BEFORE THE HON'BLE KARNATAKA HIGH COURT

AT BENGALURU

(ORIGINAL JURISDICTION)

WRIT PETITION NO. _____ OF 2020 (PIL)

IN THE MATTER OF:

1. **Mr. Krishna Prasad**

2. **N. Ram**

3. **Arun Shourie**

4. **Prashant Bhushan**

…Petitioners

VERSUS

Union of India
Through its Secretary,
Ministry of Law and Justice
4th Floor, A-Wing, Shastri Bhawan,
New Delhi - 110001

…Respondent

WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA CHALLENGING THE CONSTITUTIONAL VALIDITY OF SECTION 2(c)(i) OF THE CONTEMPT OF COURTS ACT, 1971

1. The address for service of the Petitioners is as shown in the cause title. They may also be served through their counsel, Clifton D' Rozario, Maitreyi Krishnan, Raghupathi S. and Avani Chokshi at No. 18, Bharat Bhavan, No. 35, Infantry Road, Bengaluru – 560 001. The address for service of the Respondent is as shown in the cause title.

2. That the instant writ petition is being filed under Article 226 of the Constitution of India challenging the constitutional validity of Section 2(c)(i) of the Contempt of Courts Act, 1971 as being violative of Articles 19 and 14 of the Constitution of India. The impugned sub-section is unconstitutional as it is incompatible with preambular values and basic features of the Constitution, it violates Article 19(1)(a), is unconstitutionally and incurably vague, and is manifestly arbitrary.

3. The **Petitioner No. 1**, Mr. Krishna Prasad has been a journalist since 1986. In a 35-year career, he has worked in four cities (Mysore, Bangalore, Bombay & Delhi) and in five publications (The Indian Express, The Times of India, Mid-Day, The Sunday Observer and Outlook), and taught journalism on three continents. Part of the team that founded Outlook magazine in 1995, he was the magazine's Editor in Delhi from 2007 to 2012, and its Editor-in-Chief from 2012 to 2016. He was the Editor of the Vijay Times newspaper and of The Times of India in Bangalore, in 2006-07. Upon his return to Karnataka, he has been an occasional columnist for the Kannada daily, Praja Vani. Between 2014 and 2017, he was a member of the Press Council of India—an autonomous, statutory, quasi-judicial body set up under an act of Parliament in 1966 to preserve the freedom of the press, and maintain and improve the standards of newspapers and news agencies in India— representing the Editors Guild of India. As a reporter, he has been involved in ground-breaking investigations into India's nuclear industry.

He was one of the two journalists who broke the cricket-match fixing scandal in the late 1990s. As an Editor, he has overseen the investigation and publication, among others, of the so-called 'Radia Tapes' and the 'Essar Tapes'.

4. The **Petitioner No. 2**, Mr. N. Ram, is a journalist and former Editor-inChief former Publisher, and former Chairman of The Hindu Group of Newspapers. He is presently a Director of The Hindu Group Publishing Private Limited and of Kasturi & Sons Ltd., the holding company for the Group. He has been the recipient of the Padma Bhushan (1990), the Asian Investigative Journalist of the Year (1990) Award from the Press Foundation of Asia, the JRD Tata Award for Business Ethics from XLRI, the Sri Lanka Ratna, Sri Lanka's highest civilian honour for non-nationals, and the Raja Ram Mohan Roy Award (2018) from the Press Council of India for outstanding contribution to journalism, among others.

5. The **Petitioner No. 3**, Mr. Arun Shourie, is a former Union Minister of Communication and Information Technology. He has worked with the World Bank, the Planning Commission of India, among others. He is a former Editor of The Indian Express. He was awarded the Padma Bhushan in 1990 and the Ramon Magsaysay Award in the category of Journalism, Literature, and the Creative Communication Arts.

6. The **Petitioner No. 4**, Mr. Prashant Bhushan, is a well-known advocate practicing before the Hon'ble Supreme Court for more than 35 years. He is also a social activist involved in public interest work. As a lawyer, he has filed several PILs before the Hon'ble Supreme Court and various High Courts and argued them pro bono. Many of these cases have resulted in landmark judgments and directions to authorities.

7. That the Petitioners in the instant case are all highly respected individuals with outstanding track-records in their respective fields. As part of their work, whether journalism or practicing law, they occasionally opine about public institutions including the functioning of various courts in the country. As journalists, social activists and opinion makers, the petitioners are concerned about Section 2(c)(i) of the Contempt of the Court's Act, 1971, in particular, the chilling effect on the freedom of speech that it has.

8. Section 2 of the Contempt of Courts Act, 1971 provides:

> **2. Definitions**.—In this Act, unless the context otherwise requires,—
>
> (a) "contempt of court" means civil contempt or criminal contempt;
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> (b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;
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> (c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—
>
> (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
>
> (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
>
> (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;
>
> (d) "High Court" means the High Court for a State or a Union territory, and includes the court of the Judicial Commissioner in any Union territory.

9. The Petitioners have all had a tryst with contempt proceedings especially under the impugned Section 2(c)(i) of the Contempt of Courts Act, 1971. