General**

i. The submission that the word "defamation" occurring in Article 19(2) is confined only to civil defamation and not criminal defamation cannot be countenanced on the basis of our constitutional history. The Constitutional debates amply clarify the position that when the Constituent Assembly

debated about the inclusion of defamation as a ground for imposing restrictions on the freedom of speech and expression, the statutory provision for defamation, i.e., Section 499 of IPC was already an existing law. The wisdom of the founding fathers is quite demonstrable inasmuch as at the time of drafting of the Constitution, the only statutory law on defamation was Section 499 of IPC providing for criminal defamation and, therefore, it stands to reason that the framers always contemplated criminal defamation to fall within the ambit of the word "defamation" occurring in Article 19(2).

ii. The argument that the word "defamation" occurring in Article 19(2) must be read in the light of the other grounds mentioned therein by applying the rule of *noscitur a sociis is* not correct, for the said rule has a very limited application. The word "defamation" is clearly not susceptible to analogous meaning with the other grounds mentioned therein. The word "defamation", in fact, has a distinct meaning as compared to the other grounds and it does not stand to reason that the word "defamation" will take colour from terms like "security of

the State", "friendly relations with a foreign state", "public order", "decency and morality" and the like thereby restricting and narrowing the ambit of the word "defamation" in Article 19(2). Defamation of an individual or collection of persons serves public interest which is the basic parameter of restrictions under Article 19(2) and, therefore, it can never be perceived as individual interest in a narrow compartment.

iii. The contention that the fundamental rights are matters between the State and the citizens and not between private individuals per se is untenable because it has been already recognized that it is the duty of the State is to protect the fundamental rights of citizens inter se other citizens and many a legislation do so project. In fact, the State is indeed obligated to enact laws to regulate fundamental rights of individuals vis-à-vis other individuals.

iv. The stand of direct effect test or, to put it differently, "direct and inevitable impact test" is concerned with incidentally creating a dent in the freedom of speech and expression but has no nexus with the content of the free

speech per se. A distinction has to be drawn between the external constraints on free speech and the direct assault on the free speech. The "subject matter test" can have direct and inevitable impact on the right, but the "regulation test by law" has a different connotation.

v. The object of guaranteeing constitutional protection to freedom of speech and expression is to advance public debate and discourse. However, speech laden with harmful intent or knowledge of causing harm or made with reckless disregard is not entitled to the protection of Article 19(1)(a) since it does not serve any of the purposes mentioned above. Such speech has no social value except in cases where it is a truthful statement meant for the public good or where it is made in good faith, in which case it is protected by the Exceptions in Section 499 IPC and is not criminalized.

vi. The Preamble to the Constitution plays an important role in interpreting the freedoms mentioned in Article 19. The ideals mentioned in the Preamble cannot be divorced from the purpose and objective of conferring the rights. The freedom of

speech and expression under Article 19(1)(a) must take colour from the goals set out in the Preamble and must be read in the light of the principles mentioned therein. The Preamble seeks to promote "Fraternity assuring the dignity of the individual and the unity and integrity of the Nation". In its widest meaning and amplitude, fraternity is understood as a common feeling of brotherhood. While justice, liberty and equality have been made justiciable rights under the Constitution, the idea of fraternity has been used to interpret rights, especially horizontal application of rights. The Preamble consciously chooses to assure the dignity of the individual, in the context of fraternity, before it establishes the link between fraternity and unity and integrity of India. The rights enshrined in Part III have to be exercised by individuals against the backdrop of the ideal of fraternity, and viewed in this light, Article 19(2) incorporates the vision of fraternity. Hence, the restriction imposed by the statutory provision satisfies the content of constitutional fraternity. The fraternal ideal finds resonance also in Part IVA of the Constitution. Article 51-A of the Constitution, which deals

with the fundamental duties of a citizen, makes it a duty "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women". In fact, this Court has held that Part IVA could be used as an interpretative tool while assessing the constitutional validity of laws, especially in the context of restrictions imposed on rights. Judged on the anvil of the aforesaid constitutional norms, the provisions pertaining to criminal defamation withstand scrutiny. The principal objective of the law of defamation, civil or criminal, is to protect the reputation and dignity of the individual against scurrilous and vicious attacks. Section 44 of IPC defines injury as "any harm whatever illegally caused to any person, in body, mind, reputation or property." The said section demonstrates that the harm caused to the mind and reputation of a person, protected by the right to dignity, is also treated as injury in the eyes of law, along with the harm caused to body and property. From the Preamble to the provisions in Part III, it is

clear that the aim of the Constitution has been to protect and enhance human dignity. Reputation in general, and dignity in particular, are enablers of rights which make the exercise of other rights guaranteed in the Constitution more meaningful. Dignity of a person is an affirmation of his/her constitutional identity and the individual reputation is constitutionally protected as a normative value of dignity. Laws relating to initiation of civil as well as criminal action are, therefore, permissible and withstand assail on their constitutionality.

vii. The international human right treaties explicitly provide for the right to reputation as well as right to free speech and expression. The Universal Declaration on Human Rights, 1948 in Article 12 clearly stipulates that no one shall be subjected to attack on his honour and reputation. Scrutinising on this score, it cannot be said that reputation should be allowed backseat whereas freedom of speech and expression should become absolutely paramount. Though certain countries have kept the remedy under common law and have decriminalized defamation, yet it does not mean

that where the law criminalizing defamation is maintained, the said law is unreasonable and, therefore, unconstitutional. The right to protection of reputation and the right to freedom of speech and expression are seemly balanced.

viii. The criminal law of defamation is neither vague nor ambiguous. That apart, the content restrictions in civil law and criminal law are not identical. Section 499 IPC read with the Exceptions incorporates all the three classical elements of a crime while penalizing certain forms of speech and expression. The provision criminalizes only that speech which is accompanied by malicious intention to harm or with knowledge that harm will be caused or with reckless disregard. The requirement of guilty intention, knowledge or proof of recklessness (absence of good faith) that form the bedrock of various provisions of IPC is also incorporated in Section 499. Moreover, harm to reputation and mind is treated as injury along with the injury to body and property under Section 44 of IPC. Therefore, the same standards applicable to the injury caused to body and property are

applicable to the injury caused to the mind and reputation under Section 499 which makes the axis of provision certain, definite and unambiguous. That apart, each of the Exceptions marks the contours of the section amply clear and provides an adequate warning of the conduct which may fall within the prescribed area. It excludes from its purview speech that advances public good and demarcates what is accepted speech and what is proscribed speech. Hence, it cannot be said that the said Section is vague and that it leads to uncertainty. First Exception to Section 499 which does not make truth an absolute defense has a very relevant purpose. In fact, this Exception is meant to ensure that the defense is available only in cases where the expression of truth results in 'public good'. Thus, the right to privacy is respected, and will give way only in case the truthful disclosure, *albeit* private, is meant for public good.

ix. There is an *intelligible differentia* between the complaint of the individual alleging defamation of himself and that of an official in the context of his governmental functions. This

intelligible differentia has a rational nexus to the object that the Parliament has sought to achieve, i.e., there must be credibility in the functioning of the Government and that it must protect its functioning through its officers discharging their duty from malicious disrepute. There is no justification to assume that the Government grants sanction under Section 199(4) without due application of mind. In fact, it is a safety valve to protect a citizen against a government official filing complaints on behalf of the Government. A public prosecutor is a responsible officer and this Court has held in a number of cases that he acts independently and with responsibility. The fact that the prosecution is by the public prosecutor goes to show that the proceedings will be conducted with objectivity and without any personal bias.

16. **Submissions by Dr. Abhishek Manu Singhvi:**

i. It is fallacious to argue that fundamental rights are fetters only on State action and that Article 19(2) is intended to safeguard the interests of the State and the general public and not of any individual. The exception to this fetter is that

the State can make laws under Article 19(2) which are reasonable restrictions on the right under Article 19(1)(a). Laws constitute State action, whatever their subject matter. Laws restricting obscenity or offences against public order or sovereignty of the State, for example, are just as much State action as a law making defamation of a person a criminal offence. Therefore, it cannot be said that Article 19(2) is intended to safeguard only the interests of the State and that of the general public and not of any individual. The argument that the law of criminal defamation protects the interests only of an individual and not the public in general is incorrect inasmuch as defamation cannot be understood except with reference to the general public. The law of criminal defamation protects reputation which is the estimation of a person in the eyes of the general public. That apart, the criminal law of defamation is necessary in the interests of social stability.

ii. Articles 14 and 19 have now been read to be a part of Article 21 and, therefore, any interpretation of freedom of speech under Article19(1)(a) which defeats the right to

reputation under Article 21 is untenable. The freedom of speech and expression under Article 19(1)(a) is not absolute but is subject to constrictions under Article19 (2). Restrictions under Article 19(2) have been imposed in the larger interests of the community to strike a proper balance between the liberty guaranteed and the social interests specified under Article19(2). One's right must be exercised so as not to come in direct conflict with the right of another citizen. The argument of the petitioners that the criminal law of defamation cannot be justified by the right to reputation under Article 21 because one fundamental right cannot be abrogated to advance another, is not sustainable. It is because (i) the right to reputation is not just embodied in Article 21 but also built in as a restriction placed in Article 19(2) on the freedom of speech in Article 19(1)(a); and (ii) the right to reputation is no less important a right than the right to freedom of speech.

iii. Article 19(2) enumerates certain grounds on which the right to free speech and expression can be subjected to reasonable restrictions and one such ground is defamation.

Although "libel" and "slander" were included in the original Constitution, yet the same were deleted by the First Amendment, whereas defamation continues to be a part of the Constitution. Therefore, it is fallacious to argue that defamation under Article 19(2) covers only civil defamation when at the time of the enactment of the Constitution, Section 499 IPC was the only provision that defined defamation and had acquired settled judicial meaning as it had been on the statute book for more than 90 years.

iv. Sections 499 and 500 of IPC continue to serve a public purpose by defining a public wrong so as to protect the larger interests of the society by providing reasonable restrictions under Article 19(2) of the Constitution. It is incorrect to suggest that the purpose, logic and rationale of criminal defamation no longer subsists in the modern age, and the law having served its goal, it must be struck down as violative of Article 14. Arguably, in the modern age, the need for the law is even stronger than it was in the 19th century. The constitutional validity of a statute would have to be determined on the basis of its provisions and on the ambit of

its operation as reasonably construed as has been held in ***Shreya Singhal v. Union of India***[4]. Moreover, given the presumption of constitutionality, it has also been held by this Court that in judging the reasonableness of restrictions, the Court is fully entitled to take into consideration matters of common report, history of the times and matters of common knowledge and the circumstances existing at the time of legislation. The concept reasonable restriction conveys that there should not be excessive or disproportionate restriction. Merely because law of criminal defamation is misused or abused would not make the provisions unconstitutional if they are otherwise reasonable.

v. Section 499 IPC defines the offence of defamation with specificity and particularity and enumerates ten broad Exceptions when statements against a person will not be considered defamatory, and by no stretch of imagination it can be termed as vague. That apart, for the offence of defamation as defined under Section 499 IPC, there are three

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essential ingredients which make it specific and further Explanation 4 to Section 499 IPC also limits the scope of the offence of defamation contained in the Section. It makes only such imputation punishable which lowers a person's reputation in the estimation of others, and if the imputation does not lower the moral or intellectual character or a person's character in respect of his caste or calling or his credit, it would not be defamatory. The concepts like "in good faith" or "for the public good" are the mainstay of the Exceptions available to the accused, which, if proved to the extent of preponderance of probability, enable him to avoid conviction, and these facets make the provision reasonable and definitely not vague. Truth ought not to be an absolute defence because it can be misutilised to project a negative image to harm the reputation of a person without any benefit to the public at large.

vii. The argument that protection for "legitimate criticism" or "fair comment" on a question of public interest is only available in the civil law of defamation and is not covered by

any of the Exceptions to Section 499 IPC is not tenable. Exceptions 2, 3, 5, 6 and 9 of Section 499 IPC provide protection akin to the defence of fair comment in the civil law of defamation.

viii. Section 199(1) CrPC safeguards the freedom of speech by placing the burden on the complainant to pursue the criminal complaint without involving the State prosecution machinery. This itself filters out many frivolous complaints as the complainant should be willing to bear burden and pain of pursuing the criminal complaint for defamation only when he has a clear case. Under the aforesaid provision, the cognizance of an offence, which pertains to defamation, cannot be taken except upon a complaint made by *"some person aggrieved by the offence".* This Section carves out an exception to the general rule of criminal jurisprudence that any person can set the law in motion. Under Section 199 CrPC, a complaint can be filed only by "by some person aggrieved". The contention of the petitioners that "some person aggrieved" in Section 199(1) CrPC is vague and opens floodgate for frivolous litigation is misconceived and has no

basis in law. The phrase "some person aggrieved" is neither vague nor is it unreasonably wide.

17. **Submissions of Mr. M.N. Krishnamani, Mr. Siddharth Luthra and Mr. Satish Chandra Mishra, in person**

i. The power to create an offence being an essential legislative function, there is nothing inherently wrong with Section 499 IPC. The contention that the word "defamation" in Article 19(2) has to be read down not to include criminal defamation in it so that it is confined to civil defamation alone is not permissible, for the principle of reading down a provision is inapplicable to constitutional interpretation. The words in the Constitution are to be understood in their literal dictionary meaning and in any case not to be narrowly construed as suggested. The term "defamation" is neither indefinite nor ambiguous to invite an interpretative process for understanding its meaning.

ii. Misuse of a provision or its possibility of abuse is no ground to declare Section 499 IPC as unconstitutional. If a provision of law is misused or abused, it is for the legislature to amend, modify or repeal it, if deemed necessary. Mere

possibility of abuse of a provision cannot be a ground for declaring a provision procedurally or substantively unreasonable.

iii. The law relating to defamation was enacted regard being had to the diversity in the society and it also, as on today, acts as a reasonable restriction and fulfils the purpose behind Section 44 IPC. The issue of free speech and right to reputation and the arguments regarding the constitutional validity of the provision must be considered in the context of the social climate of a country. The social climate takes in its sweep the concept of social stability.

iv. The term "harm" is not defined in the IPC and must be given its ordinary dictionary meaning, but what is important is that it must be illegally caused. There is no distinction in the IPC between harm to body, mind, reputation or property. When the legislature has treated defamation as an offence regard being had to the social balance, there is no justification to declare it *ultra vires*.

v. The mere fact that the offence under Section 499 IPC is non-cognizable or that the complainant can only be "some

person aggrieved" does not create an arbitrary distinction of it being an offence of a private character as opposed to an offence against society. There are numerous offences which are not congnizable but that does not mean that the said category of offences are private acts, for harm being caused to a person is the subject of focus of offences under the Penal Code.

vi. Section 199 CrPC adds a restriction limiting filing of a complaint by "some person aggrieved" and "a person aggrieved" is to be determined by the Courts in each case according to the fact situation. The words "some person aggrieved" and Exception II has been the subject of much deliberation by the Courts and it is not a vague concept. Section 199 CrPC mandates that the Magistrate can take cognizance of the offence only upon receiving a complaint by a person who is aggrieved. This limitation on the power to take cognizance of defamation serves the purpose of discouraging filing of frivolous complaints which would otherwise clog the Magistrate's Courts. The "collection of persons" is not a vague concept. The said body has to be an identifiable group in the sense that one could, with certainty, say that a group of particular people has been

defamed as distinguished from the rest of the community. Establishment of identity of the collection of people is absolutely necessary in relation to the defamatory imputations and hence, it is reasonable.

vii. Article 19(1)(a) guarantees freedom of speech and expression, and freedom of press is included therein. This freedom is not absolute but it is subjected to reasonable restrictions as provided in Article 19(2) of the Constitution. The freedom of speech and expression as guaranteed by the Constitution does not confer an absolute right to speak or publish whatever one chooses and it is not an unrestricted or unbridled licence that may give immunity and prevent punishment for abuse of the freedom. The right has its own natural limitation.

viii. Journalists are in no better position than any other person. They have no greater freedom than others to make any imputations or allegations sufficient to ruin the reputation of a citizen. Even truth of an allegation does not permit a justification under the First Explanation unless it is proved to be in the public good. A news item has the potentiality of

bringing dooms day for an individual. Editors have to take the responsibility of everything they publish and to maintain the integrity of published records. It can cause far reaching consequences in an individual and country's life. Section 7 of the Press and Registration Books Act, 1867 makes the declarations to be *prima facie* evidence for fastening the liability in any civil or criminal proceedings on the Editor. The press has great power in impressing minds of people and it is essential that persons responsible for publishing anything in newspapers should take good care before publishing anything which tends to harm the reputation of a person. Reckless defamatory comments are unacceptable.

18. **Submissions of learned Amicus Curiae**

Mr. K. Parasaran, Sr. Advocate

i. There has to be a harmonious interpretation of Article 19(1)(a) read with Articles 19(2) and 21. This has to be done by adverting to Articles 13(3), 366(10), 372 (Explanations I and II), and also Article 14, the Preamble, Part III and Part IV of the Constitution. There is a need to interpret Article 19(2)

by considering as to whether it includes: a) Defamation as an offence with punishment of imprisonment and/or fine on being proved guilty, or; b) Defamation as a civil wrong with liability for damages for the injury caused to reputation, or; c) both of the above. The word "defamation" in Article 19(2) includes defamation as an offence as well as a civil wrong. The above two cannot be considered in isolation while interpreting Article 19(2).

ii. The question for determination is whether the word "defamation" used in Article 19(2) has reference to the Indian Penal Code (statutory law) as an indictment, or merely the tort of defamation, as it appears after "contempt of court" (which includes criminal contempt) and before the phrase "incitement to an offence", both being penal in nature. Applying the principle of '*noscitur a sociis*', the word "defamation" is not to be interpreted only as civil defamation. Applying the principle of '*nomen juris*' the word "defamation" must necessarily refer only to IPC, since there is no other statute in existence that defines "defamation".

iii. The Preamble to the Constitution opens with the word 'Justice'. It is the concept of *Dharma*. The foundation of administration of Justice after the advent of the Constitution is the motto '*yato dharmastato jayaha*'. Judge-made law, insofar as the right to life is concerned, is to protect the inherent right to reputation as part of the right to life. No one can be deprived of that right except according to the procedure established by law. The word "law" in Article 21 has to necessarily bear interpretation that it is procedure established by plenary legislation only. Whenever any right conferred by Part III is abridged or restricted or violated by "law", as widely defined in Article 13 for the purposes of that Article, are rendered void. Right to reputation is an inherent right guaranteed by Article 21. Duty not to commit defamation is owed to the community at large, because the right to reputation is a natural right. The personality and dignity of the individual is integral to the right to life and liberty and fraternity assuring dignity of an individual is part of the Preamble to the Constitution. The right to life or personal liberty includes dignity of individuals which is so precious a right that it is

placed on a higher pedestal than all or any of the fundamental rights conferred by Part III. The right to reputation is an inherent right guaranteed by Article 21 and hence, the right to freedom of speech and expression under Article 19(1)(a) has to be balanced with the right under Article 21 and cannot prevail over the right under Article 21.

iv. The test of reasonableness has been invariably applied when deciding the constitutionality of a plenary legislation. As Article 19(2) itself uses the words "existing laws" and "defamation", and as the offence of defamation is defined in Section 499, it must be held to have been incorporated in the Constitution at least to the extent it is defined in Section 499 ('*nomen juris*'). It is, thus, not open to challenge as being an unreasonable restriction for there is no other law that defined "defamation".

v. The test of reasonableness cannot be a principle in abstraction. A general pattern cannot be conceived to be made applicable to all cases because it will depend upon the nature of right infringed or violated and the underlying

purpose of the imposition of restrictions. The evil thought to be remedied and the prevailing conditions of the time are to be kept in view while judging proportionality of the restriction. Being a part of the original Constitution, the penal provision as to defamation having been approved by the constituent power when Article 19(2) was enacted, it cannot now be held to be unreasonable. If defamation as an offence is a reasonable law for the purposes of Article 19(2), it has to be equally a reasonable law for the purposes of Article 14. The principle of a law being worn out by passage of time and the principle of *'Cessante Ratione Legis Cessat Ipsa Lex'* cannot be applied to a constitutional provision like Article 19(2) or to procedural laws. Section 500 IPC does not impose any mandatory minimum punishment and when a penal law does not mandate a minimum sentence but provides only for simple imprisonment with discretion vested in the Court, the provision will not be struck down as arbitrary or unreasonable.

vi. Right to life and liberty is an inherent right and natural right and not a right conferred by the Constitution but recognized and protected by it. Judge-made law is meant to protect fundamental rights and not to impose restrictions on the fundamental rights. The constitutional courts are assigned the role of a "Sentinel on the qui vive". In the said bedrock, the right to life which includes right to reputation has to be protected and respected and cannot be allowed to succumb to the right to freedom of speech and expression.

vii. The inherent right to life or personal liberty recognized by Article 21, the fundamental right of freedom of speech conferred by Article 19(1)(a) read with Article 19(2) and Article 194 dealing with the Powers, Privileges etc. of the Houses of Legislature and of the Members and Committees thereof (Article 105 also corresponds to this Article) were considered and harmoniously interpreted and applied in ***Special Reference No 1 of 1964***[5] wherein this Court also observed that if a citizen moves the High Court on the ground that his

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fundamental right under Article 21 has been contravened, the High Court would be entitled to examine his claim, and that itself would introduce some limitation on the extent of the powers claimed by the House. Thus, balancing of rights is a constitutional warrant.

Mr. T.R. Andhyarujina, Sr. Advocate

i. Freedom of speech and expression in India is not absolute but subject to various restrictions mentioned in the Constitution itself. Article 19(1)(a) is subject to the restrictions prescribed by Article 19(2) of the Constitution. The protection given to criticism of public officials even if not true, as in the case of ***New York Times v. Sullivan***[6], is not protected by Article 19(1)(a) as this Court has noted that there is a difference between Article 19(1)(a) and the First Amendment to the US Constitution

ii. A law of defamation protects reputation of a person. Reputation is an integral and important part of the dignity of the individual and when reputation is damaged, society as

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well as the individual is the loser. Protection of reputation is conducive to the public good. Therefore, freedom of expression is not an absolute right.

iii. While the freedom of speech and expression is, no doubt, extremely relevant and requires protection as a fundamental right, at the same time, it is necessary that the reputation of individuals requires to be protected from being unnecessarily tarnished. Reputation is an element of personal security and is protected as a fundamental right under Article 21 of the Constitution and requires equal protection. The right to freedom of expression under Article 19 is subject to the right to reputation. It is to be noted that civil action for defamation would not be a satisfactory remedy in many cases as the author of the defamation may not be able to compensate the person defamed.

iv. The prosecution of a person for defamation under Sections 499 and 500 of IPC is not absolute. The crime is subject to ten Exceptions in favour of the author of the imputation. The most relevant is First Exception which

protects the author if the imputation is true and made for the public good. Even with the Exceptions in Section 499 IPC, there remains the problem of whether criminal prosecution for defamation under Section 499 and Section 500 IPC acts as a "chilling effect" on the freedom of speech and expression or a potential for harassment, particularly, of the press and media. Fair comment on a matter of public interest is not actionable in civil action for defamation. This right is one of the aspects of the fundamental principles of freedom of expression and the courts are zealous to preserve it unimpaired; and the said principle has been stated in ***Salmon and Heuston on Law of Torts, 25th Ed., p. 138***.

v. In a prosecution for defamation under Section 499 IPC, fair comment which is not covered by the Exceptions would not be protected. The prospect of punishment may sometimes act as a deterrent on the freedom of speech. Section 199(2) CrPC may also give an unfair disadvantage to have a public prosecutor in cases of a libel against a Minister or a public servant. These factors need to be considered for safeguarding

the freedom of speech. Section 499 IPC be read to provide that imputation and criticism or fair comment even if not true but made in good faith and in the public interest would not invite criminal prosecution. Such and other qualifications may be considered as necessary to retain criminal defamation as a reasonable restriction on the freedom of speech and expression. Hence, there may be a need to have a proper balancing between the freedom of speech and the necessity of criminal defamation.

19. We have studiedly put forth the submissions of the learned counsel for the parties. They have referred to various authorities and penetratingly highlighted on numerous aspects to which we shall advert to at the appropriate stage. Prior to that, we intend to, for the sake of clarity and also keeping in view the gravity of the issue, dwell upon certain aspects.

20. First, we shall expatiate on the concepts of "defamation" and "reputation". The understanding of the term "defamation"

and appreciation of the fundamental concept of "reputation" are absolutely necessitous to understand the controversy.

21. **Meaning of the term "defamation"**

i. ***Salmond & Heuston*** on the ***Law of Torts***, **20th Edn.**[7] define a defamatory statement as under:-

> "A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right thinking member of society…"

ii. ***Halsburys Laws of England***, Fourth Edition, Vol. 28, defines 'defamatory statement' as under:-

> "A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling trade or business."

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7 *Bata India Ltd. v. A.M. Turaz & Ors*. 2013 (53) PTC 586; *Pandey Surindra Nath Sinha v. Bageshwari Pd.*. AIR 1961 Pat. 164

iii. The definition of the term has been given by Justice Cave in the case of ***Scott v. Sampson***[8] as a "false statement about a man to his discredit."

iv. Defamation, according to ***Chambers Twentieth Century Dictionary***, means to take away or destroy the good fame or reputation; to speak evil of; to charge falsely or to asperse. According to Salmond:-

> "The wrong of defamation, consists in the publication of a false and defamatory statement concerning another person without lawful justification. The wrong has always been regarded as one in which the Court should have the advantage of the personal presence of the parties if justice is to be done. Hence, not only does an action of defamation not survive for or against the estate of a deceased person, but a statement about a deceased person is not actionable at the suit of his relative"[9].

v. ***Winfield & Jolowics on Torts***[10] defines defamation thus:-

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8 (1882) QBD 491

9 Gatley's Libel and Slander, 6th edition, 1960 also Odger's Libel and Slander 6th Ed. 1929

10 (17th Edn. 2006)

> "Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person.

vi. In the book "***The Law of Defamation"***[11], the term defamation has been defined as below:-

> "Defamation may be broadly defined as a false statement of which the tendency is to disparage the good name or reputation of another person."

vii. In ***Parmiter v. Coupland***[12], defamation has been described as:-

> 'A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule."

viii. The definition of defamation by Fraser was approved by Mc Cardie J in ***Myroft v. Sleight***[13]**.** It says:-

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11 Richard O' Sullivan, QC and Roland Brown

12 (1840) 6 MLW 105

13 **(**1921) 37 TLR 646

> "a defamatory statement is a statement concerning any person which exposes him to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or trade."

ix. ***Carter Ruck*** on ***Libel and Slander***[14] has carved out some of the tests as under:

> "(1) a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, professional or trade.
>
> (2) a false statement about a man to his discredit.
>
> (3) would the words tend to lower the plaintiff in the estimation of right thinking members of society generally"

22. We have noted the aforesaid definitions, descriptions and analytical perceptions only to understand how the concept has been extensively dealt with regard being had to its ingredients and expanse, and clearly show the solemnity of 'fame' and its sapient characteristics. Be it stated, Section 499 IPC defines fame and covers a quite range of things but

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14 *Manisha Koirala v. Shashi Lal Nair & Ors, 2003 (2) Bom CR 136*

the reference to the term 'fame' is to ostracise the saying that "fame is a food that dead men eat".

23. CONCEPT OF REPUTATION

Having dealt about "defamation", we would like to refer to the intrinsic facets of "reputation" and what constitutes reputation. The allusions would clearly exposit the innate universal value of "reputation" and how it is a cherished constituent of life and not limited or restricted by time. The description may be different, but the crucial base is the same.

Vision of the Ancients

i. In Bhagawad Gita, it has been said :-

अहिंसा सत्यमक्रोधस्त्यागः शान्तिरपैशुनम्।
दया भूतेष्वलोलुप्त्वं मार्दवं ह्रीरचापलम् ॥१६- २॥

The English translation of the aforequoted shloka is:

> "Non-violence in thought, word and deed, truthfulness and geniality of speech, absence of anger even on provocation, disclaiming doership in respect of actions, quietude or composure of mind. Abstaining from malicious gossip, compassion towards all creatures, absence of attachment to the objects of senses even during their contact with the senses, mildness, a sense of shame in transgressing against the scriptures or usage, and abstaining from frivolous pursuits."

ii. In *Subhashitratbhandagaram*, it has been described:-

"***Sa jeevti yasho yashya kirtiyashya sa jeevti,***

Ayashokirtisanyukto jeevannipe mritoopamma"

Translated into English it is as follows:

"One who possesses fame alone does live. One who has good praise does alone live. Who has no fame and negative praise is equal to one who is dead while alive."

iii. The English translation of Surah 49 Aayaat 11 of the Holy Quran reads as follows:-

"Let not some men among you laugh at others: it may be that the (latter) are better than the (former): nor defame nor be sarcastic to each other, nor call each other by (offensive) nicknames, ill-seeming is a name connoting wickedness, (to be used of one) after he has believed: and those who do not desist are (indeed) doing wrong."

iv. Proverb 15 of the Holy Bible reads as under:-

"A soft answer turns away wrath,
but a harsh word stirs up anger.
The tongue of the wise dispenses
knowledge,
but the mouths of fools pour out
folly.
The eyes of the LORD are in every
place,
keeping watch on the evil and the good.

A gentle tongue is a tree of life,
but perverseness in it breaks the spirit."

Though the aforesaid sayings have different contexts, yet they lay stress on the reputation, individual honour and also the need of gentleness of behavior on the part of each one.

Thoughts of the creative writers and thinkers

24. William Shakespeare in **Othello** expressed his creative thoughts on character by the following expression:-

"Good name in man and woman, my dear lord,
is the immediate jewel of their souls
Who steals my purse steals trash; 'tis something, nothing;
'T was mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed,"

25. The said author in **Richard II**, while enhancing the worth of individual reputation, achieved his creative heights, and the result in the ultimate is the following passage:-

"The purest Treasure mortal times afford
Is spotless reputation; that away,
Men are but gilded loam or painted clay.
A jewel in a ten-times-barr'd-up chest
Is a bold spirit in a loyal breast.
Mine honour is my life, both grow in one;
Take honour from me and my life is done."

26. The famous Greek philosopher and thinker Socrates taught:-

> "Regard your good name as the richest jewel you can possibly be possessed of – for credit is like fire; when once you have kindled it you may easily preserve it, but if you once extinguish it, you will find it an arduous task to rekindle it again. The way to gain a good reputation is to endeavour to be what you desire to appear."

27. The philosopher in Aristotle inspired him to speak:-

> "Be studious to preserve your reputation; if that be once lost, you are like a cancelled writing, of no value, and at best you do but survive your own funeral".

28. While speaking about reputation, William Hazlitt had to say:-

> "A man's reputation is not in his own keeping, but lies at the mercy of the profligacy of others. Calumny requires no proof. The throwing out of malicious imputations against any character leaves a stain, which no after-refutation can wipe out. To create an unfavourable impression, it is not necessary that certain things should be true, but that they have been said. The imagination is of so delicate a texture that even words wound it."

The International Covenants

29. Various International Covenants have stressed on the significance of reputation and honour in a person's life. The ***Universal Declaration on Human Rights, 1948*** has explicit provisions for both, the right to free speech and right to reputation. Article 12 of the said Declaration provides that:-

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

30. ***The International Covenant on Civil and Political Rights*** (CICCPR) contains similar provisions. Article 19 of the Covenant expressly subjects the right of expression to the rights and reputation of others. It reads thus:-

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or imprint, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to

certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (order public), or of public health or morals".

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

"Article 8. Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

"**Article 10. Freedom of expression**

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

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

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

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

Perception of the Courts in United Kingdom as regards Reputation

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

34. Lord Denning explained the distinction between character and reputation in ***Plato Films Ltd. v. Spiedel***[15] in a succinct manner. We quote:-

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

15 (1961) 1 All. E.R. 876

his own personality or disposition. That is why Cave J. spoke of "reputation" rather than "character."

The truth is that the word "character" is often used, and quite properly used, in the same sense as the word "reputation." Thus, when I say of a man that "He has always "borne a good character," I mean that he has always been thought well of by others: and when I want to know what his "character" is, I write, not to him, but to others who know something about him. In short, his "character" is the esteem in which he is held by others who know him and are in a position to judge his worth. A man can sue for damage to his character in this sense, even though he is little known to the outside world. If it were said of Robinson Crusoe that he murdered Man Friday, he would have a cause of action, even though no one had ever heard of him before. But a man's "character," so understood, may become known to others beyond his immediate circle. In so far as the estimate spreads outwards from those who know him and circulates among people generally in an increasing range, it becomes his "reputation," which is entitled to the protection of the law just as much as his character. But here I speak only of a reputation which is built upon the estimate of those who know him. No other reputation is of any worth. The law can take no notice of a reputation which has no foundation except the gossip and rumour of busybodies who do not know the man. Test it this way. Suppose an honourable man becomes the victim of groundless rumour. He should be entitled to damages without having this wounding gossip dragged up against him. He can call people who know him to give evidence of his good character. On the other hand, suppose a "notorious rogue" manages to conceal his

> dishonesty from the world at large. He should not be entitled to damages on the basis that he is a man of unblemished reputation. There must, ones would think, be people who know him and can come and speak to his bad character."

35. In regard to the importance of protecting an individual's reputation Lord Nicholls of Birkenhead observed in ***Reynolds v. Times Newspapers Ltd***[16]:-

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

16 [2001] 2 AC 127 at 201

> are necessary in a democratic society for the protection of the reputations of others."

36. While deliberating on possible balance between the right to reputation and freedom of expression, in ***Campbell v. MGN Ltd***[17], it has been stated:-

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

View of the Courts in United States

37. In ***Wisconsin v. Constantineau***[18] it has been observed that:-

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an

17 (2004) UKHL 22 at para 55

18 400 U.S. 433 (1971)

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

38. In ***Rosenblatt v. Baer***[19] Mr. Justice Stewart observed that:-

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

Outlook of the Courts in Canada

39. ***Hill v. Church of Scientology of Toronto***[20]

"(ii) The Reputation of the Individual

19 383 U.S. 75 (1966)

20 [1995] 2 SCR 1130

> 107 The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.
>
> 108 Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited."

Opinion of the Courts in South Africa

40. In the approach of the South African Courts, "human dignity" is one of the founding values of the South African Constitution (Clause 1). The Constitution protects dignity

(clause 7), privacy (clause 14) and freedom of expression (clause 16). In ***Khumalo v. Holomisa***[21] the Court said:-

> "27. In the context of the actio injuriarum, our common law has separated the causes of action for claims for injuries to reputation (fama) and dignitas. Dignitas concerns the individual's own sense of self worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. [a footnote here in the judgment reads: "See National Coalition .. at para 30: "The present case illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy."] The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion... This right serves to foster human dignity. No sharp lines then can be drawn between

21 [2002] ZACC 12; 2002 (5) SA 401

> reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution. ...
>
> 28. The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other."

Perception of the European Court of Human Rights

41. In ***Lindon v. France***[22], Judge Loucaides, in his concurring opinion, held:-

> "Accepting that respect for reputation is an autonomous human right, which derives its source from the Convention itself, leads inevitably to a more effective protection of the reputation of individuals vis-à-vis freedom of expression."

42. In the said case, the Court has expressly recognised that protection of reputation is a right which is covered by the scope of the right to respect for one's private life under Article 8 of the Convention. In course of deliberations reference has

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22 (2008) 46 E.H.R.R. 35

been made to ***Chauvy and Others v. France***[23], ***Abeberry v. France (dec.)***, no. 58729/00, 21 September 2004; and ***White v. Sweden***[24].

43. In ***Karakó v. Hungary***[25] the Court has opined that:-

> "24. The Court reiterates that paragraph 2 of Article 10 recognises that freedom of speech may be restricted in order to protect reputation (see paragraph 16 above). In other words, the Convention itself announces that restrictions on freedom of expression are to be determined within the framework of Article 10 enshrining freedom of speech.
>
> 25. The Court is therefore satisfied that the inherent logic of Article 10, that is to say, the special rule contained in its second paragraph, precludes the possibility of conflict with Article 8. In the Court's view, the expression "the rights of others" in the latter provision encompasses the right to personal integrity and serves as a ground for limitation of freedom of expression in so far as the interference designed to protect private life is proportionate."

44. In ***Axel Springer AG v. Germany***[26] it has been ruled:-

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23 (2005) 41 EHRR 29

24 [2007] EMLR 1

25 (2011) 52 E.H.R.R. 36

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> "... [T]he right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life ... In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life ... The Court has held, moreover, that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence ...
>
> When examining the necessity of an interference in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8."

The perspective of this Court

45. In ***Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and others***[27], the Court has opined that expression "Life" does not merely

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(2012) 55 E.H.R.R. 6

27 (1983) 1 SCC 124

connote animal existence or a continued drudgery through life. Further, it proceeded to state thus:-

> "... The expression "life" has a much wider meaning. Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilization which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedures. In this context one can recall the famous words of Chapter II of *Bhagwad-Gita*:
>
> *"Sambhavitasya Cha Kirti Marnadati Richyate"*

46. In ***Kiran Bedi v. Committee of Inquiry and another***[28], a three-Judge Bench, while dealing with the petition for quashing of the inquiry report against the petitioner therein, referred to Section 8-B of the Commissions of Inquiry Act, 1952 and opined that the importance has been attached with regard to the matter of safeguarding the reputation of a person being prejudicially affected in clause (b) of Section 8-B of the Commissions of Inquiry Act. It is because reputation of an individual is a very ancient concept. The Court referred to the words of caution uttered by Lord Krishna to Arjun in

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28 (1989) 1 SCC 494

Bhagwad Gita with regard to dishonour or loss of reputation; and proceeded to quote:-

> "*Akirtinchapi bhutani kathaishyanti te-a-vyayam, Sambha-vitasya Chakirtir maranadatirichyate*. (2.34)
>
> (Men will recount thy perpetual dishonour, and to one highly esteemed, dishonour exceedeth death.)"

Thereafter, the Court referred to Blackstone's *Commentary of the Laws of England*, Vol. I, 4th Edn., wherein it has been stated that the right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. Thereafter, advertence was made to the statement made in *Corpus Juris Secundum*, Vol. 77 at p. 268 which is to the following effect:-

> "It is stated in the definition Person, 70 C.J.S. p. 688 note 66 that legally the term "person" includes not only the physical body and members, but also every bodily sense and personal attribute, among which is the reputation a man has acquired. Blackstone in his *Commentaries* classifies and distinguishes those rights which are annexed to the person, *jura personarum*, and acquired rights in external objects, *jura rerum*; and in the former he

includes personal security, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. And he makes the corresponding classification of remedies. The idea expressed is that a man's reputation is a part of himself, as his body and limbs are, and reputation is a sort of right to enjoy the good opinion of others, and it is capable of growth and real existence, as an arm or leg. Reputation is, therefore, a personal right, and the right to reputation is put among those absolute personal rights equal in dignity and importance to security from violence. According to Chancellor Kent as a part of the rights of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection.

The right to the enjoyment of a good reputation is a valuable privilege, of ancient origin, and necessary to human society, as stated in Libel and Slander Section 4, and this right is within the constitutional guaranty of personal security as stated in Constitutional Law Section 205, and a person may not be deprived of this right through falsehood and violence without liability for the injury as stated in Libel and Slander Section 4.

Detraction from a man's reputation is an injury to his personality, and thus an injury to reputation is a personal injury, that is, an injury to an absolute personal right".

Be it noted a passage from ***D.F. Marion v. Davis***[29], was reproduced with approval:-

> "The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property."

47. In ***Gian Kaur v. State of Punjab***[30], this Court observed that the right to reputation is a natural right. In ***Mehmood Nayyar Azam v. State of Chhatisgarh and others***[31], while discussing the glory of honourable life, the Court observed:-

> "Albert Schweitzer, highlighting on the Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is

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29 55 ALR 171

30 (1996) 2 SCC 648

31 (2012) 8 SCC 1

insegregably associated with the dignity of a human being who is basically divine, not servile."

Elucidating further, the Court observed:-

"A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief candle", or "a hollow bubble". The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence". When a dent is created in the reputation, humanism is paralysed…."

48. In ***Vishwanath Agrawal v. Saral Vishwanath Agrawal***[32] this Court observed that reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is a revenue generator for the present as well as for the posterity. In ***Umesh Kumar v. State of Andhra Pradesh and another***[33] the Court observed that personal rights of a human being include the right of reputation. A good reputation is an element of personal

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32 (2012) 7 SCC 288

33 (2013) 10 SCC 591

security and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property and as such it has been held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution. The International Covenant on Civil and Political Rights, 1966 recognises right to have opinions and right to freedom of expression under Article 19 is subject to the right of reputation of others.

49. In ***Kishore Samrite v. State of Uttar Pradesh and others***[34], while dealing with the term "person" in the context of reputation, the Court after referring to the authorities in ***Kiran Bedi*** (supra) and ***Nilgiris Bar Association v. T.K. Mahalingam and another***[35] held that:-

> "The term "person" includes not only the physical body and members but also every bodily sense and personal attribute among which is the reputation a man has acquired. Reputation can also be defined to be good name, the credit, honour or character which is derived from a favourable public opinion or esteem, and character by report. The right to enjoyment of a good reputation is a valuable

34 (2013) 2 SCC 398

35 (1998) 1 SCC 550

> privilege of ancient origin and necessary to human society. "Reputation" is an element of personal security and is protected by the Constitution equally with the right to enjoyment of life, liberty and property. Although "character" and "reputation" are often used synonymously, but these terms are distinguishable. "Character" is what a man is and "reputation" is what he is supposed to be in what people say he is. "Character" depends on attributes possessed and "reputation" on attributes which others believe one to possess. The former signifies reality and the latter merely what is accepted to be reality at present. …"

50. In ***Om Prakash Chautala v. Kanwar Bhan and others***[36] it has been held that reputation is fundamentally a glorious amalgam and unification of virtues which makes a man feel proud of his ancestry and satisfies him to bequeath it as a part of inheritance on posterity. It is a nobility in itself for which a conscientious man would never barter it with all the tea of China or for that matter all the pearls of the sea. The said virtue has both horizontal and vertical qualities. When reputation is hurt, a man is half-dead. It is an honour which deserves to be equally preserved by the downtrodden and the privileged. The aroma of reputation is an excellence

36 (2014) 5 SCC 417

which cannot be allowed to be sullied with the passage of time. It is dear to life and on some occasions it is dearer than life. And that is why it has become an inseparable facet of Article 21 of the Constitution. No one would like to have his reputation dented, and it is perceived as an honour rather than popularity.

51. In ***State of Gujarat and another v. Hon'ble High Court of Gujarat***[37], the court opined:-

> "An honour which is a lost or life which is snuffed out cannot be recompensed"

52. We have dwelled upon the view of this Court as regards value of reputation and importance attached to it. We shall be obliged, as we are, to advert to some passages from the aforementioned authorities and also from other pronouncements to understand the Court's "accent" on reputation as an internal and central facet of right to life as projected under Article 21 of the Constitution at a later stage.

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37 (1998) 7 SCC 392

53. Having reconnoitered the assessment of the value of reputation and scrutinised the conceptual meaning of the term "reputation", we are required to weigh in the scale of freedom of speech and expression, especially under our Constitution and the nature of the democratic polity the country has.

Right of the Freedom of Speech and Expression

54. To appreciate the range and depth of the said right, it is essential to understand the anatomy of Articles 19(1)(a) and 19(2) of the Constitution. Be it noted here that Article 19(2) was amended by the 1st Amendment to the Constitution on 18th June, 1951 w.e.f. 26.01.1950. Article 19(1)(a) has remained its original form. It reads as under:-

> "19. (1) All citizens shall have the right –
>
> (a) To freedom of speech and expression;
>
> .....

55. Article 19(2) prior to the amendment was couched in the following words:-

> "Nothing in sub-clause (a) of Cl.(1) shall affect the operation of any existing law in so far as it relates to, or prevents the state from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

56. After the amendment, the new incarnation is as follows:-

> "(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 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."

57. Learned counsel appearing for some of the petitioners, apart from addressing at length on the concept of reasonable restriction have also made an effort, *albeit* an Everestian one, pertaining to the meaning of the term "defamation" as used in Article 19(2). In this regard, four aspects, namely, (i) defamation, however extensively stretched, can only include a civil action but not a criminal proceeding, (ii) even if defamation is conceived of to include a criminal offence,

regard being had to its placement in Article 19(2), it has to be understood in association of the words, "incitement to an offence", for the principle of *noscitur a sociis* has to be made applicable, then only the cherished and natural right of freedom of speech and expression which has been recognized under Article 19(1)(a) would be saved from peril, (iii) the intention of clause (2) of Article 19 is to include a public law remedy in respect of a grievance that has a collective impact but not to take in its ambit an actionable claim under the common law by an individual and (iv) defamation of a person is mostly relatable to assault on reputation by another individual and such an individual cavil cannot be thought of being pedestalled as fundamental right and, therefore, the criminal defamation cannot claim to have its source in the word "defamation" used in Article 19(2) of the Constitution.

58. To appreciate the said facets of the submission, it is necessary to appreciate ambit and purport of the word "defamation". To elaborate, whether the word "defamation" includes both civil and criminal defamation. Only after we answer the said question, we shall proceed to advert to the

aspect of reasonable restriction on the right of freedom of speech and expression as engrafted under Article 19(1)(a). Mr. Rohtagi, learned Attorney General for India has canvassed that to understand the ambit of the word "defamation" in the context of the language employed in Article 19(2), it is necessary to refer to the Constituent Assembly debates. He has referred to certain aspects of the debates and we think it appropriate to reproduce the relevant parts:-

> "**The Honourable Dr. B.R. Ambedkar**: Sir, this article is to be read along with article 8.
>
> Article 8 says –
>
> "All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with the provision of this Part, shall, to the extent of such inconsistency be void."
>
> And all that this article says is this, that all laws, which relate to libels, slander, defamation or any other matter which offends against decency or morality or undermines the security of the State shall not be affected by article 8. That is to say, they shall continue to operate. If the words "contempt of court" were not there, then to any law relating to contempt of court article 8 would apply, and it would stand abrogated. It is prevent that kind of situation that the words "contempt of court" are introduced, and there is,

therefore, no difficulty in this amendment being accepted.

Now with regard to the point made by Friend Mr. Santhanam, it is quite true that so far as fundamental rights are concerned, the word "State" is used in a double sense, including the Centre as well as the Provinces. But I think he will bear in mind that notwithstanding this fact, a State may make a law as well as the Centre may make a law, some of the heads mentioned here such as libel, slander, defamation, security of State, etc., are matters placed in the Concurrent list so that if there was any very great variation among the laws made, relating to these subjects, it will be open to the Centre to enter upon the field and introduce such uniformity as the Centre thinks it necessary for this purpose".

"**Mahaboob Ali Baig Sahib Bahadur**...

Then, Sir, it is said by Dr. Ambedkar in his introductory speech that fundamental rights are not absolute. Of course, they are not; they are always subject to the interests of the general public and the safety of the State, but the question is when a certain citizen oversteps the limits so as to endanger the safety of the State, who is to judge? According to me, Sir, and according to well recognized canons, it is not the executive or the legislature, but it is the independent judiciary of the State that has to judge whether a certain citizen has overstepped the limits so as to endanger the safety of the State. This distinction was recognized by the framers of the American Constitution in that famous Fourteenth Amendment which clearly laid down that no Congress can make any law to prejudice the freedom of speech, the freedom of association and the freedom of the press. This

was in 1791, and if the American citizen transgressed the limits and endangered the State, the judiciary would judge him and not the legislature or the executive."

The following speech from the Constituent Assembly Debates of **Shri. K. Hanumanthaiya (Mysore)** is extremely significant:

"The question next arises whether this limiting authority should be the legislature or the court. That is a very much debated question. Very many people, very conscientiously too, think that the legislature or the executive should not have anything to do with laying down the limitations for the operation of these fundamental rights, and that it must be entrusted to courts which are free from political influences, which are independent and which can take an impartial view. That is the view taken by a good number of people and thinkers. Sir, I for one, though I appreciate the sincerity with which this argument is advanced, fail to see how it can work in actual practice. Courts can, after all, interpret the law as it is. Law once made may not hold good in its true character for all time to come. Society changes; Government change; the temper and psychology of the people change from decade to decade if not from year to year. The law must be such as to automatically adjust itself to the changing conditions. Courts cannot, in the very nature of things, do legislative work; they can only interpret. Therefore, in order to see that the law automatically adjusts to the conditions that come into being in times to come, this power of limiting the operation of the fundamental rights is given to the legislature. After all, the legislature does not consist of people who come without the sufferance of the people. The legislature consists of real representatives of the people as laid down

in this Constitution. If, at a particular time the legislature thinks that these rights ought to be regulated in a certain manner and in a particular method, there is nothing wrong in it, nothing despotic about it, nothing derogatory to these fundamental rights. I am indeed glad that this right of regulating the exercise of fundamental rights is given to the legislature instead of to the courts."

59. In this regard, excerpts from speech from **Prof. K.T. Shah** are also noteworthy:-

"... my purpose in bringing forward this amendment is to point out that, if all the freedoms enumerated in this article are to be in accordance with only the provisions of this article, or are to be guaranteed subject to the provisions of this article only, then they would amount more to a negation of freedom than the promise or assurance of freedom, because in everyone of these clauses the exceptions are much more emphasised than the positive provision. In fact, what is given by one right hand seems to be taken away by three or four or five left hands; and therefore the article is rendered negatory in any opinion.

I am sure that was not the intention or meaning of the draftsmen who put in the other articles also. I suggest therefore that instead of making it subject to the provisions of this article, we should make it subject to the provisions of this Constitution. That is to say, in this Constitution this article will remain. Therefore if you want to insist upon these exceptions, the exceptions will also remain. But the spirit of the Constitution,

the ideal under which this Constitution is based, will also come in, which I humbly submit, would not be the case, if you emphasise only this article. If you say merely subject to the provisions of this article, then you very clearly emphasise and make it necessary to read only this article by itself, which is more restrictive than necessary. ...

... The freedoms are curtly enumerated in 5, 6 or 7 items in one sub-clause of the article. The exceptions are all separately mentioned in separate sub-clauses. And their scope is so widened that I do not know what cannot be included as exception to these freedoms rather than the rule. In fact, the freedoms guaranteed or assured by this article become so elusive that one would find it necessary to have a microscope to discover where these freedoms are, whenever it suits the State or the authorities running it to deny them. I would, therefore, repeat that you should bring in the provisions of the whole Constitution, including its Preamble and including all other articles and chapters where the spirit of the Constitution should be more easily and fully gathered than merely in this article, which, in my judgment, runs counter to the spirit of the Constitution. ...

I also suggest that it would not be enough to enumerate these freedoms, and say the citizen shall have them. I would like to add the words also that by this Constitution these freedoms are guaranteed. That is to say, any exception which is made, unless justified by the spirit of the Constitution, the Constitution as a whole and every part of it included, would be a violation of the freedoms guaranteed hereby."

Relying on the said debates, it is urged by Mr. Rohatgi that the founding fathers had no intention to confer a restricted meaning on the term "defamation".

60. After this debate, Article 19(2) came in its original shape. Thereafter, the First Amendment to the Constitution, passed in June, 1951 which empowered the State to impose "reasonable restrictions" on the freedom of speech and expression "in the interests of the security of the State[38], friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to an offence". The words "libel" and "slander" were dropped. "Incitement to an offence" was added as a response to the rulings in ***State of Bihar v. Shailabala Devi[39] and Brij Bhushan v. State of Delhi[40]***. The restrictions were qualified by prefixing the word "reasonable". The 16th

38 Replacing the words *"tends to overthrow the State"*.

39 AIR 1952 SC 329

40 1952 SCR 654 : AIR 1950 SC 129

Amendment to the Constitution in 1963 added the power to impose restrictions on the freedom of speech and expression in the interests of "sovereignty and integrity of India".

61. We may state with profit that the debates of the Constituent Assembly can be taken aid of for the purpose of understanding the intention of the framers of the Constitution. In ***S.R. Chaudhuri v. State of Punjab and others***[41] a three-Judge Bench has observed that Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. While so observing, the Court proceeded to state that it is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function

41 (2001) 7 SCC 126

of the court to find out the intention of the framers of the Constitution. It was also highlighted that the Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit. In ***Special Reference No. 1 of 2002, In re*** (Gujarat Assembly Election matter)[42], the issue of relying on the Constituent Assembly Debates again came up for consideration. Khare, J. (as His Lordship then was) referred to ***His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another***[43] and held:-

> "Constituent Assembly Debates although not conclusive, yet show the intention of the framers of the Constitution in enacting provisions of the Constitution and the Constituent Assembly Debates can throw light in ascertaining the intention behind such provisions."

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42 (2002) 8 SCC 237

43 (1973) 4 SCC 225

62. Recently, in ***Manoj Narula v. Union of India***[44] the majority in the context of understanding the purpose of Article 75 of the Constitution referred to the Constituent Assembly debates.

63. We have referred to the aforesaid aspect only to highlight the intention of the founding fathers and also how contextually the word "defamation" should be understood. At this stage, we may state that in the course of hearing, an endeavour was made even to the extent of stating that the word "defamation" may not even call for a civil action in the absence of a codified law. In this regard, we may usefully refer to M.C. Setalvad's Hamlyn Lectures (Twelfth Series) "The Common Law of India" wherein India's first Attorney General expressed that:-

> "an important branch of law which has remained uncodified in India is the law relating to civil wrongs.
>
> Some of the most important rights of a person which the law protects from injury are rights to the security of his person, his domestic relations and his property and reputation… (page 108)

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44 (2014) 9 SCC 1

> One of the outstanding fact of English legal history for the last three centuries is the development of the law of torts from small beginnings to its present dimensions as a separate branch of law. The action for damages as a remedy for violations of rights and duties has been fashioned by lawyers, judges and juries of England as an instrument for making people adhere to standards of reasonable behavior and respect the rights and interest of one another. A body of rules has grown and is constantly growing in response to new concepts of right and duty and new needs and conditions of advancing civilization. The principles which form the foundation of the law of torts are usually expressed by saying the *injuria sine damno is actionable but damnum sine (or absque) injuria is not.* …"(page 109)

64. The common law of England was the prevalent law being adopted before the Constitution came into force and it is declared as a law in force under Article 372 of the Constitution of India by a larger Bench decision in ***Superintendent and Remembrancer of Legal Affairs v. Corporation of Calcutta***[45].

65. The position has further become clear in ***Ganga Bai v. Vijay Kumar***[46] wherein this Court has ruled thus:-

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45 AIR 1967 SC 997 = 1967 (2) SCR 170

46 (1974) 2 SCC 393

> "There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statue one may, at one's peril, bring a suit one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit."

66. We have referred to this aspect only to clarify the position that it is beyond any trace of doubt that civil action for which there is no codified law in India, a common law right can be taken recourse to under Section 9 of the Code of Civil Procedure, 1908, unless there is specific statutory bar in that regard.

67. The other aspect that is being highlighted in the context of Article 19(2)(a) is that defamation even is conceived of to include a criminal offence, it must have the potentiality to "incite to cause an offence". To elaborate, the submission is the words "incite to cause an offence" should be read to give attributes and characteristics of criminality to the word "defamation". It must have the potentiality to lead to breach of peace and public order. It has been urged that the intention of clause (2) of Article 19 is to include a public law remedy in

respect of a grievance that has a collective impact but not as an actionable claim under the common law by an individual and, therefore, the word "defamation" has to be understood in that context, as the associate words are "incitement to an offence" would so warrant. Mr. Rao, learned senior counsel, astutely canvassed that unless the word "defamation" is understood in this manner applying the principle of *noscitur a sociis*, the cherished and natural right of freedom of speech and expression which has been recognized under Article 19(1)(a) would be absolutely at peril. Mr. Narsimha, learned ASG would contend that the said rule of construction would not be applicable to understand the meaning of the term "defamation". Be it noted, while construing the provision of Article 19(2), it is the duty of the Court to keep in view the exalted spirit, essential aspects, the value and philosophy of the Constitution. There is no doubt that the principle of *noscitur a sociis* can be taken recourse to in order to understand and interpret the Constitution but while applying the principle, one has to keep in mind the contours and scope of applicability of the said principle. In ***State of Bombay v.***

Hospital Mazdoor Sabha [47], it has been held that it must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the said rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service.

68. In ***Bank of India v. Vijay Transport and others***[48], the Court was dealing with the contention that a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting

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47 AIR 1960 SC 610 = (1960) 2 SCR 866

48 1988 Supp SCC 47 = AIR 1988 SC 151

in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used. For the said purpose, reliance was placed on ***R.L. Arora v. State of Uttar Pradesh***[49]. Dealing with the said aspect, the Court has observed thus:-

> "... It may be that in interpreting the words of the provision of a statute, the setting in which such words are placed may be taken into consideration, but that does not mean that even though the words which are to be interpreted convey a clear meaning, still a different interpretation or meaning should be given to them because of the setting. In other words, while the setting of the words may sometimes be necessary for the interpretation of the words of the statute, but that has not been ruled by this Court to be the only and the surest method of interpretation. ..."

69. The Constitution Bench, in ***Godfrey Phillips India Ltd. and another v. State of U.P. and others***[50], while expressing its opinion on the aforesaid rule of construction, opined:-

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49 (1964) 6 SCR 784 = AIR 1964 SC 1230

50 (2005) 2 SCC 515

> "81. We are aware that the maxim of *noscitur a sociis* may be a treacherous one unless the "*societas*" to which the "*socii*" belong, are known. The risk may be present when there is no other factor except contiguity to suggest the "*societas*". But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as "including" is sufficiently indicative of the *societas*. As we have said, the word "includes" in the present context indicates a commonality or shared features or attributes of the including word with the included.
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> x x x x
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> 83. Hence on an application of general principles of interpretation, we would hold that the word "luxuries" in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society and not articles of luxury."

70. At this juncture, we may note that in ***Ahmedabad Pvt. Primary Teachers' Assn. v. Administrative Officer and others***[51], it has been stated that *noscitur a sociis* is a legitimate rule of construction to construe the words in an Act of the Parliament with reference to the words found in immediate connection with them. In this regard, we may refer to a

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51 (2004) 1 SCC 755

passage from Justice G.P. Singh, Principles of Statutory Interpretation[52] where the learned author has referred to the lucid explanation given by Gajendragadkar, J. We think it appropriate to reproduce the passage:-

> "It is a rule wider than the rule of *ejusdem generis*; rather the latter rule is only an application of the former. The rule has been lucidly explained by GAJENDRAGADKAR, J. in the following words: "This rule, according to MAXWELL[53], means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general."

Learned author on further discussion has expressed the view that meaning of a word is to be judged from the company it keeps, i.e., reference to words found in immediate connection with them. It applies when two or more words are susceptible of analogous meanings are coupled together, to be read and understood in their cognate sense.[54] *Noscitur a*

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52 13th Edn. 2012 p. 509

53 Maxwell: Interpretation of Statutes, 11th Edition, p. 321

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soccis is merely a rule of construction and cannot prevail where it is clear that wider and diverse etymology is intentionally and deliberately used in the provision. It is only when and where the intention of the legislature in associating wider words with words of narrowest significance is doubtful or otherwise not clear, that the rule of *noscitur a soccis* is useful.

71. The core issue is whether the said doctrine of *noscitur a soccis* should be applied to the expression "incitement of an offence" used in Article 19(2) of the Constitution so that it gets associated with the term "defamation". The term "defamation" as used is absolutely clear and unambiguous. The meaning is beyond doubt. The said term was there at the time of commencement of the Constitution. If the word "defamation" is associated or is interpreted to take colour from the terms "incitement to an offence", it would unnecessarily make it a restricted one which even the founding fathers did not intend to do. Keeping in view the aid that one may take from the Constituent Assembly Debates and regard being had to the

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Principles of Statutory Interpretations by G.P. Singh, Eighth Edition, p. 379

clarity of expression, we are of the considered opinion that there is no warrant to apply the principle of *noscitur a sociis* to give a restricted meaning to the term "defamation" that it only includes a criminal action if it gives rise to incitement to constitute an offence. The word "incitement" has to be understood in the context of freedom of speech and expression and reasonable restriction. The word "incitement" in criminal jurisprudence has a different meaning. It is difficult to accede to the submission that defamation can only get criminality if it incites to make an offence. The word "defamation" has its own independent identity and it stands alone and the law relating to defamation has to be understood as it stood at the time when the Constitution came into force.

72. The submission is that Sections 499 and 500 of IPC are not confined to defamation of the State or its components but include defamation of any private person by another private person totally unconnected with the State. In essence, the proponement is that the defamation of an individual by another individual can be a civil wrong but it cannot be made a crime in the name of fundamental right as protection of

private rights qua private individuals cannot be conferred the status of fundamental rights. If, argued the learned counsel, such a pedestal is given, it would be outside the purview of Part III of the Constitution and run counter to Articles 14, 19 and 21 of the Constitution. It is urged that defamation of a private person by another person is unconnected with the fundamental right conferred in public interest by Article 19(1)(a); and a fundamental right is enforceable against the State but cannot be invoked to serve a private interest of an individual. Elucidating the same, it has been propounded that defamation of a private person by another person cannot be regarded as a 'crime' under the constitutional framework and hence, what is permissible is the civil wrong and the remedy under the civil law. Section 499 IPC, which stipulates defamation of a private person by another individual, has no nexus with the fundamental right conferred under Article 19(1)(a) of the Constitution, for Article 19(2) is meant to include the public interest and not that of an individual and, therefore, the said constitutional provision cannot be the source of criminal defamation. This argument is built up on

two grounds: (i) the common thread that runs through the various grounds engrafted under Article 19(2) is relatable to the protection of the interest of the State and the public in general and the word "defamation" has to be understood in the said context, and (ii) the principle of *noscitur a sociis,* when applied, "defamation" remotely cannot assume the character of public interest or interest of the crime inasmuch a crime remotely has nothing to do with the same.

73. We have already stated about the doctrine of *noscitur a sociis* with regard to 'incitement of an offence'. Mr. Rao, learned senior counsel, has emphasized on public interest relying on the said principle and in that context has commended us to the decisions in ***K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya and another***[55], ***Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others***[56]. In ***Peerless General***

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55 (1999) 4 SCC 135

56 (1987) 1 SCC 424

Finance and Investment Co. Ltd. (supra), Chinnappa Reddy, J. speaking for the Court, has observed that:-

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

74. In ***K. Bhagirathi*** (supra), it has been held that:-

> "It is not a sound principle in interpretation of statutes to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision."

75. The decision in ***Peerless General Finance and Investment Co. Ltd.*** (supra) relates to the principles to be adopted for understanding the statute. In ***K. Bhagirathi*** (supra), the Court has referred to the principle having regard to the statutory context. We have already referred to the decision in ***Hospital Mazdoor Sabha*** (supra) wherein it has been ruled

that the principle of *noscitur a sociis* is merely a rule of construction and it cannot be allowed to prevail in a case where it is clear that wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. The term "defamation" as used in Article 19(2) should not be narrowly construed. The conferment of a narrow meaning on the word would defeat the very purpose that the founding fathers intended to convey and further we do not find any justifiable reason to constrict the application. The word "defamation" as used in Article 19(2) has to be conferred an independent meaning, for it is incomprehensible to reason that it should be read with the other words and expressions, namely, "security of the State", "friendly relations with foreign States", "public order, decency or morality". The submission is based on the premise that "defamation" is meant to serve private interest of an individual and not the larger public interest. Both the aspects of the said submission are interconnected and interrelated. Defamation has been regarded as a crime in the IPC which is a pre-constitutional law. It is urged that such kind of legal right is unconnected with the

fundamental right conceived of under Article 19(1)(a) of the Constitution. Additionally, it is canvassed that reputation which has been held to be a facet of Article 21 in ***Dilipkumar Raghavendranath Nadkarni*** (supra), ***Mehmood Nayyar Azam*** (supra), and ***Umesh Kumar*** (supra), is against the backdrop where the State has affected the dignity and reputation of an individual. This aspect of the submission needs apposite understanding. Individuals constitute the collective. Law is enacted to protect the societal interest. The law relating to defamation protects the reputation of each individual in the perception of the public at large. It matters to an individual in the eyes of the society. Protection of individual right is imperative for social stability in a body polity and that is why the State makes laws relating to crimes. A crime affects the society. It causes harm and creates a dent in social harmony. When we talk of society, it is not an abstract idea or a thought in abstraction. There is a link and connect between individual rights and the society; and this connection gives rise to community interest at large. It is a concrete and visible

phenomenon. Therefore, when harm is caused to an individual, the society as a whole is affected and the danger is perceived.

76. In this context, it is necessary to understand the basic concept of crime. In Halsbury's, 4th Edition, "Principles of Criminal Liability" it has been described thus:-

> "There is no satisfactory definition of crime which will embrace the many acts and omissions which are criminal, and which will at the same time exclude all those acts and omissions which are not. Ordinarily a crime is a wrong which affects the security or well-being of the public generally so that the public has an interest in its suppression. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community. It is, however, possible to instance many crimes which exhibit neither of the foregoing characteristics. An act may be made criminal by Parliament simply because it is criminal process, rather than civil, which offers the more effective means of controlling the conduct in question."

77. In Kenny's Outlines of Criminal law, 19th Edition, 1966 by J.W. Cecil Turner, it has been stated that:-

> "There is indeed no fundamental or inherent difference between a crime and a tort. Any conduct which harms an individual to some extent harms society, since society is made up of individuals; and therefore although it is true to say of crime

that is an offence against society, this does not distinguish crime from tort. The difference is one of degree only, and the early history of the common law shows how words which now suggest a real distinction began rather as symbols of emotion than as terms of scientific classification."

And, again :-

"So long as crimes continue (as would seem inevitable) to be created by government policy the nature of crime will elude true definition. Nevertheless it is a broadly accurate description to say that nearly every instance of crime presents all of the three following characteristics: (1) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (2) that among the measures of prevention selected is the threat of punishment; (3) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so."

78. Stephen defines a Crime thus:-

"a crime is an unlawful act or default which is an offence against the public, rendering the person guilty of such act or default liable to legal punishment. The process by which such person is punished for the unlawful act or default is carried on in the name of the Crown; although any private person, in the absence of statutory provision to the contrary, may commence a criminal prosecution. Criminal proceedings were formerly called pleas of the crown, because the

> King, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community. Wherefore he is, in all cases, the proper prosecutor for every public offence".[57]

79. Blackstone, while discussing the general nature of crime, has defined crime thus:-

> "A crime, or misdemeanour, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours; which, properly speaking, are mere synonyms terms: though, in common usage, the word 'crimes' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of 'misdemeanours' only."[58]

80. The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belongs to individuals, considered merely as individuals; public wrongs

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57 Stephen's : New Commentaries on the Laws of England, Ed 17, Vol.4, Chap I, p.1-2.

58 Blackstone's : Commentaries on the Laws of England; Edited by Wayne Morrison, Vol. 4, p.5

or crimes and misdemeanours are a breach and violation of the public rights and duties due to the whole community in its social aggregate capacity.[59] In all cases the crime includes injury; every public offence is also a private wrong, and somewhat more. It affects the individual, and it likewise affects the community.[60]

81. The constituents of crime in general has been enumerated in Halsbury's Laws of England as "a person is not to be convicted of a crime unless he has, by voluntary conduct, brought about those elements which by common law or statute constitute that crime. In general a person does not incur criminal liability unless he intended to bring about, or recklessly brought about, those elements which constitute the crime. The foregoing concepts are traditionally expressed in maxim "*actus non facit reum nisi mens sit rea*"[61].

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59 Ibid. p. 5

60 Ibid . p. 6

61 Halsbury's Laws of England : Edition 4, Vol.2 , Para 4, p.12

Enforcement of a right and seeking remedy are two distinct facets. It should not be confused.

82. The concept of crime is essentially concerned with social order. It is well known that man's interests are best protected as a member of the community. Everyone owes certain duties to his fellow-men and at the same time has certain rights and privileges which he expects others to ensure for him. This sense of mutual respect and trust for the rights of others regulates the conduct of the members of society *inter-se*. Although most people believe in the principle of 'live and let live', yet there are a few who, for some reason or the other, deviate from this normal behavioural pattern and associate themselves with anti-social elements. This obviously imposes an obligation on the State to maintain normalcy in the society. This arduous task of protecting the law abiding citizens and punishing the law breakers vests with the State which performs it through the instrumentality of law. It is for this reason that Salmond has defined law as a 'rule of action' regulating the conduct of individuals in society. The conducts

which are prohibited by the law in force at a given time and place are known as wrongful acts or crimes, whereas those which are permissible under the law are treated as lawful. The wrongdoer committing crime is punished for his guilt under the law of crime.[62]

83. Mr. Rohtagi has referred to the Blackstone's definition crimes and laid emphasis on the statement of Antony Duff who has lucidly observed that "we should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public i.e. the polity as a whole". In this regard, he has drawn our attention to a passage from **Duff and Marshall** which state that public wrongs are wrongs which village the shared values that normatively define the political community in which fellow citizens are participants. The impact of such wrongs are shared by both the victims and fellow citizens and in this sense, such wrongs, concern the public at large- the polis, the state and fellow citizens. It is because of the "public" element that it is the State rather than

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Criminology and Penology by Dr. N.V Pranjape, 15th Edition, 2012 p. 1

the victim who is principally in-charge of the legal process. It is the police who investigates the case, it is the State that brings the charges and whether charges are brought, how far the case proceeds is up to the prosecution – it is not for the victim to decide the course of the case. On the other hand, in the civil process it is the affected private individual who is primarily in-charge of the legal process and it is for such individual to take the case to its logical conclusion or to drop it if he so chooses – there is no duty on him to bring the case at all.

84. In this context, reference to certain authorities that deliberated the conception of crime in the societal context would be apt. In ***State of Maharashtra v. Sujay Mangesh Poyarekar***[63], this Court has held that every crime is considered as an offence against the society as a whole and not only against an individual even though it is an individual who is the ultimate sufferer. It is, therefore, the duty of the State to take appropriate steps when an offence has been

63 (2008) 9 SCC 475

committed. Yet again, in ***Mohd. Shahabuddin v. State of Bihar and others***[64], it has been observed that every criminal act is an offence against the society. The crime is a wrong done more to the society than to an individual. It involves a serious invasion of rights and liberties of some other person or persons. In ***Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd.***[65], the Court, while deliberating on the issue of compromise in a criminal case, has noted that it is no doubt true that every crime is considered to be an offence against the society as a whole and not only against an individual even though an individual might have suffered thereby. It is, therefore, the duty of the State to take appropriate action against the offender. It is equally the duty of a court of law administrating criminal justice to punish a criminal. The stress is on the duty of the State in taking action against the violator of law.

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64 (2010) 4 SCC 653

65 (2008) 2 SCC 305

85. In ***R. Sai Bharathi v. J. Jayalalitha and others***[66], while opining about crime, it has been observed as under:-

> "56. Crime is applied to those acts, which are against social order and are worthy of serious condemnation. Garafalo, an eminent criminologist, defined "*crime*" in terms of immoral and anti-social acts. He says that:-
>
> > "*crime is an immoral and harmful act that is regarded as criminal by public opinion because it is an injury to so much of the moral sense as is possessed by a community — a measure which is indispensable for the adaptation of the individual to society*".
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> The authors of the Indian Penal Code stated that:
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> > "… We cannot admit that a Penal Code is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that, because an act is not punished at all, it follows that the legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in passion, or breaks a window in a frolic; yet we have punishment for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow creature from death may be a far worse man than the starving wretch who

66 (2004) 2 SCC 9

> snatches and devours the rice; yet we punish the latter for theft, and we do not punish the former for hard-heartedness.""

86. In ***T.K. Gopal alias Gopi v. State of Karnataka***[67], deliberating on the definition of crime, the Court ruled that crime can be defined as an act that subjects the doer to legal punishment. It may also be defined as commission of an act specifically forbidden by law; it may be an offence against morality or social order". In ***Kartar Singh v. State of Punjab***[68], this Court observed that:-

> "446. What is a crime in a given society at a particular time has a wide connotation as the concept of crime keeps on changing with change in political, economic and social set-up of the country. Various legislations dealing with economic offences or offences dealing with violation of industrial activity or breach of taxing provision are ample proof of it. The Constitution-makers foresaw the eventuality, therefore they conferred such powers both on Central and State Legislatures to make laws in this regard. Such right includes power to define a crime and provide for its punishment. Use of the expression, "including all matters included in the Indian Penal Code at the

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67 (2000) 6 SCC 168

68 (1994) 3 SCC 569

> commencement of the Constitution" is unequivocal indication of comprehensive nature of this entry. It further empowers the legislature to make laws not only in respect of matters covered by the Indian Penal Code but any other matter which could reasonably and justifiably be considered to be criminal in nature."

87. In ***Harpreet Kaur (Mrs) v. State of Maharashtra and another***[69], the Court, though in a different context, opined that crime is a revolt against the whole society and an attack on the civilisation of the day. In their essential quality, the activities which affect 'law and order' and those which disturb 'public order' may not be different but in their potentiality and effect upon even tempo of the society and public tranquility there is a vast difference. In ***State of Karnataka v. Appa Balu Ingale and others***[70] it has been observed that criminal law primarily concerns with social protection, prescribes rules of behavior to be observed by all persons and punishes them for deviance, transgression or omission.

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69 (1992) 2 SCC 177

70 1995 Supp. (4) SCC 469

88. From the aforesaid discussion, it is plain as day that the contention that the criminal offence meant to subserve the right of *inter se* private individuals but not any public or collective interest in totality is sans substance. In this regard, we may take note of the submission put forth by Mr. Narsimha, learned Additional Solicitor General, that Articles 17, 23 and 24 which deal with abolition of untouchability and prohibit trafficking in human beings and forced labour and child labour respectively are rights conferred on the citizens and they can be regarded as recognition of horizontal rights under the Constitution. He has referred to certain legislations to highlight that they regulate rights of individuals *inter se*. Mr. Narsimha has drawn immense inspiration from ***Vishaka and others v. State of Rajasthan and others***[71] where the Court has framed guidelines to protect the rights of individuals at their work place. It ultimately resulted in passing of the Sexual Harassment of Women at Workplace (Prevention, prohibition and Redressal) Act, 2013 which empowered

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71 (1997) 6 SCC 241

individuals to protect their fundamental right to dignity against other citizens. Similarly, legislations like the Child Labour (Prohibition & Regulation) Act, 1986, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Protection of Civil Rights Act, 1955, Press Council Act, 1978, the Noise Pollution (Regulation and Control) Rules, 2000 under the Environment (Protection) Act, 1986 regulate the fundamental rights of citizens vis-à-vis other citizens.

89. We have referred to this facet only to show that the submission so astutely canvassed by the learned counsel for the petitioners that treating defamation as a criminal offence can have no public interest and thereby it does not serve any social interest or collective value is sans substratum. We may hasten to clarify that creation of an offence may be for some different reason declared unconstitutional but it cannot be stated that the legislature cannot have a law to constitute an act or omission done by a person against the other as a crime. It depends on the legislative wisdom. Needless to say, such wisdom has to be in accord with constitutional wisdom and pass the test of constitutional challenge. If the law enacted is

inconsistent with the constitutional provisions, it is the duty of the Court to test the law on the touchstone of Constitution.

90. It is submitted by Mr. Rao, learned senior counsel, that the object of Part III of the Constitution is to provide protection against the State action and, therefore, the criminal defamation which is basically a dispute between two private individuals cannot become a facet of the term criminal defamation as used in Article 19(2) of the Constitution, for there cannot be a constitutional protection for such an action. For the said purpose, he has placed reliance on the authority in ***State of West Bengal v. Subodh Gopal Bose and others***[72]. On a perusal of the said decision, we find that it has been rendered in a quite different context and not with regard to an individual act becoming an offence in the criminal law and hence, the said decision is remotely not applicable to such a situation. Therefore, we conclude and hold that the restricted meaning sought to be given to the term "defamation" is unacceptable and insupportable.

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72 AIR 1954 SC 92 : [1954] SCR 587

Sanctity and significance of Freedom of Speech and Expression in a democracy

91. Freedom of speech and expression in a spirited democracy is a highly treasured value. Authors, philosophers and thinkers have considered it as a prized asset to the individuality and overall progression of a thinking society, as it permits argument, allows dissent to have a respectable place, and honours contrary stances. There are proponents who have set it on a higher pedestal than life and not hesitated to barter death for it. Some have condemned compelled silence to ruthless treatment. William Dougles has denounced regulation of free speech like regulating diseased cattle and impure butter. The Court has in many an authority having realized its precious nature and seemly glorified sanctity has put it in a meticulously structured pyramid. Freedom of speech is treated as the thought of the freest who has not mortgaged his ideas, may be wild, to the artificially cultivated social norms; and transgression thereof is not perceived as a folly. Needless to emphasise, freedom of speech

has to be allowed specious castle, but the question is should it be so specious or regarded as so righteous that it would make reputation of another individual or a group or a collection of persons absolutely ephemeral, so as to hold that criminal prosecution on account of defamation negates and violates right to free speech and expression of opinion. Keeping in view what we have stated hereinabove, we are required to see how the constitutional conception has been understood by the Court where democracy and rule of law prevail.

92. Bury in his work ***History of Freedom of Thought*** (1913) has observed that freedom of expression is "a supreme condition of mental and moral progress" [p.239]. In the words of American Supreme Court, it is "absolutely indispensible for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities" (See ***Speiser v. Randall***[73]). In

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73 (1958) 257 US 513 (530)

Yates v. U.S.[74] the court held that "the only kind of security system that can preserve a free Government – one that leaves the way wide open for people to favor discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us." In ***Stromberg v. California***[75] the Court remarked "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means... is a fundamental principle of our constitutional system." In ***Palko v. Connecticut***[76] the right to freedom of speech and expression has been described as the "touchstone of individual liberty" and "the indispensable condition of nearly every form of freedom."

93. Apart from the aforesaid decisions, we may refer to the dissenting opinion of Holmes J. in ***Abrams v. United States***[77], thus:-

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75 (1958) 354 US 298 (344)

76 (1931) 283 US 359 (369)

77 (1937) 302 US 319

> "... But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That at any rate, is the theory of our Constitution."

94. In the concurring judgment Brandeis, J. in ***Whitney v. California***[78], stated that:-

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its Government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American Government. They recognised the risks

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78 250 US 616 :63 L Ed 1173 (1919)

71 L Ed 1095 : 274 US 357 (1927)

to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable Government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. *To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced*. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is

> nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."
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> (Emphasis supplied)

95. Be it stated, the dissenting opinion of Holmes, J. and the concurring opinion of Brandeis have been quoted in ***Shreya Singhal*** (supra). We have only referred to these decisions as immense emphasis has been laid on the freedom of speech and expression and in a way propositions have been propounded that it can have no boundary in a growing democracy if democracy is expected to thrive. In ***Shreya Singhal*** (supra), the Court has drawn a difference between the US First Amendment and Article 19(1)(a) read with Article 19(2). The Court has drawn four differences. We need not advert to the same. However, the Court has also opined that American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement but it is only when it comes to

subserving the general public interest that there is the world of difference. In the said judgment, a passage has been quoted from ***Kameshwar Prasad v. State of Bihar***[79] wherein it has been held that the resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising under Article 19(1)(*a*) or (*b*) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision. The Court has also referred to a passage from ***Indian Express Newspapers (Bombay) Private Ltd. and others v. Union of India and others***[80] wherein the Court has opined that while examining constitutionality of a law which is alleged to contravene Article 19(1)(*a*) of the Constitution, the Court cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand

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79 1962 Supp. (3) SCR 369 : AIR 1962 SC 1166

80 (1985) 1 SCC 641

the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, the Court may take them into consideration. We will be referring to ***Shreya Singhal*** (supra) in detail at a later stage as the learned counsel for the petitioners have submitted with immense vigour that the principles stated in ***Shreya Singhal*** (supra) would squarely apply to the concept of defamation and application of the said principles would make Section 499 IPC unconstitutional.

96. In ***Romesh Thappar v. State of Madras***[81] the majority opined that freedom of speech and of the press 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 the Framers of the Constitution may well have reflected with Madison who was 'the leading spirit in the preparation of the First Amendment of the

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81 1950 SCR 594 : AIR 1950 SC 124

Federal Constitution', that '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' (*Near* v. *Minnesota*[82], L Ed p. 1368.).

97. In ***Express Newspaper (Private) Ltd. and another v. Union of India and others***[83] the Court referred to the decision in ***Romesh Thappar*** (supra), noted a few decisions of the Court which involved with the interpretation of Article 19(1)(a) that they only lay down that the freedom of speech and expression includes freedom of propagation of ideas by which freedom is ensured; emphasized on liberty of the press as it is an essential part of the right to freedom of speech and expression and further stated that liberty of the press consists in allowing no previous restraint upon publication. Thereafter the Court referred to number of authorities of the United States of America and culled out the principles from the American decisions to the effect that in

82 283 U.S. 607, at 717-8

83 AIR 1958 SC 578 : 1959 SCR 12

the United States of America (a) the freedom of speech comprehends the freedom of press and the freedom of speech and press are fundamental personal rights of the citizens; (b) that the freedom of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public; (c) that such freedom is the foundation of free Government of a free people; (d) that the purpose of such a guarantee is to prevent public authorities from assuming guardianship of the public mind, and (e) that freedom of press involves freedom of employment or non-employment of necessary means of exercising this right or in other words, freedom from restriction in respect of employment in the editorial force and eventually ruled thus:-

> "This is the concept of the freedom of speech and expression as it obtains in the United States of America and the necessary corollary thereof is that no measure can be enacted which would have the effect of imposing a pre-censorship, curtailing the circulation or restricting the choice of employment or un-employment in the editorial force. Such a measure would certainly tend to infringe the freedom of speech and expression and would,

therefore, be liable to be struck down as unconstitutional."

98. In ***All India Bank Employees' Association v. National Industrial Tribunal (Bank Disputes), Bombay and others***[84] it has been held that "freedom of speech" means freedom to speak so as to be heard by others, and, therefore, to convey one's ideas to others. Similarly the very idea of freedom of expression necessarily connotes that what one has a right to express may be communicated to others; and that includes right to freedom of circulation of ideas.

99. In ***Sakal Papers (P) Ltd. v. Union of India***[85] it has been held that it must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so

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84 (1962) 3 SCR 269 : AIR 1962 SC 171

85 (1962) 3 SCR 842 = AIR 1962 SC 305

literal a sense as to whittle them down. On the other hand, the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions. The Court further observed that the right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under clause (2) of Article 19. Be it stated here that in ***Indian Express Newspapers*** (supra), this Court referring to earlier decisions had accepted that freedom of speech and expression includes within its scope freedom of press, for the said freedom promises freedom of propagation of ideas which freedom is assured by the freedom of circulation. Liberty of the press has been treated as inseparable and essential for the right to freedom of speech and expression.

100. The Court in ***Bennett Coleman & Co. and others v. Union of India and others***[86] referring to ***Sakal Papers*** case opined that in the said case the Court has held that freedom of speech would not be restricted for the purpose of regulating the commercial aspects of activities of the newspapers. Similarly, it referred to the authorities in ***Indian Express Newspapers*** (supra) and stated that if a law were to single out the press for laying down prohibitive burdens on it, that would restrict circulation and eventually violate Article 19(1)(a) and would fall outside the protection afforded by Article 19(2). Elaborating the idea further, the majority ruled:-

> "The faith of a citizen is that political wisdom and virtue will sustain themselves in the free market of ideas so long as the channels of communication are left open. 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. Steel will yield products of steel. Newsprint will manifest whatever is thought of by man. The newspapers give ideas".

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86 (1972) 2 SCC 788

101. In the said case, the Court referred to William Blackstone's commentaries:-

> "Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

102. Mathew, J., while otherwise dissenting, accepted the protection of freedom of speech in the following words:-

> "…. Free expression is necessary (*1*) for individual fulfilment, (*2*) for attainment of truth, (*3*) for participation by members of the society in political or social decision-making, and (4) for maintaining the balance between stability and change in society. In the traditional theory, freedom of expression is not only an individual good, but a social good. It is the best process for advancing knowledge and discovering truth. The theory contemplates more than a process of individual judgment. It asserts that the process is also the best method to reach a general or social judgment. In a democracy the theory is that all men are entitled to participate in the process of formulating common decisions. [See Thomas I. Emerson: *Toward a General Theory of First Amendment*]. The crucial point is not that freedom of expression is politically useful but that it is indispensable to the operation of a democratic system. In a democracy the basic premise is that the people are both the governors and the governed. In order that governed may form intelligent and wise judgment it is necessary that they must be appraised of all the

> aspects of a question on which a decision has to be taken so that they might arrive at the truth".

We have reproduced the said passage to appreciate the height to which the freedom of speech and expression has been elevated by this Court regard being to the democratic and constitutional goals.

103. In ***Indian Express Newspapers*** (supra), a three-Judge Bench was again concerned with the importance of freedom of press in a democratic society. Venkataramiah, J. speaking for the Court opined that freedom of press is the heart and soul and political intercourse and it has assumed the role of public educator making formal and non-formal education possible in a large scale particularly in the developing world. The Court further observed that 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. In this backdrop, it was emphatically stated it is the primary duty of the courts to uphold the said freedom and invalidate all laws

or administrative actions which interfere with it, contrary to the constitutional mandate.

104. In ***Secretary, Ministry of Information & Broadcasting, Govt. of India and others v. Cricket Association of Bengal and others***[87], it has been ruled that the freedom of speech and expression includes right to acquire information and to disseminate it; and freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. The Court further observed that it enables people to contribute to debates on social and moral issues and 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. Emphasis has been laid on freedom of the press and freedom to communicate or circulate one's opinion without interference.

105. The Court in ***Union of India and others v. Motion Picture Association and others***[88] explaining the significance

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87 (1995) 2 SCC 161

88 (1999) 6 SCC 150

of free speech has observed that free speech is the foundation of a democratic society and a free exchange of ideas, dissemination of information without restraints, dissemination of knowledge, airing of differing viewpoints, debating and forming one's own views and expressing them, are the basic indicia of a free society. It has been further stated that freedom alone makes it possible for people to formulate their own views and opinions on a proper basis and to exercise their social, economic and political rights in a free society in an informed manner and, therefore, restraints on this right have been jealously watched by the courts. Article 19(2) spells out the various grounds on which this right to free speech and expression can be restrained. Reddi J. in his concurring opinion in ***People's Union for Civil Liberties (PUCL) and another v. Union of India and another***[89], has explained the nature of freedom of speech and expression by elucidating that just as the equality clause and guarantee of life and liberty, has been very broadly construed by this Court freedom of

89 (2003) 4 SCC 399

speech and expression has been variously described as a "basic human right", "a natural right" and the like. The learned Judge has observed that the importance 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.

106. In ***Union of India v. Naveen Jindal and another***[90], the Court has laid down that freedom of expression is a cornerstone of functioning of the democracy and there is a constitutional commitment to free speech. In ***Government of Andhra Pradesh and others v. P. Laxmi Devi***[91], it has been ruled that freedom and liberty is essential for progress, both economic and social and without freedom to speak, freedom to write, freedom to think, freedom to experiment, freedom to criticise (including criticism of the Government) and freedom to dissent there can be no

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90 (2004) 2 SCC 510

91 (2008) 4 SCC 720

progress. In ***S. Khushboo v. Kanniammal and another***[92], it has been laid down that even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as `decency and morality' among others, stress must be laid on the need to tolerate unpopular views in the socio-cultural space. The framers of our Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance in the political sense, it is the duty of everyone to promote a culture of open dialogue when it comes to societal attitudes.

107. The significance of freedom of speech has been accentuated in ***Ramlila Maidan Incident, In re***[93] by observing that the freedom of speech is the bulwark of a democratic Government. This freedom is essential for proper

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92 (2010) 5 SCC 600

93 (2012) 5 SCC 1

functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like.

108. The observations in ***Sahara India Real Estate Corporation Ltd. and others v. Securities and Exchange Board of India and another***[94] being extremely significant in the present context are extracted below:-

> "Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute.

94 (2012) 10 SCC 603

> Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government."
>
> [Emphasis added]

109. In ***State of Karnataka and another v. Associated Management of English Medium Primary and Secondary Schools and others***[95], while dealing with the freedom under Article 19(1)(*a*), the Constitution Bench opined:-

> "*36.* The word 'freedom' in Article 19 of the Constitution means absence of control by the State and Article 19(1) provides that the State will not impose controls on the citizen in the matters mentioned in sub-clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*g*) of Article 19(1) except those specified in clauses (2) to (6) of Article 19 of the Constitution. In all matters specified in clause (1) of Article 19, the citizen has therefore the liberty to choose, subject only to restrictions in clauses (2) to (6) of Article 19."

110. The Court referred to the famous essay 'on liberty' by John Stuart Mill and reproduced a passage from A Grammer of Politics by Harold J. Laski and then ruled that:-

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95 (2014) 9 SCC 485

> "Freedom or choice in the matter of speech and expression is absolutely necessary for an individual to develop his personality in his own way and this is one reason, if not the only reason, why under Article 19(1)(*a*) of the Constitution every citizen has been guaranteed the right to freedom of speech and expression."

111. Recently in ***Devidas Ramachandra Tuljapurkar v. State of Mahrashtra and others***[96] the court relying upon various judgments has ruled that:-

> "…There can be no doubt that there has been an elevation of the concept in a different way, but it cannot form the foundation or base to sustain the argument of Mr Subramanium that the freedom has to be given absolute and uncurtailed expanse without any boundaries of exceptions. We accept the proposition that there should not be a narrow or condensed interpretation of freedom of speech and expression, but that does not mean that there cannot be any limit."

112. While discussing about importance of freedom of speech and expression which includes freedom to express, we feel it necessary to dwell upon the liberty or freedom to express one's ideas through various medium like writing, printing or making films, etc. Dr. Dhawan, learned senior counsel, has commended us to the authorities in ***Odyssey***

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96 (2015) 6 SCC 1

Communications Pvt. Ltd. v. Lokvidayan Sanghatana and others[97] and ***S. Rangarajan v. P. Jagjivan Ram and others***[98]. In ***Odyssey Communications Pvt. Ltd.*** (supra), a public interest litigation was filed before the High Court for restraining the authorities from telecasting a serial film *Honi-Anhoni* on the plea that it had the potential to spread false or blind beliefs and superstition amongst the members of the public. The High Court by an interim order had restrained the authorities from telecasting the film. This Court allowed the appeal and observed that right of a citizen to exhibit films on the Doordarshan subject to the terms and conditions to be imposed by the Doordarshan is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(a) and can be curtailed only under circumstances enshrined in Article 19(2) and by no other measure. In ***S. Rangarajan*** (supra) the Court was required to consider whether the High Court was justified in revoking the 'U Certificate' issued to a

97 (1988) 3 SCC 410

98 (1989) 2 SCC 574

Tamil film '*Ore Oru Gramathile'* for public viewing. The principal point that was argued before this Court was based on right to freedom of speech and expression under Article 19(1)(a). The Court after referring to earlier decisions opined thus:-

> "The High Court, however, was of opinion that public reaction to the film, which seeks to change the system of reservation is bound to be volatile. The High Court has also stated that people of Tamil Nadu who have suffered for centuries will not allow themselves to be deprived of the benefits extended to them on a particular basis. It seems to us that the reasoning of the High Court runs afoul of the democratic principles to which we have pledged ourselves in the Constitution. In democracy it is not necessary that everyone should sing the same song. Freedom of expression is the rule and it is generally taken for granted. 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."

113. Recently, in ***Devidas Ramachandra Tuljapurkar*** (supra) a two-Judge Bench was dealing with the issue of obscenity in a poem in a different context. Various judgments of the United States of America, the United Kingdom and European Courts were referred to. There was also reference to

the authorities of this Court in the context of Section 292 IPC which included ***Ranjit D. Udeshi v. State of Maharashtra***[99], ***Chandrakant Kalyandas Kakodkar v. State of Maharashtra***[100], ***K.A. Abbas v. Union of India***[101], ***Raj Kapoor v. State***[102], ***Samaresh Bose v. Amal Mitra***[103], ***Directorate General of Doordarshan v. Anand Patwardhan***[104], ***Ajay Goswami v. Union of India***[105], ***Bobby Art International v. Om Pal Singh Hoon***[106] and ***Aveek Sarkar v. State of W.B.***[107] and observed that factum of obscenity has to be judged by applying the contemporary

99 AIR 1965 SC 881 : (1965) 1 SCR 65

100 (1969) 2 SCC 687

101 (1970) 2 SCC 780

102 (1980) 1 SCC 43

103 (1985) 4 SCC 289

104 (2006) 8 SCC 433

105 (2007) 1 SCC 143

106 (1996) 4 SCC 1

107 (2014) 4 SCC 257

community standards test. However, the Court held that when name of Mahatma Gandhi is used as a symbol speaking or using obscene words, the concept of 'degree' comes in. We think it appropriate to reproduce the said passage:-

> "When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in. To elaborate, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standards test for use of the same language, it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene. While so concluding, we leave it to the poet to put his defence at the trial explaining the manner in which he has used the words and in what context. We only opine that view of the High Court pertaining to the framing of charge under Section 292 IPC cannot be flawed."

114. We have referred to a series of judgments on freedom of speech and then referred to ***Devidas Ramchandra Tuljapurkar*** (supra) which dealt with Section 292 IPC solely for the purpose that test in respect of that offence is different. That apart, constitutional validity of Section 292 has been upheld in ***Ranjit D. Udeshi*** (supra). It is to be noted that all

the cases, barring ***Odyssey Communication Pvt. Ltd.*** (supra) and ***Bobby Art International*** (supra) [Bandit Queen case], all others are in the fictional realm. We are disposed to think that the right of expression with regard to fictional characters through any medium relating to creation of a fiction would be somewhat dissimilar for it may not have reference to an individual or a personality. Right of expression in such cases is different, and be guided by provisions of any enactment subject to constitutional scrutiny. The right of freedom of expression in a poem, play or a novel pertaining to fictional characters stand on a different footing than defamation as the latter directly concerns the living or the legal heirs of the dead and most importantly, having a known identity. A person in reality is defamed contrary to a "fictional character" being spoken of by another character or through any other mode of narrative. Liberty or freedom in that sphere is fundamentally different than the arena of defamation. Therefore, the decisions rendered in the said context are to be guardedly studied, appreciated and applied. It may be immediately added here that the freedom in the said sphere is not totally without any

limit or boundary. We have only adverted to the said aspect to note that what could legally be permissible in the arena of fiction may not have that allowance in reality. Also, we may state in quite promptitude that we have adverted to this concept only to have the completeness with regard to precious value of freedom of speech and expression and the limitations perceived and stipulated thereon.

115. Be that as it may, the aforesaid authorities clearly lay down that freedom of speech and expression is a highly treasured value under the Constitution and voice of dissent or disagreement has to be respected and regarded and not to be scuttled as unpalatable criticism. Emphasis has been laid on the fact that dissonant and discordant expressions are to be treated as view-points with objectivity and such expression of views and ideas being necessary for growth of democracy are to be zealously protected. Notwithstanding, the expansive and sweeping ambit of freedom of speech, as all rights, right to freedom of speech and expression is not absolute. It is subject to imposition of reasonable restrictions.

Reasonable Restrictions

116. To appreciate the compass and content of reasonable restriction, we have to analyse nature of reasonable restrictions. Article 19(2) envisages "reasonable restriction". The said issue many a time has been deliberated by this Court. The concept of reasonable restriction has been weighed in numerous scales keeping in view the strength of the right and the effort to scuttle such a right. In ***Chintaman Rao v. State of M.P.***[108], this Court, opined as under:-

> "The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19 (1) (g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality."

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108 AIR 1951 SC 118

117. In ***State of Madras v. V.G. Row***[109], the Court has ruled that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

118. In ***Bennett Coleman & Co.*** (supra) while dealing with the concept of reasonable restriction, this Court has held that the law which lays excessive and prohibitive burden which would restrict the circulation of a newspaper will not be saved by Article 19(2), for the freedom of a newspaper to publish any number of pages or to circulate it to any number of persons is an integral part of the freedom of speech and expression and said freedom is violated by placing restraints

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109 AIR 1952 SC 196

upon it or by placing restraints upon something which is an essential part of that freedom.

119. In ***Maneka Gandhi v. Union of India and another***[110] Bhagwati, J. referred to the authority in ***R.C. Cooper v. Union of India***[111] and the principles stated in ***Bennett Coleman & Co.*** (supra) and opined that:-

> "It may be recalled that the test formulated in *R.C. Cooper case* (supra) merely refers to "direct operation" or 'direct consequence and effect' of the State action on the fundamental right of the petitioner and does not use the word "inevitable" in this connection. But there can be no doubt, on a reading of the relevant observations of Shah, J., that such was the test really intended to be laid down by the Court in that case. If the test were merely of direct or indirect effect, it would be an open-ended concept and in the absence of operational criteria for judging "directness", it would give the Court an unquantitiable discretion to decide whether in a given case a consequence or effect is direct or not. Some other concept-vehicle would be needed to quantify the extent of directness or indirectness in order to apply the test. And that is supplied by the criterion of "inevitable" consequence or effect adumbrated in the *Express Newspapers case*. This criterion helps to quantify the extent of directness necessary to constitute infringement of a fundamental right. Now, if the

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110 (1978) 1 SCC 248 : AIR 1978 SC 597

111 (1970) 2 SCC 298

> effect of State action on fundamental right is direct and inevitable, then a fortiori it must be presumed to have been intended by the authority taking the action and hence this doctrine of direct and inevitable effect has been described by some jurists as the doctrine of intended and real effect. ..."

120. In ***M/s Laxmi Khandsari* and others *v. State of U.P. and others***[112] the Court has observed that imposition of reasonable restrictions and its extent would depend upon the object which they seek to serve. The Court has observed that it is difficult to lay down any hard and fast rule of universal application but in imposing such restrictions the State must adopt an objective standard amounting to a social control by restricting the rights of the citizens where the necessities of the situation demand and in adopting the social control one of the primary considerations which should weigh with the court is that as the directive principles contained in the Constitution aim at the establishment of an egalitarian society so as to bring about a welfare State within the framework of the Constitution. That apart, restrictions may be partial, complete,

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112 (1981) 2 SCC 600

permanent or temporary but they must bear a close nexus with the object in the interest of which they are imposed. Another important consideration is that the restrictions must be in public interest and are imposed by striking a just balance between deprivation of right and danger or evil sought to be avoided.

121. In ***Ramlila Maidan Incident, In re*** (supra), this Court opined that a restriction imposed in any form has to be reasonable and to that extent, it must stand the scrutiny of judicial review. It cannot be arbitrary or excessive. It must possess a direct and proximate nexus with the object sought to be achieved. Whenever and wherever any restriction is imposed upon the right to freedom of speech and expression, it must be within the framework of the prescribed law, as subscribed by Article 19(2) of the Constitution. Thereafter, it has been laid down that associating police as a prerequirement to hold such meetings, dharnas and protests, on such large scale, would not infringe the fundamental rights enshrined under Articles 19(1)(*a*) and 19(1)(*b*) of the Constitution as this would squarely fall within the regulatory

mechanism of reasonable restrictions, contemplated under Articles 19(2) and 19(3). Furthermore, it would help in ensuring due social order and would also not impinge upon the rights of the others, as contemplated under Article 21 of the Constitution of India. Emphasis was laid on the constitutional duties that all citizens are expected to discharge.

122. In ***Sahara India Real Estate Corporation Ltd.*** (supra), this Court reiterated the principle of social interest in the context of Article 19(2) as a facet of reasonable restriction. In ***Dwarka Prasad Laxmi Narain v. State of U.P.***[113], while deliberating upon "reasonable restriction" observed that it connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. It was also observed that to achieve quality of reasonableness a proper balance between the freedom guaranteed under

113 AIR 1954 SC 224

Article 19(1)(g) and the social control permitted by clause (6) of Article 19 has to be struck.

123. In ***Bishambhar Dayal Chandra Mohan and others v. State of Uttar Pradesh and others***[114], this Court ruled that the expression "reasonable restriction" signifies that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable in all cases. In ***State of Bihar v. K.K. Misra***[115], the Court, after referring to ***Dr. N.B. Khare v. The State of Delhi***[116] and ***V.G. Row*** (supra), ruled that it is not possible to formulate an effective test which would enable the court to pronounce any particular restriction to be reasonable or

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114 (1982) 1 SCC 39

115 (1969) 3 SCC 377

116 [1952] S.C.R. 597

unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice.

124. In ***Papnasam Labour Union v. Madura Coats Ltd. and another***[117] the Court on the base of earlier authorities summed up that when the constitutionality of a statutory provision is challenged on the ground of reasonableness of the restriction, the Court should evaluate whether the restriction is excessive in nature, existence of the reasonable nexus between restriction imposed and the object sought to be achieved, quality of reasonableness, felt need of the society and the complex issues facing the people which the legislature intends to solve, protection of social welfare prevailing within the social values, its consistency and accord with Article 14 of the Constitution. Additionally, the Court also observed that in judging the reasonableness of the restriction imposed by clause (6) of Article 19, the Court has

117 (1995) 1 SCC 501

to bear in mind the Directive Principles of State Policy and any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest.

125. The principles as regards reasonable restriction as has been stated by this Court from time to time are that the restriction should not be excessive and in public interest. The legislation should not invade the rights and should not smack of arbitrariness. The test of reasonableness cannot be determined by laying down any abstract standard or general pattern. It would depend upon the nature of the right which has been infringed or sought to be infringed. The ultimate "impact", that is, effect on the right has to be determined. The "impact doctrine" or the principle of "inevitable effect" or "inevitable consequence" stands in contradistinction to abuse or misuse of a legislation or a statutory provision depending upon the circumstances of the case. The prevailing conditions of the time and the principles of proportionality of restraint are to be kept in mind by the court while adjudging the

constitutionality of a provision regard being had to the nature of the right. The nature of social control which includes public interest has a role. The conception of social interest has to be borne in mind while considering reasonableness of the restriction imposed on a right. The social interest principle would include the felt needs of the society. As the submissions would show, the stress is given on the right to freedom of speech and expression in the context of individual growth, progress of democracy, conceptual respect for a voice of dissent, tolerance for discordant note and acceptance of different voices. Right to say what may displease or annoy others cannot be throttled or garroted. There can never be any cavil over the fact that the right to freedom of speech and expression is a right that has to get ascendance in a democratic body polity, but at the same time the limit has to be proportionate and not unlimited. It is urged that the defamation has been described as an offence under Section 499 IPC that protects individual's perception of his own reputation which cannot be elevated to have the status of public interest. The argument is that to give a remedy by

taking recourse to criminal jurisprudence to curb the constitutional right, that is, right to freedom of speech and expression, is neither permissible nor justified. The provision possibly could have met the constitutional requirement has it been associated with law and order or breach of peace but the same is not the position. It is also canvassed that in the colonial era the defamation was conceived of to keep social peace and social order but with the changing climate of growing democracy, it is not permissible to keep alive such a restriction.

126. The principles being stated, the attempt at present is to scrutinize whether criminalization of defamation in the manner as it has been done under S. 499 IPC withstands the said test. The submission of the respondents is that right to life as has been understood by this Court while interpreting Article 21 of the Constitution covers a wide and varied spectrum. Right to life includes the right to life with human dignity and all that goes along with it, namely, the bare necessities of life such as nutrition, clothing and shelter and

facilities for reading, writing and expressing oneself in diverse forums, freely moving about and mixing and commingling with fellow human beings and, therefore, it is a precious human right which forms the arc of all other rights [See : ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others***[118]]. It has also been laid down in the said decision that the right to life has to be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance dignity of an individual and worth of a human being. In ***Chameli Singh and others v. State of U.P. and another***[119], the Court has emphasized on social and economic justice which includes the right to shelter as an inseparable component of meaningful right to life. The respect for life, property has been regarded as essential requirement of any civilized society in ***Siddharam Satlingappa Mhetre v. State of Maharashtra***[120].

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118 (1981) 1 SCC 608

119 (1996) 2 SCC 549

120 (2011) 1 SCC 694

Deprivation of life, according to Krishna Iyer, J. in ***Babu Singh and others v. State of U.P.***[121] has been regarded as a matter of grave concern. Personal liberty, as used in Article 21, is treated as a composition of rights relatable to various spheres of life to confer the meaning to the said right. Thus perceived, the right to life under Article 21 is equally expansive and it, in its connotative sense, carries a collection or bouquet of rights. In the case at hand, the emphasis is on right to reputation which has been treated as an inherent facet of Article 21. In ***Haridas Das v. Usha Rani Banik and others***[122], it has been stated that a good name is better than good riches. In a different context, the majority in ***S.P. Mittal v. Union of India and others***[123], has opined that man, as a rational being, endowed with a sense of freedom and responsibility, does not remain satisfied with any material existence. He has the urge to indulge in creative activities and effort is to realize the value

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121 (1978) 1 SCC 579

122 (2007) 14 SCC 1

123 (1983) 1 SCC 51 : AIR 1983 SC 1

of life in them. The said decision lays down that the value of life is incomprehensible without dignity.

127. In ***Charu Khurana and others v. Union of India and others***[124], it has been ruled that dignity is the quintessential quality of a personality, for it is a highly cherished value. Thus perceived, right to honour, dignity and reputation are the basic constituents of right under Article 21. Submission of the learned counsel for the petitioners is that reputation as an aspect of Article 21 is always available against the highhanded action of the State. To state that such right can be impinged and remains unprotected *inter se* private disputes pertaining to reputation would not be correct. Neither can this right be overridden and blotched notwithstanding malice, vile and venal attack to tarnish and destroy the reputation of another by stating that the same curbs and puts unreasonable restriction on the freedom of speech and expression. There is no gainsaying that individual rights form the fundamental fulcrum of

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124 (2015) 1 SCC 192

collective harmony and interest of a society. There can be no denial of the fact that the right to freedom of speech and expression is absolutely sacrosanct. Simultaneously, right to life as is understood in the expansive horizon of Article 21 has its own significance. We cannot forget the rhetoric utterance of Patrick Henry:-

> "Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take, but as for me, give me liberty, or give me death!"[125]

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

> "Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal

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125 Patrick Henry, Speech in House of Burgesses on 23.3.1775 (Virginia)

> constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters[126]."

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

126 Alfred Howard, The Beauties of Burke (T. Davison, London) 109

allowed to mar the other's reputation as is understood within the ambit of defamation as defined in criminal law.

Balancing of Fundamental Rights

130. To appreciate what we have posed hereinabove, it is necessary to dwell upon balancing the fundamental rights. It has been argued by the learned counsel for the petitioners that the right conferred under Article 19(1)(a) has to be kept at a different pedestal than the individual reputation which has been recognized as an aspect of Article 21 of the Constitution. In fact the submission is that right to freedom of speech and expression which includes freedom of press should be given higher status and the individual's right to have his/her reputation should yield to the said right. In this regard a passage from ***Sakal Papers (P) Ltd.*** (supra) has been commended us. It says:-

> ".....Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the

> restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom."
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> [Emphasis supplied]

131. Having bestowed our anxious consideration on the said passage, we are disposed to think that the above passage is of no assistance to the petitioners, for the issue herein is sustenance and balancing of the separate rights, one under Article 19(1)(a) and the other, under Article 21. Hence, the concept of equipose and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom. In ***Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj and others v. The State of Gujarat and others***[127], it has been observed that a particular fundamental right cannot exist in isolation

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127 (1975) 1 SCC 11

in a watertight compartment. One fundamental right of a person may have to co-exist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the Directive Principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests. In ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others***[128] the Court has ruled that Articles relating to fundamental rights are all parts of an integrated scheme in the Constitution and their waters must mix to constitute that grand flow of unimpeded and impartial justice; social, economic and political, and of equality of status and opportunity which imply absence of unreasonable or unfair discrimination between individuals or groups or classes. In ***St. Stephen's College v. University of Delhi***[129] this Court while emphasizing the need for balancing the fundamental rights

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128 1991 Supp (1) SCC 600

129 (1992) 1 SCC 558

observed that it is necessary to mediate between Article 29(2) and Article 30(1), between letter and spirit of these articles, between traditions of the past and the convenience of the present, between society's need for stability and its need for change."

132. In ***Mr 'X' v. Hospital 'Z'***[130] this Court stated that, where there is a clash of two Fundamental Rights, the right to privacy as part of right to life and Ms 'Y's right to lead a healthy life which is her Fundamental Right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day". (See: Allen: *Legal Duties*). That apart, we would also add

130 (1998) 8 SCC 296

that there has to be emphasis on advancement of public or social interest.

133. In ***Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and others***[131] while emphasizing the need to balance the fundamental rights, this Court held that:-

> "... It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of the citizens. The special provision under Article 15(4) [*sic* 16(4)] must therefore strike a balance between several relevant considerations and proceed objectively".

134. In ***Ram Jethmalani and others v. Union of India and others***[132] it has been held that the rights of citizens, to effectively seek the protection of fundamental rights have to be balanced against the rights of citizens and

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131 (1998) 4 SCC 1

132 (2011) 8 SCC 1

persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems through defamation speech, for it would lead to dangerous circumstances and anarchy may become the order of the day.

135. In ***Sahara India Real Estate Corporation Ltd.*** (supra) while describing the role of this Court in balancing the fundamental rights, the Constitution Bench observed that the Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control. The larger Bench further observed that:-

> "Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, *but in ways which sometimes conflict*. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of *freedom of expression* as it is for other values".

136. In ***Maneka Gandhi*** (supra), it has been held:-

> "*5.* ... It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in *R.C. Cooper case* (supra) and our approach in the interpretation of the fundamental rights must now be in tune with this wavelength. We may point out even at the cost of repetition that this Court has said in so many terms in *R.C. Cooper case* (supra) that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1)."

137. Krishna Iyer, J., in his concurring opinion, has observed thus:-

> "96. ..... the law is now settled, as I apprehend it, that no article in Part III is an island but part

of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man *human* have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached.

97. We may switch to Article 19 very briefly and travel along another street for a while. Is freedom of extra-territorial travel to assure which is the primary office of an Indian passport, a facet of the freedom of speech and expression, of profession or vocation under Article 19? My total consensus with Shri Justice Bhagwati jettisons from this judgment the profusion of precedents and the mosaic of many points and confines me to some fundamentals confusion on which, with all the clarity on details, may mar the conclusion. It is a salutary thought that the summit Court should not interpret constitutional rights enshrined in Part III to choke its life-breath or chill its *élan vital* by processes of legalism, overruling the enduring values burning in the bosoms of those who won our independence and drew up our founding document. We must also remember that when this Court lays down the law, not ad hoc tunes but essential notes, not temporary tumult but transcendental truth, must guide the judicial process in translating into authoritative notation and mood music of the Constitution."

138. Beg, J. has stated that:-

> "Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), ..."

139. In ***Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India and others***[133], wherein the majority in the Constitution Bench has observed that the fundamental right to life among all fundamental rights is the most precious to all human beings. The aforementioned authorities clearly state that balancing of fundamental rights is a constitutional necessity. It is the duty of the Court to strike a balance so that the values are sustained. The submission is that continuance of criminal defamation under Section 499 IPC is constitutionally inconceivable as it creates a serious dent in the right to freedom of speech and expression. It is urged that to have defamation as a component of criminal law is an anathema to the idea of free speech which is recognized under

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133 (2014) 9 SCC 737

the Constitution and, therefore, criminalization of defamation in any form is an unreasonable restriction. We have already held that reputation is an inextricable aspect of right to life under Article 21 of the Constitution and the State in order to sustain and protect the said reputation of an individual has kept the provision under Section 499 IPC alive as a part of law. The seminal point is permissibility of criminal defamation as a reasonable restriction as understood under Article 19(2) of the Constitution. To elucidate, the submission is that criminal defamation, a pre-Constitution law is totally alien to the concept of free speech. As stated earlier, the right to reputation is a constituent of Article 21 of the Constitution. It is an individual's fundamental right and, therefore, balancing of fundamental right is imperative. The Court has spoken about synthesis and overlapping of fundamental rights, and thus, sometimes conflicts between two rights and competing values. In the name of freedom of speech and expression, the right of another cannot be jeopardized. In this regard,

reproduction of a passage from ***Noise Pollution (V), In re***[134] would be apposite. It reads as follows:-

> "... Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels, then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19(1)(*a*) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21. We need not further dwell on this aspect. Two decisions in this regard delivered by the High Courts have been brought to our notice wherein the right to live in an atmosphere free from noise pollution has been upheld as the one guaranteed by Article 21 of the Constitution. These decisions are *Free Legal Aid Cell Shri Sugan Chand Aggarwal* v. *Govt. of NCT of Delhi*[135] and *P.A. Jacob* v. *Supdt. of Police*[136]. We have

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134 (2005) 5 SCC 733

135 AIR 2001 Del 455 : (2001) 93 DLT 28 (DB)

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> carefully gone through the reasoning adopted in the two decisions and the principle of law laid down therein, in particular, the exposition of Article 21 of the Constitution. We find ourselves in entire agreement therewith."

140. We are in respectful agreement with the aforesaid enunciation of law. Reputation being an inherent component of Article 21, we do not think it should be allowed to be sullied solely because another individual can have its freedom. It is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas. In fact, it is control regard being had to another person's right to go to Court and state that he has been wronged and abused. He can take recourse to a procedure recognized and accepted in law to retrieve and redeem his reputation. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech. The legislature in its wisdom has not thought it appropriate to abolish criminality of defamation in the obtaining social climate. In this context, the pronouncement in ***Shreya Singhal*** (supra)

AIR 1993 Ker 1

becomes significant, more so, as has been heavily relied upon by the learned counsel for the petitioners. In the said case, constitutional validity of Section 66-A and ancillary thereto Section 69-A of the Information Technology Act, 2000 was challenged on the ground that they infringe the fundamental right to free speech and expression and are not saved by any of the eight subjects covered in Article 19(2). The two-Judge Bench has expressed the view that both U.S. and India permit freedom of speech and expression as well as freedom of the press. So far as abridgement and reasonable restrictions are concerned, both the U.S. Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. The Court has observed that only when it comes to the eight subject matters in Article 19(2) that there is vast difference. The Court has further observed thus:-

> "... In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass

> muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law."

141. The Court has referred to the decisions rendered in ***Kameshwar Prasad*** (supra) and ***Indian Express Newspapers (Bombay) (P) Ltd.*** (supra) to understand the great persuasive value of the American judgments. There has been a reference to the observations of Jackson, J. in ***American Communications Assn. v. Douds***[137] which are to the following effect:-

> "... Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

142. There has been reference to many other pronouncements relating to reasonable restrictions and public order. The Court has reproduced a passage from **S.**

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137 94 L Ed 925 : 339 US 382 (1950)

Rangarajan (supra) and thereafter adverted to the pronouncement in ***Shailabala Devi*** (supra) and opined that:-

> "Viewed at, either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66-A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates."

143. It is interesting to note that the Court referred to "defamation" as defined in Section 499 IPC and stated thus:-

> "It will be noticed that for something to be defamatory, injury to reputation is a basic ingredient. Section 66-A does not concern itself with injury to reputation. Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation. It is clear, therefore, that the section is not aimed at defamatory statements at all."

144. The aforesaid paragraph makes it absolutely clear that the Court has observed that Section 66-A did not concern itself with injury to reputation. Thereafter, the Court proceeded to analyse the provision under challenge from the point of vagueness. It is apposite to quote:-

"90. That the content of the right under Article 19(1)(*a*) remains the same whatever the means of communication including internet communication is clearly established by *Reno case*[138] and by *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal* (supra), SCC at para 78 already referred to. It is thus clear that not only are the expressions used in Section 66-A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, *Kedar Nath Singh* v. *State of Bihar*[139], SCR at pp. 808-09. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first *Ram Manohar Lohia case*[140], namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the section takes in the innocent as well as the guilty, bona fide and mala fide advice and whether the person be a legal adviser, a friend or a well-wisher of the person instigated, he cannot escape the

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138 Reno v. American Civil Liberties Union, 521 US 844 : 138 L Ed 2d 874 (1997)

139 1962 Supp (2) SCR 769 : AIR 1962 SC 955

140 Supt., Central Prison v. Ram Manohar Lohia, (1960) 2 SCR 821 : AIR 1960 SC 633

> tentacles of the section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the field of constitutional prohibitions. It further held that the section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.
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> 94. These two Constitution Bench decisions bind us and would apply directly on Section 66-A. We, therefore, hold that the section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth."

145. We have referred to the aforesaid authority in extenso as it has been commended to us to pyramid the submission that it lays the foundation stone for striking down Sections 499 and 500 IPC because existence of defamation as a criminal offence has a chilling effect on the right to freedom of speech and expression. As we understand the decision, the two-Judge Bench has neither directly nor indirectly laid down such a foundation. The analysis throughout the judgment

clearly pertains to the vagueness and to an act which would make an offence dependent on uncertain factors billowed in inexcactitude and wide amplitude. The Court has ruled that Section 66-A also suffers from vice of procedural unreasonableness. The judgment drew distinction and observed defamation was different. Thus, the canvas is different. Once we have held that reputation of an individual is a basic element of Article 21 of the Constitution and balancing of fundamental rights is a constitutional necessity and further the legislature in its wisdom has kept the penal provision alive, it is extremely difficult to subscribe to the view that criminal defamation has a chilling effect on the freedom of speech and expression.

146. We have been diligently commended to the following passage from ***S. Rangarajan*** (supra):-

> "The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of

> expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg".

147. The said paragraph has also been reproduced in ***Shreya Singhal*** (supra) while dealing with the principle of "tendency to affect". In the said context, the two-Judge Bench in ***Shreya Singhal*** (supra) had analysed how Sections 124A and 295A IPC were treated to be constitutional by this Court in ***Ramji Lal Modi v. State of U.P.***[141] and ***Kedar Nath Singh*** (supra). We think it appropriate for the sake of completeness to reproduce the analysis made in ***Shreya Singhal*** (supra) :-

> "43. In *Ramji Lal Modi* v. *State of U.P.* (supra), SCR at p. 867, this Court upheld Section 295-A of the Penal Code only because it was read down to mean that aggravated forms of insults to

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141 AIR 1957 SC 620

> religion must have a tendency to disrupt public order. Similarly, in *Kedar Nath Singh* v. *State of Bihar* (supra) Section 124-A of the Penal Code, 1860 was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It was added that merely creating disaffection or *creating feelings of enmity* in certain people was not good enough or else it would violate the fundamental right of free speech under Article 19(1)(*a*). Again, in *Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte*[142], Section 123(3-A) of the Representation of the People Act was upheld only if the enmity or hatred that was spoken about in the section would tend to create immediate public disorder and not otherwise."

148. The two-Judge Bench in paragraph 44 has reached the following conclusion:-

> "Viewed at, either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66-A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates."

149. The analysis therein would show that tendency to create public disorder is not evincible in the language employed in Section 66-A. Section 66-A dealt with

142 (1996) 1 SCC 130

punishment for certain obscene messages through communication service, etc. A new offence had been created and the boundary of the forbidding area was not clearly marked as has been held in ***Kedar Nath Singh*** (supra). The Court also opined that the expression used in Section 66-A having not been defined and further the provision having not used the expression that definitions in IPC will apply to the Information Technology Act, 2000, it was vague. The decision in ***Shreya Singhal*** (supra) is placed reliance upon to highlight that a restriction has to be narrowly tailored but criminal defamation is not a narrowly tailored concept. We have earlier opined that the word "defamation" is in existence from the very beginning of the Constitution. Defamation as an offence is admittedly a pre-constitutional law which was in existence when the Constitution came into force. To interpret that the word "defamation" occurring in Article 19(2) would not include "criminal defamation" or it should have a tendency to cause public disorder or incite for an offence, would not be in consonance with the principle of interpretation pertaining to the Constitution. It may be noted

here that the decisions rendered in ***Ramji Lal Modi*** (supra) and ***Kedar Nath Singh*** (supra) where constitutional validity of Sections 124A and 295A IPC had been upheld subject to certain limitations. But inspiration cannot be drawn from the said authorities that to argue that they convey that defamation which would include criminal defamation must incorporate public order or intention of creating public disorder. The said decisions relate to a different sphere. The concept of defamation remains in a different area regard being had to the nature of the offence and also the safeguards provided therein which we shall advert to at a later stage. The passage which we have reproduced from ***S. Rangarajan*** (supra), which has also been referred to in ***Shreya Singhal*** (supra), has to be understood in the context in which it is stated having regard to the facts of the case. The said decision was rendered in the backdrop that the Tamil film '*Ore Oru Gramathile'* which was given "U-Certificate" was revoked by the High Court observing that the certificate given to the movie was bound to invoke reactions which are bound to be volatile. This Court observed that all that film seems to

suggest is that existing method of reservation on the basis of caste is bad and reservation on the basis of economic background is better and also the film deprecated the exploitation of people on caste considerations. In that context, the Court observed, as has been stated earlier, in a democracy it is not necessary that everyone should sing the same song; freedom of expression is the rule, and it is generally taken for granted. Criticism and commentary on policies, enactments or opinions do not remotely constitute defamation. Disapproval is not defamation. The argument ignores the scope and ambit of the contours of what is criminal defamation. Bearing in mind the factual scenario, the Court has discussed about balancing of freedom of expression and "special interest". The Court was not concerned with balancing of Article 19(1)(a) and the facet of Article 21 of the Constitution. Therefore, in the ultimate conclusion, we come to hold that applying the doctrine of balancing of fundamental rights, existence of defamation as a criminal offence is not beyond the boundary of Article 19(2) of

the Constitution, especially when the word "defamation" has been used in the Constitution.

Appreciation in the backdrop of constitutional fraternity and fundamental duty

150. Permissibility of criminal defamation can be tested on the touchstone of constitutional fraternity and fundamental duty. It is submitted by Mr. Narsimha, learned Additional Solicitor General that right to reputation being an inseparable component of Article 21 deserves to be protected in view of Preambular concept. Learned Additional Solicitor General has referred to the Preamble to the Constitution which provides for "... to promote among them all Fraternity assuring the dignity of the individual..."

151. The term "fraternity" has a significant place in the history of constitutional law. It has, in fact, come into prominence after French Revolution. The motto of Republican France echoes:- 'Liberté, égalité, fraternité', or 'Liberty, equality, fraternity'. The term "fraternity" has an animating effect in the constitutional spectrum. The

Preamble states that it is a constitutional duty to promote fraternity assuring the dignity of the individual. Be it stated that fraternity is a perambulatory promise. Dr. B.R. Ambedkar in the Constituent Assembly spoke:-

> "The principles of liberty, equality and fraternity are not to be treated as separate entities but in a trinity. They form the union and trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy ... Without fraternity, liberty and equality would not become natural course of things. Courts, as sentinel on the *qui vive*, therefore must strike a balance between the changing needs of the society for peaceful transformation with orders and protection of the rights of the citizens."

152. In the Preamble to the Constitution of India, fraternity has been laid down as one of the objectives. Dr. B.R. Ambedkar inserted the same in the Draft Constitution stating "the need for fraternal concord and goodwill in India was never greater than now, and that this particular aim of the new Constitution should be emphasized by special mention in the Preamble." Fraternity, as a constitutional concept, is umbilically connected with justice, equality and liberty.

153. American scholarship tends to be in agreement with this precept. Morris Abram expresses this in even more emphatic terms when he treats it as essential to achieving liberty and equality, and *vice versa*. According to him:-

> "In America, we have learned that the elements of the plea are interdependent: that liberty of itself may not bring about fraternity and equality . . . Permit me to observe that the converse is also true: merely by possessing fraternity and equality man will not thereby automatically achieve liberty."[143]

154. Fraternity as a concept is characteristically different from the other constitutional goals. It, as a constitutional concept, has a keen bond of sorority with other concepts. And hence, it must be understood in the breed of homogeneity in a positive sense and not to trample dissent and diversity. It is neither isolated nor lonely. The idea of fraternity is recognised as a

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143 . Morris B Abram, 'Liberty, Fraternity and Equality - One or Two Alone are not Enough' (1967) 16 Journal of Public Law 3, 8.

constitutional norm and a precept. It is a constitutional virtue that is required to be sustained and nourished.

155. It is a constitutional value which is to be cultivated by the people themselves as a part of their social behavior. There are two schools of thought; one canvassing individual liberalization and the other advocating for protection of an individual as a member of the collective. The individual should have all the rights under the Constitution but simultaneously he has the responsibility to live upto the constitutional values like essential brotherhood – the fraternity – that strengthens the societal interest. Fraternity means brotherhood and common interest. Right to censure and criticize does not conflict with the constitutional objective to promote fraternity. Brotherliness does not abrogate and rescind the concept of criticism. In fact, brothers can and should be critical. Fault finding and disagreement is required even when it leads to an individual disquiet or group disquietude. Enemies Enigmas Oneginese on the part of some does not create a dent in the idea of fraternity but, a

significant one, liberty to have a discordant note does not confer a right to defame the others. The dignity of an individual is extremely important. In ***Indra Sawhney and others v. Union of India and others***[144], the Court has deliberated upon as to how reservation connects equality and fraternity with social, economic and political justice as it can hamper fraternity and liberty if perpetuated for too long. Jeevan Reddy, J. has opined that "Fraternity assuring the dignity of the individual has a special relevance in the Indian context . ..." Sawant, J., in a separate but concurring opinion, stated:-

> "Inequality ill-favours fraternity, and unity remains a dream without fraternity. The goal enumerated in the preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all.'[145]

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144 AIR 1993 SC 477 : 1992 Supp. (3) SCC 217

145 *Id.* para 514.

156. This principle was reiterated in the case of ***AIIMS Students' Union v. AIIMS and others***[146] where reservation for post graduate students was held unconstitutional as it went against the objective of attaining fraternity. In ***Indian Medical Association v. Union of India***[147] exemptions granted to a private non-aided educational institution to only admit wards of army personnel was challenged. Among the various tests to determine the constitutionality the Court focused on fraternity by stating "in the absence of substantive equality or equality of means to access resources, various social groups could never achieve the requisite dignity necessary for the promotion of fraternity."[148]

157. In ***Raghunathrao Ganpatrao v. Union of India***[149] where the 26th Amendment to the Constitution which

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146 (2002) 1 SCC 428

147 Indian Medical Association V. Union Of India, Civil Appeal No. 8170 Of 2009 & Writ Petition (Civil) Nos. 320 Of 2009 & 192 Of 2010.

148 Id.

149 1994 Supp. (1) SCC 191

abolished the privileges given to former rulers of India was in question, the Court held it to be a positive step towards achieving the objective of fraternity. The Court adverted to the statements of Dr. B.R. Ambedkar during the Constitution Assembly debates and stated that:-

> "In a country such as India, with several disruptive forces, such as religion, caste and language, the idea of fraternity is imperative to ensure the unity of the nation through a shared feeling of common brotherhood."[150]

158. The concept of fraternity under the Constitution expects every citizen to respect the dignity of the other. Mutual respect is the fulcrum of fraternity that assures dignity. It does not mean that there cannot be dissent or difference or discordance or a different voice. It does not convey that all should join the chorus or sing the same song. Indubitably not. One has a right to freedom of speech and expression. One is also required to maintain the constitutional value which is embedded in the idea of fraternity that assures the dignity of the individual. One is

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150 Id.

obliged under the Constitution to promote the idea of fraternity. It is a constitutional obligation.

159. In the context of constitutional fraternity, fundamental duties engrafted under Article 51-A of the Constitution gain significance. Sub-articles (e) and (j) of Article 51-A of the Constitution read as follows:-

> "Article 51-A.(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
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> X x x x x
>
> (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;"

160. The prismatic perception of sub-article (e) would reflect that it is the duty of every citizen of India to promote harmony and the concept of common brotherhood amongst all the people despite many diversities. It is also the duty of every citizen to strive towards excellence in all spheres of individual and collective activity. In this regard, a passage

from ***AIIMS Students' Union*** (supra) would be apt to refer. It reads as follows:-

> "... Fundamental duties, though not enforceable by a writ of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice, peoples wish as manifested through Article 51A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the courts. Constitutional enactment of fundamental duties, if it has to have any meaning, must be used by courts as a tool to tab, even a taboo, on State action drifting away from constitutional values."

161. In ***P.A. Inamdar and others v. State of Maharashtra and others***[151] it has been observed that:-

> "Fundamental duties recognized by Article 51A include, amongst others, (i) to develop the scientific temper, humanism and the spirit of inquiry and reform; and (ii) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. None can be achieved or ensured except by means of education. It is well accepted by the thinkers, philosophers and academicians that if JUSTICE, LIBERTY, EQUALITY and FRATERNITY, including social, economic and political justice, the golden goals set out in the

151 (2005) 6 SCC 537

> Preamble to the Constitution of India are to be achieved, the Indian polity has to be educated and educated with excellence. Education is a national wealth which must be distributed equally and widely, as far as possible, in the interest of creating an egalitarian society, to enable the country to rise high and face global competition..."

162. In ***Ramlila Maidan Incident, In re*** (supra), the Court had opined that:-

> "... a common thread runs through Parts III, IV and IVA of the Constitution of India. One Part enumerates the fundamental rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these parts."

163. We have referred to two concepts, namely, constitutional fraternity and the fundamental duty, as they constitute core constitutional values. Respect for the dignity of another is a constitutional norm. It would not amount to an overstatement if it is said that constitutional fraternity and the intrinsic value inhered in fundamental

duty proclaim the constitutional assurance of mutual respect and concern for each other's dignity. The individual interest of each individual serves the collective interest and correspondingly the collective interest enhances the individual excellence. Action against the State is different than an action taken by one citizen against the other. The constitutional value helps in structuring the individual as well as the community interest. Individual interest is strongly established when constitutional values are respected. The Preamble balances different and divergent rights. Keeping in view the constitutional value, the legislature has not repealed Section 499 and kept the same alive as a criminal offence. The studied analysis from various spectrums, it is difficult to come to a conclusion that the existence of criminal defamation is absolutely obnoxious to freedom of speech and expression. As a prescription, it neither invites the frown of any of the Articles of the Constitution nor its very existence can be regarded as an unreasonable restriction.

Anatomy of the provision and its field of operation

164. Having dealt with this facet, now we shall focus on whether Section 499 of IPC either in the substantive sense or procedurally violates the concept of reasonable restriction. We have to examine whether it is vague or arbitrary or disproportionate.

165. For the aforesaid purpose, it is imperative to analyse in detail what constitutes the offence of "defamation" as provided under Section 499 of IPC. To constitute the offence, there has to be imputation and it must have made in the manner as provided in the provision with the intention of causing harm or having reason to believe that such imputation will harm the reputation of the person about whom it is made. Causing harm to the reputation of a person is the basis on which the offence is founded and *mens rea* is a condition precedent to constitute the said offence. The complainant has to show that the accused had intended or known or had reason to believe that the imputation made by him would harm the reputation of the complainant. The

criminal offence emphasizes on the intention or harm. Section 44 of IPC defines "injury". It denotes any harm whatever illegally caused to any person, in body, mind, reputation or property. Thus, the word "injury" encapsulates harm caused to the reputation of any person. It also takes into account the harm caused to a person's body and mind. Section 499 provides for harm caused to the reputation of a person, that is, the complainant. In ***Jeffrey J. Diermeier and another v. State of West Bengal and another***[152], a two-Judge Bench deliberated on the aspect as to what constitutes defamation under Section 499 of IPC and in that context, it held that there must be an imputation and such imputation must have been made with the intention of harming or knowing or having reason to believe that it will harm the reputation of the person about whom it is made. In essence, the offence of defamation is the harm caused to the reputation of a person. It would be sufficient to show that the accused intended or knew or had reason to believe that the

152 (2010) 6 SCC 243

imputation made by him would harm the reputation of the complainant, irrespective of whether the complainant actually suffered directly or indirectly from the imputation alleged.

166. Having dwelt upon the ingredients, it is necessary to appreciate the Explanations appropriately. There are four Explanations to the main provision and an Explanation has been appended to the Fourth Exception. Explanation 4 needs to be explained first. It is because the said Explanation provides the expanse and the inherent control wherein what imputation has been regarded as harm to a person's reputation and that an imputation can only be treated as harm of a person's reputation if it directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful. It is submitted by Dr. Dhawan, learned senior counsel, that Explanation 4 has many a distinction and covers a number of criteria which can be used

widely. He has commended us to a passage from ***State of Jammu and Kashmir v. Triloki Nath Khosa and others***[153] solely for the purpose that the Explanation 4 engulfs micro-distinctions which is impermissible. To appreciate manifold submissions urged by the learned counsel for the petitioners, it is seemly to refer to how these Explanations have been understood by the Court. We are conscious that we are dealing with the constitutional validity of the provision and the decisions relate to interpretation. But the purpose is to appreciate how the Explanations have been understood by this Court.

167. Explanation 1 stipulates that an imputation would amount to defamation if it is done to a deceased person if the imputation would harm the reputation of that person if he is living and is intended to be harmful to the feelings of his family or other near relatives. It is submitted by the learned counsel for the petitioners that the width of the Explanation is absolutely excessive as it enables the family members to

153 (1974) 1 SCC 19

prosecute a criminal action whereas they are debarred to initiate civil action for damages. According to the learned counsel for the petitioners, Explanation 1 is anomalous and creates a piquant situation which can effortlessly be called unreasonable, for when a civil suit cannot be entertained or allowed to be prosecuted by the legal heirs or the legal representatives, how could they prosecute criminal offence by filing a complaint. On a first blush, the aforesaid submission looks quite attractive, but on a keener scrutiny, it loses its significance. In ***Melepurath Sankuni Ezhuthassan v. Thekittil Geopalankutty Nair***[154], a suit for damages was dismissed by the trial court but on an appeal being preferred, the same was allowed. In second appeal, the High Court reversed the decree of the appellate court and dismissed the cross objections of the respondent therein. The appellant preferred an appeal by special leave before this Court and during the pendency before this Court, he died. His surviving legal heirs came to be brought on record to prosecute the

154 (1986) 1 SCC 118

appeal. The issue that arose before this Court was whether the appeal should abate. The Court posed the question whether in a defamation action, the right to sue survives if the plaintiff dies. The Court referred to the Common Law principle and the maxim *action personalis moritur cum persona* (a personal action dies with the person) and thereafter referred to Section 306 of the Indian Succession Act, 1925 as to which causes of action survive and which shall abate. The Court in that context opined thus:-

> "Where a suit for defamation is dismissed and the plaintiff has filed an appeal, what the appellant-plaintiff is seeking to enforce in the appeal is his right to sue for damages for defamation and as this right does not survive his death, his legal representative has no right to be brought on the record of the appeal in his place and stead if the appellant dies during the pendency of the appeal. The position, however, is different where a suit for defamation has resulted in a decree in favour of the plaintiff because in such a case the cause of action has merged in the decree and the decretal debt forms part of his estate and the appeal from the decree by the defendant becomes a question of benefit or detriment to the estate of the plaintiff respondent which his legal representative is entitled to uphold and defend and is, therefore, entitled to be substituted in place of the deceased respondent plaintiff".

168. In ***M. Veerappa v. Evelyn Sequeira and others***[155], a two-Judge Bench distinguished the authority in ***Melepurath Sankuni Ezhuthassan*** (supra) as there was a subsisting decree and came to hold thus:-

> "The maxim "*actio personalis cum moritur persona*" has been applied not only to those cases where a plaintiff dies during the pendency of a suit filed by him for damages for personal injuries sustained by him but also to cases where a plaintiff dies during the pendency of an appeal to the appellate court, be it the first appellate court or the second appellate court against the dismissal of the suit by the trial court and/or the first appellate court as the case may be. This is on the footing that by reason of the dismissal of the suit by the trial court or the first appellate court as the case may be, the plaintiff stands relegated to his original position before the trial court.
>
> And again:-
>
> "The maxim of *actio personalis cum moritur persona* has been held inapplicable only in those cases where the injury caused to the deceased person has tangibly affected his estate or has caused an accretion to the estate of the wrong-doer vide *Rustomji Dorabji* v. *W.H. Nurse*[156] and *Ratanlal* v. *Baboolal*[157] as well as in those

155 (1988) 1 SCC 556

156 ILR 44 Mad 357

157

> cases where a suit for damages for defamation, assault or other personal injuries sustained by the plaintiff had resulted in a decree in favour of the plaintiff because in such a case the cause of action becomes merged in the decree and the decretal debt forms part of the plaintiff's estate and the appeal from the decree by the defendant becomes a question of benefit or detriment to the estate of the plaintiff which his legal representatives are entitled to uphold and defend (vide *Gopal* v. *Ramchandra*[158] and *Melepurath Sankunni* v. *Thekittil*)".

169. The aforesaid enunciation of law makes it clear how and when the civil action is not maintainable by the legal heirs. The prosecution, as envisaged in Explanation 1, lays two postulates, that is, (i) the imputation to a deceased person is of such a nature that would have harmed the reputation of that person if he was living and (ii) the said imputation must be intended to be hurtful to the feelings of the family or other near relatives. Unless the twin tests are satisfied, the complaint would not be entertained under Section 199 of CrPC. The said Explanation protects the reputation of the family or relatives. The entitlement to

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158 AIR 1960 MP 200

ILR 26 Bom 597

damages for personal injury is in a different sphere whereas a criminal complaint to be filed by the family members or other relatives under twin tests being satisfied is in a distinct compartment. It is more rigorous. The principle of grant of compensation and the principle of protection of reputation of family or near relative cannot be equated. Therefore, we do not find any extra mileage is given to the legal heirs of a deceased person when they have been made eligible to initiate a criminal action by taking recourse to file a criminal complaint.

170. Explanation 2 deals with imputation concerning a company or an association or collection of persons as such. Explanation 3 says that an imputation in the form of an alternative or expressed ironically may amount to defamation. Section 11 of IPC defines "person" to mean a company or an association or collection of persons as such or body of persons, whether incorporated or not. The inclusive nature of the definition indicates that juridical persons can come within its ambit. The submission advanced on behalf of the petitioners is that collection of persons or, for that matter,

association, is absolutely vague. More than five decades back, the Court, in ***Sahib Singh Mehra v. State of Uttar Pradesh***[159] while being called upon to decide whether public prosecutor would constitute a class or come within the definition of "collection of persons" referred to Explanation 2 to Section 499 of IPC, and held that collection of persons must be identifiable in the sense that one could, with certainty, say that this group of particular people has been defamed, as distinguished from the rest of the community. The Court, in the facts of the case, held that the prosecuting staff of Aligarh or, as a matter of fact, the prosecuting staff in the State of Uttar Pradesh, was certainly such an identifiable group or collection of persons, and there was nothing indefinite about it. Thus, in the said authority, emphasis is laid on the concept of identifiability and definitiveness as regards collection of persons.

171. In ***G. Narasimhan, G. Kasturi and K. Gopalan v. T.V. Chokkappa***[160], the Court dealt with the applicability of

159 AIR 1965 SC 1451 : 1965 (2) SCR 823

160

the said Explanation as regards "association" or "collection of persons" and ruled that a collection of persons must be an identifiable body so that it is possible to say with definiteness that a group of particular persons, as distinguished from the rest of the community, was defamed. Therefore, in a case where Explanation 2 is resorted to, the identity of the company or the association or the collection of persons must be established so as to be relatable to the defamatory words or imputations. Where a writing weighs against mankind in general, or against a particular order of men, e.g., men of gown, it is no libel. It must descend to particulars and individuals to make it a libel. Thus, the accentuation is on 'particulars'. In ***S. Khushboo*** (supra), it has been ruled that though the Explanation is wide yet in order to demonstrate the offence of defamation, such a collection of persons must be an identifiable body so that it is possible to say with precision that a group of particular persons, as distinguished from the rest of the community, stood defamed. In case the identity of the collection of persons is not established so as to

(1972) 2 SCC 680

be relatable to the defamatory words or imputations, the complaint is not maintainable. It has been further opined that in case a class is mentioned, if such a class is indefinite, the complaint cannot be entertained and furthermore, if it is not possible to ascertain the composition of such a class, the criminal prosecution cannot proceed.

172. The aforesaid enunciation of law clearly lays stress on determinate and definite body. It also lays accent on identifiable body and identity of the collection of persons. It also significantly states about the test of precision so that the collection of persons have a distinction. Thus, it is fallacious to contend that it is totally vague and can, by its inclusiveness, cover an indefinite multitude. The Court has to understand the concept and appositely apply the same. There is no ambiguity. Be it noted that a three-Judge Bench, though in a different context, in ***Aneeta Hada v. Godfather Travels & Tours (P) Ltd***[161] has ruled that a company has its

161 (2012) 5 SCC 661

own reputation. Be that as it may, it cannot be said that the persons covered under the Explanation are gloriously vague.

Exceptions and understanding of the same

173. Having dealt with the four Explanations, presently, we may analyse the Exceptions and note certain authorities with regard to the Exceptions. It is solely for the purpose of appreciating how the Court has appreciated and applied them. The First Exception stipulates that it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. "Public good" has to be treated to be a fact. In ***Chaman Lal v. State of Punjab***[162], the Court has held that in order to come within the First Exception to Section 499 of the Indian Penal Code it has to be established that what has been imputed concerning the respondent is true and the publication of the imputation is for the public good. The onus of proving these two ingredients, namely, truth of the

162 (1970) 1 SCC 590

imputation and the publication of the imputation for the public good, is on the accused.

174. It is submitted by Dr. Dhawan, learned senior counsel for the petitioners that if the imputation is not true, the matter would be different. But as the Exception postulates that imputation even if true, if it is not to further public good then it will not be defamation, is absolutely irrational and does not stand to reason. It is urged that truth is the basic foundation of justice, but this Exception does not recognize truth as a defence and, therefore, it deserves to be struck down.

175. It has been canvassed by Mr. Rao, learned senior counsel, that the term "public good" is a vague concept and to bolster the said submission, he has placed reliance upon ***Harakchand Ratanchand Banthia & others v Union of India and others***[163] to highlight that in the said case, it has been held that "public interest" do not provide any objective standard or norm. The context in which the said decision

163 (1969) 2 SCC 166

was rendered has to be appreciated. In the said case, the Court was dealing with the constitutional validity of the Gold Control Act, 1968. Section 27 of the said Act related to licensing of dealers. It was contended that the conditions imposed by sub-section (6) of the Act for grant or renewal of licences were uncertain, vague, unintelligible and consequently wide and unfettered power was conferred upon the statutory authorities in the matter of grant or renewal of licence. The Court expressed the view that the contention was well founded. Further analyzing, the Court expressed that:-

> "... The expression "anticipated demand" is a vague expression which is not capable of objective assessment and is bound to lead to a great deal of uncertainty. Similarly the expression "suitability of the applicant" in Section 27(6)(*e*) and "public interest" in Section 27(6)(*g*) do not provide any objective standard or norm or guidance. For these reasons it must be held that clauses (*a*),(*d*),(*e*) and (*g*) of Section 27(6) impose unreasonable restrictions on the fundamental right of the petitioner to carry on business and are constitutionally invalid..."

176. As we perceive, the factual score and the provision under challenge was totally different. It has been stated in the backdrop of the power conferred on an administrative authority for the purpose of renewal of licence, and in that context, the Court opined that the criterion of "public interest" did not provide objective standard. The Court, on analysis of the provision from a manifold angle, opined that the provision proposed unreasonable restriction. The context and the conferment of power makes a gulf of difference and, therefore, the said authority has to be considered on its own facts. It cannot be ruled that it lays down as a principle that "public interest" is always without any norm or guidance or has no objective interest. Ergo, the said decision is distinguishable.

177. In ***Arundhati Roy, In re***[164], this Court, referring to Second Exception, observed that even a person claiming the benefit of Second Exception to Section 499 of the Indian Penal Code, is required to show that the opinion expressed by him

164 (2002) 3 SCC 343

was in good faith which related to the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct. Third Exception states about conduct of any person touching any public question and stipulates that it is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question and respecting his character, so far as his character appears in that conduct. The said Exception uses the words "good faith" and particularizes conduct of any person relating to any public question and the Exception, as is perceptible, gives stress on good faith. Third Exception comes into play when some defamatory remark is made in good faith as held in ***Sahib Singh Mehra*** (supra). The Court has clarified that if defamatory remarks are made after due care and attention, it will be regarded as made in good faith. In the said case, the Court also adverted to Ninth Exception which gives protection to imputation made in good faith for the protection of the interest of the person making it or of any other person or for the public good. A three-Judge Bench in ***Harbhajan Singh v.***

State of Punjab and another[165] has opined that where the accused invokes Ninth Exception to Section 499 IPC, good faith and public good are both to be satisfied and the failure of the appellant to prove good faith would exclude the application of Ninth Exception in favour of the accused even if requirement of public good is satisfied. The Court has referred to Section 52 IPC which defines "good faith" that requires the element of honesty. It is necessary to note here that the three-Judge Bench has drawn a distinction between the First Exception and the Ninth Exception to opine that the proof of truth which is one of the ingredients of the First Exception is not an ingredient of the Ninth Exception and what the Ninth Exception requires an accused person to prove is that he made the statement in good faith. Proceeding further, the Court has stated that in dealing with the claim of the accused under the Ninth Exception, it is not necessary and, in a way, immaterial, to consider whether he has strictly proved the truth of the allegations made by him.

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165 AIR 1966 SC 97

178. In ***Sukra Mahto v. Basdeo Kumar Mahto and another***[166] the Court has opined that the ingredients of Ninth Exception are first that the imputation must be made in good faith; secondly, the imputation must be protection of the interest of the person making it or of any other person or for the public good. The Court further opined that good faith and public good are questions of fact and emphasis has been laid on making enquiry in good faith and due care and attention for making the imputation. In ***Jatish Chandra Ghosh v. Hari Sadhan Mukherjee***[167] , the Constitution Bench dealt with appellant's claim of absolute privilege as a Member of the West Bengal Legislative Assembly which was not accepted by the High Court of Judicature at Calcutta. The appellant therein was facing a prosecution under Section 500 IPC. The larger Bench referred to Section 499 IPC and observed that:-

> "In this connection, it is also relevant to note that we are concerned in this case with a criminal prosecution for defamation. The law of

166 1971 (1) SCC 885

167 (1961) 3 SCR 486

> defamation has been dealt with in Sections 499 and 500 of the Indian Penal Code. Section 499 contains a number of exceptions. Those specified exceptions lay down what is not defamation. The fourth exception says that it is not defamation to publish a substantially true report of the proceedings of a court of justice, but does not make any such concession in respect of proceedings of a House of Legislature or Parliament. The question naturally arises how far the rule in *Wason case*[168] can be applied to criminal prosecutions in India, but as this aspect of the controversy was not canvassed at the Bar, we need not say anything about it, as it is not necessary for the decision of this case."

179. After so stating, the Court further opined that the proceedings did not deserve to be quashed as there was no such absolute privilege in the facts of the case. Being of this view, the Court opined that the accused appellant must take his trial and enter upon his defence such as he may have. We have referred to the said decision only to highlight that the Court has clarified publishing of substantial true report of proceedings of a Court of Justice.

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168 Wason v. Walter, (1868) 4 QB 73

180. Fifth Exception stipulates that it is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent. The further stipulation is that the said opinion must relate to the character of said person, as far as his character appears in that conduct. In ***Kanwal Lal v. State of Punjab***[169] the Court, while dealing with the Eighth Exception, has opined that in order to establish a defence under this Exception the accused would have to prove that the person to whom the complaint was made had lawful authority over the person complained against, in respect of the subject-matter of the accusation.

181. Again in ***M.C. Verghese v. T.J. Poonan***[170], it has been ruled that a person making libellous statements in his complaint filed in Court is not absolutely protected in a criminal proceeding for defamation, for under the Eighth

169 1963 Supp (1) SCR 479

170 (1969) 1 SCC 37

Exception and the illustration to Section 499 the statements are privileged only when they are made in good faith. There is, therefore, authority for the proposition that in determining the criminality of an act under the Indian Penal Code the Courts will not extend the scope of special exceptions by resorting to the rule peculiar to English common law that the husband and wife are regarded as one. In ***Chaman Lal*** (supra) this Court has opined that the Eighth Exception to Section 499 of the Indian Penal Code indicates that accusation in good faith against the person to any of those who have lawful authority over that person is not defamation. In ***Rajendra Kumar Sitaram Pande v. Uttam***[171], it has been observed that Exception 8 to Section 499 IPC clearly indicates that it is not a defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with regard to the subject-matter of accusation. In the said case the report of the Treasury Officer clearly indicated that pursuant to the

171 (1999) 3 SCC 134

report made by the accused persons against the complainant, a departmental enquiry had been initiated and the complainant was found to be guilty. Under such circumstances the fact that the accused persons had made a report to the superior officer of the complainant alleging that he had abused the Treasury Officer in a drunken state which was the gravamen of the complaint, would be covered by Exception 8 to Section 499 of the Indian Penal Code.

182. In ***Chaman Lal*** (supra) the Court has opined that good faith requires care and caution and prudence in the background of context and circumstances. The position of the persons making the imputation will regulate the standard of care and caution. In ***Sukra Mahto*** (supra), emphasis has been laid on protection of the interest of the person making it or of any other person or for the public good. Reference has been made to ***Harbhajan Singh*** case (supra) to stress on due care and attention. In ***Sewakram Sobhani v. R.K. Karanjia***[172], it has been observed that the ingredients of the

172 (1981) 3 SCC 208

Ninth Exception are that (*1*) the imputation must be made in good faith, and (*2*) the imputation must be for the protection of the interests of the person making it or of any other person or for the public good, and the imputation made must be in good faith for the public good. In ***M.A. Rumugam v. Kittu***[173], it has been held that for the purpose of bringing the case within the purview of the Eighth and the Ninth Exception appended to Section 499 of the Penal Code, it would be necessary for the accused to prove good faith for the protection of the interests of the person making it or of any other person or for the public good. This Court, in ***Jeffrey J. Diermeier*** (supra), has observed thus:-

> "37. It is trite that where to the charge of defamation under Section 500 IPC the accused invokes the aid of Tenth Exception to Section 499 IPC, "good faith" and "public good" have both to be established by him. The mere plea that the accused believed that what he had stated was in "good faith" is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.

173 (2009) 1 SCC 101

> 38. It is well settled that the degree and the character of proof which an accused is expected to furnish in support of his plea cannot be equated with the degree of proof expected from the prosecution in a criminal trial. The moment the accused succeeds in proving a preponderance of probability, onus which lies on him in this behalf stands discharged. Therefore, it is neither feasible nor possible to lay down a rigid test for deciding whether an accused person acted in "good faith" and for "public good" under the said Exception."

183. The detailed discussion made hereinabove do clearly reveal that neither the main provision nor the Explanation nor the Exceptions remotely indicate any vagueness. It is submitted that the Exceptions make the offence more rigorous and thereby making the concept of criminal defamation extremely unreasonable. The criticism advanced pertain to truth being not a defence, and unnecessary stress on 'public good'. The counter argument is that if a truthful statement is not made for any kind of public good but only to malign a person, it is a correct principle in law that the statement or writing can amount to defamation. Dr. Singhvi, learned senior counsel for some of the respondents has given certain examples. The examples

pertain to an imputation that a person is an alcoholic; an imputation that two family members are involved in consensual incest; an imputation that a person is impotent; a statement is made in pubic that a particular person suffers from AIDS; an imputation that a person is a victim of rape; and an imputation that the child of a married couple is not fathered by the husband but born out of an affair with another man. We have set out the examples cited by the learned senior counsel only to show that there can be occasions or situations where truth may not be sole defence. And that is why the provision has given emphasis on public good. Needless to say, what is public good is a question of fact depending on the facts and circumstances of the case.

184. From the analysis we have made it is clear as day that the provision along with Explanations and Exceptions cannot be called unreasonable, for they are neither vague nor excessive nor arbitrary. There can be no doubt that Court can strike down a provision, if it is excessive, unreasonable or disproportionate, but the Court cannot strike down if it thinks

that the provision is unnecessary or unwarranted. Be it noted that it has also been argued that the provision is defeated by doctrine of proportionality. It has been argued that existence of criminal defamation on the statute book and the manner in which the provision is engrafted suffers from disproportionality because it has room for such restriction which is disproportionate. In ***Om Kumar v. Union of India***[174], the Court has observed that while regulating the exercise of fundamental rights it is to be seen whether the legislature while exercising its choice has infringed the right excessively. Recently, the Constitution Bench in ***Modern Dental College & Research Centre and others v. State of Madhya Pradesh and others***[175], explaining the doctrine of proportionality has emphasized that when the Court is called upon to decide whether a statutory provision or a rule amounts to unreasonable restriction, the exercise that is required to be undertaken is the balancing of fundamental

174 (2001) 2 SCC 386

175 2016 (4) SCALE 478

rights on the one hand and the restrictions imposed on the other. Emphasis is on recognition of affirmative constitutional rights along with its limitations. Limitations, save certain interests and especially public or social interests. Social interest takes in its sweep to confer protection to rights of the others to have social harmony founded on social values. To treat a restriction constitutionally permissible it is necessary to scrutinize whether the restriction or imposition of limitation is excessive or not. The proportionality doctrine recognizes balancing of competing rights and the said hypothesis gains validity if it subserves the purpose it is meant for.

185. Needless to emphasise that when a law limits a constitutional right which many laws do, such limitation is constitutional if it is proportional. The law imposing restriction is proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. Such limitations should not be arbitrary or of

an excessive nature beyond what is required in the interest of the public. Reasonableness is judged with reference to the objective which the legislation seeks to achieve, and must not be in excess of that objective (see : ***P.P. Enterprises v. Union of India***[176]). Further, the reasonableness is examined in an objective manner form the stand point of the interest of the general public and not from the point of view of the person upon whom the restrictions are imposed or abstract considerations (see : ***Mohd Hanif Quareshi. V. State of Bihar***[177]). The judgment refers to and approves guidelines propounded in ***MRF Ltd. v. Inspector, Kerala Govt.***[178] for examining reasonableness of a statutory provision. In the said decision the Constitution Bench while discussing about the doctrine of proportionality has observed:-

> "54. Modern theory of constitutional rights draws a fundamental distinction between the scope of the constitutional rights, and the extent

176 (1982) 2 SCC 33

177 AIR 1958 SC 731

178 (1998) 8 SCC 227

of its protection. Insofar as the scope of constitutional rights is concerned, it marks the outer boundaries of the said rights and defines its contents. The extent of its protection prescribes the limitations on the exercises of the rights within its scope. In that sense, it defines the justification for limitations that can be imposed on such a right.

55. It is now almost accepted that there are no absolute constitutional rights 14 and all such rights are related. As per the analysis of Aharon Barak[179], two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law, i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the corner stone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose

179 Proportionality : Constitutional Rights and Their Limitation by Aharon Barak, Cambridge University Press, 2012

> reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. ..."

186. One cannot be unmindful that right to freedom of speech and expression is a highly valued and cherished right but the Constitution conceives of reasonable restriction. In that context criminal defamation which is in existence in the form of Sections 499 and 500 IPC is not a restriction on free speech that can be characterized as disproportionate. Right to free speech cannot mean that a citizen can defame the other. Protection of reputation is a fundamental right. It is also a human right. Cumulatively it serves the social interest. Thus, we are unable to accept that provisions relating to criminal defamation are not saved by doctrine of proportionality because it determines a limit which is not impermissible within the criterion of reasonable restriction. It has been held in ***D.C. Saxena (Dr) v. Hon'ble The Chief Justice of India***[180], though in a different context, that if

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180 (1996) 5 SCC 216

maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. The reason is obvious, viz., that society accepts free speech and expression and also puts limits on the right of the majority. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression. The Court had further observed that the State has legitimate interest, therefore, to regulate the freedom of speech and expression which liberty represents the limits of the duty of restraint on speech or expression not to utter defamatory or libellous speech or expression. There is a correlative duty not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation.

187. The submission of Mr. Datar, learned senior counsel is that defamation is fundamentally a notion of the

majority meant to cripple the freedom of speech and expression. It is too broad a proposition to be treated as a guiding principle to adjudge reasonable restriction. There is a distinction between social interest and a notion of the majority. The legislature has exercised its legislative wisdom and it is inappropriate to say that it expresses the notion of the majority. It has kept the criminal defamation on the statute book as in the existing social climate it subserves the collective interest because reputation of each is ultimately inhered in the reputation of all. The submission that imposition of silence will rule over eloquence of free speech is a stretched concept inasmuch as the said proposition is basically founded on the theory of absoluteness of the fundamental right of freedom of speech and expression which the Constitution does not countenance.

188. Now, we shall advert to Section 199 of CrPC, which provides for prosecution for defamation. Sub-section (1) of the said section stipulates that no court shall take cognizance of an offence punishable under Chapter XXI of the Indian

Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by, the offence; provided that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the court, make a complaint on his or her behalf. Sub-section (2) states that when any offence is alleged against a person who is the President of India, the Vice-President of India, the Government of a State, the Administrator of a Union territory or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor. Sub-section 3 states that every complaint referred to in sub-section (2) shall set forth the facts which constitute the offence alleged, the nature of such offence and such other

particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him. Sub-section mandates that no complaint under sub-section (2) shall be made by the Public Prosecutor except with the previous sanction of the State Government, in the case of a person who is or has been the Governor of that State or a Minister of that Government or any other public servant employed in connection with the affairs of the State and of the Central Government, in any other case. Sub-section 5 bars Court of Session from taking cognizance of an offence under sub-section (2) unless the complaint is made within six months from the date on which the offence is alleged to have been committed. Sub-section (6) states that nothing in this section shall affect the right of the person against whom the offence is alleged to have been committed, to make a complaint in respect of that offence before a Magistrate having jurisdiction or the power of such Magistrate to take cognizance of the offence upon such complaint.

189. The said provision is criticized on the ground that "some person aggrieved" is on a broader spectrum and that is why, it allows all kinds of persons to take recourse to defamation. As far as the concept of "some person aggrieved" is concerned, we have referred to plethora of decisions in course of our deliberations to show how this Court has determined the concept of "some person aggrieved". While dealing with various Explanations, it has been clarified about definite identity of the body of persons or collection of persons. In fact, it can be stated that the "person aggrieved" is to be determined by the courts in each case according to the fact situation. It will require ascertainment on due deliberation of the facts. In ***John Thomas v. Dr. K. Jagadeesan***[181] while dealing with "person aggrieved", the Court opined that the test is whether the complainant has reason to feel hurt on account of publication is a matter to be determined by the court depending upon the facts of each case. In ***S. Khushboo*** (supra), while dealing with "person aggrieved", a three-Judge Bench has opined that

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181 (2001) 6 SCC 30

the respondents therein were not "person aggrieved" within the meaning of Section 199(1) CrPC as there was no specific legal injury caused to any of the complainants since the appellant's remarks were not directed at any individual or readily identifiable group of people. The Court placed reliance on ***M.S. Jayaraj v. Commr. of Excise***[182] and ***G. Narasimhan*** (supra) and observed that if a Magistrate were to take cognizance of the offence of defamation on a complaint filed by one who is not a "aggrieved person", the trial and conviction of an accused in such a case by the Magistrate would be void and illegal. Thus, it is seen that the words "some person aggrieved" are determined by the courts depending upon the facts of the case. Therefore, the submission that it can include any and everyone as a "person aggrieved" is too spacious a submission to be accepted.

190. It has also been commented upon that by giving a benefit to public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in

182 (2000) 7 SCC 552

the discharge of public functions to file the case through public prosecutor, apart from saving his right under sub-section (6) of Section 199 CrPC, the provision becomes discriminatory. In this regard, it is urged that a public servant is treated differently than the other persons and the classification invites the frown of Article 14 of the Constitution and there is no base for such classification. Thus, the attack is on the base of Article 14 of the Constitution. In ***Special Courts Bill, 1978, In re***[183] Chandrachud, CJ, speaking for the majority of the Constitution Bench after referring to series of judgments of this Court, culled out certain principles. We may refer to a few of them:-

> "(1) x x x x x
>
> (*2*) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of

183 (1979) 1 SCC 380

distinguishing and classifying persons or things to be subjected to such laws.

(*3*) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(*4*) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(*5*) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no

application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(*6*) x x x x x

(*7*) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (*1*) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (*2*) that differentia must have a rational relation to the object sought to be achieved by the Act.

(*8*) x x x x x
(*9*) x x x x x
(*10*) x x x x x

(*11*) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in

no manner determines the matter of constitutionality."

191. Recently, in ***Yogendra Kumar Jaiswal & others v. State of Bihar and others***[184], the Court, after referring to ***Ram Krishna Dalmia v. S.R. Tendolkar***[185], ***Satyawati Sharma v. Union of India***[186], ***Rehman Shagoo v. State of J&K***[187] and ***C.I. Emden v. State of U.P.***[188] in the context of challenge to the constitutional validity of the Orissa Special Courts Act, 2006 and the Bihar Special Courts Act, 2009, repelled the contention that there was no justification for trial of offence under Section 13(1)(e) and the rest of the offences enumerated in Section 13 in different Act and ultimately opined:-

184 (2016) 3 SCC 183

185 AIR 1958 SC 538

186 (2008) 5 SCC 287

187 AIR 1960 SC 1

188 AIR 1960 SC 548

> "... Section 13(1)(*e*) targets the persons who have disproportionate assets to their known sources of income. This conceptually is a period offence, for it is not incident-specific as such. It does not require proof of corruption in specific acts, but has reference to assets accumulated and known sources of income in a particular period. The test applicable and proof required is different. That apart, in the context of the present Orissa Act it is associated with high public office or with political office which are occupied by people who control the essential dynamics of power which can be a useful weapon to amass wealth adopting illegal means. In such a situation, the argument that they being put in a different class and tried in a separate Special Court solely because the alleged offence, if nothing else, is a self-defeating one. The submission that there is a sub-classification does not remotely touch the boundaries of Article 14; and certainly does not encroach thereon to invite the wrath of the equality clause."

192. Be it stated that learned counsel for the petitioners stated that there can be no cavil about the President of India, the Vice-President of India, the Governor of a State, the Administrator of a Union territory but about others whose names find mention in the provision there is no justification to put them in a different class to enable them to file a case through the public prosecutor in the Court of Session. A studied scrutiny of the provision makes it clear that a public

servant is entitled to file a complaint through public prosecutor in respect of his conduct in discharge of public functions. Public function stands on a different footing than the private activities of a public servant. The provision gives them protection for their official acts. There cannot be defamatory attacks on them because of discharge of their due functions. In that sense, they constitute a different class. Be it clarified here that criticism is different than defamation. One is bound to tolerate criticism, dissent and discordance but not expected to tolerate defamatory attack.

193. Sub-section (6) gives to a public servant what every citizen has as he cannot be deprived of a right of a citizen. There can be cases where sanction may not be given by the State Government in favour of a public servant to protect his right and, in that event, he can file a case before the Magistrate. The provision relating to engagement of public prosecutor in defamation cases in respect of the said authorities is seriously criticized on the ground that it allows unnecessary room to the authorities mentioned therein and

the public servants to utilize the Public Prosecutor to espouse their cause for vengeance. Once it is held that the public servants constitute a different class in respect of the conduct pertaining to their discharge of duties and functions, the engagement of Public Prosecutor cannot be found fault with. It is ordinarily expected that the Public Prosecutor has a duty to scan the materials on the basis of which a complaint for defamation is to be filed. He has a duty towards the Court. This Court in ***Bairam Muralidhar v. State of Andhra Pradesh***[189] while deliberating on Section 321 CrPC has opined that the Public Prosecutor cannot act like the post office on behalf of the State Government. He is required to act in good faith, peruse the materials on record and form an independent opinion. It further observed that he cannot remain oblivious to his lawful obligations under the Code and is required to constantly remember his duty to the court as well as his duty to the collective. While filing cases under Sections 499 and 500 IPC, he is expected to maintain that

189 (2014) 10 SCC 380

independence and not act as a machine. The other ground of attack is that when a complaint is filed in a Court of Session, right to appeal is curtailed. The said submission suffers from a basic fallacy. Filing of a complaint before the Court of Session has three safeguards, namely, (i), it is filed by the public prosecutor; (ii) obtaining of sanction from the appropriate Government is necessary, and (iii) the Court of Session is a superior court than the Magistrate to deal with a case where a public servant is defamed. In our considered opinion, when sufficient protection is given and the right to appeal to the High Court is not curtailed as the CrPC protects it, the submission does not really commend acceptation. In view of the aforesaid, we do not perceive any justification to declare the provisions *ultra vires*.

194. On behalf of petitioner—Foundation of Media Professionals, Mr. Bhambhani, learned senior counsel has submitted that the operation of the Press and Registration of Books Act, 1867 (for short "1867 Act") must necessitate a Magistrate to accord due consideration of the provision of the

1867 Act before summoning the accused. Attention has been drawn to the Sections 3, 5, 6 and 8 of the 1867 Act and it is submitted that only person recognized under the said Act as editor, publisher, printer and owner could be summoned in the proceeding under Section 499 Indian Penal Code (IPC), apart from the author or person who has made the offending statements. The submission of the petitioner, Mr. Bhambhani, learned senior counsel is that in all the proceedings under Section 499 of IPC against a newspaper the accused must be confined to those who are identifiable to be responsible under Section 5 of the 1867 Act. In our considered opinion that the said aspects can be highlighted by an aggrieved person either in a challenge for quashing of the complaint or during the trial. There is no necessity to deal with the said facet while deliberating upon the constitutional validity of the provisions.

195. In the course of hearing, it has been argued that the multiple complaints are filed at multiple places and there is abuse of the process of the court. In the absence of any specific provisions to determine the place of proceedings in a

case of defamation, it shall be governed by the provisions of Chapter XIII of the CrPC - Jurisdiction of the Criminal Courts in Inquiries and Trials. A case is ordinarily tried where the Offence is committed (Section 177). The expression used in Section 177 is "shall ordinarily be inquired and tried" by a court within whose jurisdiction it was committed. Whereas "shall" brings a mandatory requirement, the word "ordinarily" brings a situational variation which results in an interpretation that the case may be tried as per the further provisions of the Chapter. In case the place of committing the offence is uncertain, the case may also be tried where the offence was partly committed or continues to be committed (Section 178). The case may also be tried where the consequence of the act ensues (Section 179). The other provisions in the chapter also deal with regard to certain specific circumstances. Section 186 CrPC gives the High Court powers to determine the issue if two or more courts take cognizance of the same offence. If cases are filed in two or more courts in different jurisdictions, then the Jurisdiction to determine the case lies with the High Court under whose

jurisdiction the first complaint was filed. Upon the decision of the High Court regarding the place of trial, the proceedings in all other places shall be discontinued. Thus, it is again left to the facts and circumstances of each case to determine the right forum for the trial of case of defamation. Thus, CrPC governs the territorial jurisdiction and needless to say, if there is abuse of the said jurisdiction, the person grieved by the issue of summons can take appropriate steps in accordance with law. But that cannot be a reason for declaring the provision unconstitutional.

196. Another aspect requires to be addressed pertains to issue of summons. Section 199 CrPC envisages filing of a complaint in court. In case of criminal defamation neither any FIR can be filed nor can any direction be issued under Section 156(3) CrPC. The offence has its own gravity and hence, the responsibility of the Magistrate is more. In a way, it is immense at the time of issue of process. Issue of process, as has been held in ***Rajindra Nath Mahato v. T. Ganguly, Dy. Superintendent and another***[190], is a matter of judicial

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determination and before issuing a process, the Magistrate has to examine the complainant. In ***Punjab National Bank and others v. Surendra Prasad Sinha***[191] it has been held that judicial process should not be an instrument of oppression or needless harassment. The Court, though in a different context, has observed that there lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the

191 (1972) 1 SCC 450

1993 Supp. (1) SCC 499

means to wreak personal vengeance. In ***Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others***[192] a two-Judge Bench has held that summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course.

197. We have referred to these authorities to highlight that in matters of criminal defamation the heavy burden is on the Magistracy to scrutinise the complaint from all aspects. The Magistrate has also to keep in view the language employed in Section 202 CrPC which stipulates about the resident of the accused at a place beyond the area in which the Magistrate exercises his jurisdiction. He must be satisfied that ingredients of Section 499 CrPC are satisfied. Application of mind in the case of complaint is imperative.

198. We will be failing in our duty if we do not take note of submission of Mr. Bhambhani, learned senior counsel. It is submitted by the learned senior counsel that Exception to Section 499 are required to be considered at the time of

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192 (1998) 5 SCC 749

summoning of the accused but as the same is not conceived in the provision, it is unconstitutional. It is settled position of law that those who plead Exception must prove it. It has been laid down in ***M.A. Rumugam*** (supra) that for the purpose of bringing any case within the purview of the Eighth and the Ninth Exceptions appended to Section 499 IPC, it would be necessary for the person who pleads the Exception to prove it. He has to prove good faith for the purpose of protection of the interests of the person making it or any other person or for the public good. The said proposition would definitely apply to any Exception who wants to have the benefit of the same. Therefore, the argument that if the said Exception should be taken into consideration at the time of the issuing summons it would be contrary to established criminal jurisprudence and, therefore, the stand that it cannot be taken into consideration makes the provision unreasonable, is absolutely an unsustainable one and in a way, a mercurial one. And we unhesitatingly repel the same.

199. In view of the aforesaid analysis, we uphold the constitutional validity of Sections 499 and 500 of the Indian Penal Code and Section 199 of the Code of Criminal Procedure. During the pendency of the Writ Petitions, this Court had directed stay of further proceedings before the trial court. As we declare the provisions to be constitutional, we observe that it will be open to the petitioners to challenge the issue of summons before the High Court either under Article 226 of the Constitution of India or Section 482 CrPC, as advised and seek appropriate relief and for the said purpose, we grant eight weeks time to the petitioners. The interim protection granted by this Court shall remain in force for a period of eight weeks. However, it is made clear that, if any of the petitioners has already approached the High Court and also become unsuccessful before this Court, he shall face trial and put forth his defence in accordance with law.

200. The Writ Petitions and the Transfer Petitions are disposed of accordingly. All pending criminal miscellaneous

petitions also stand disposed of. There shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Prafulla C. Pant]

New Delhi
May 13, 2016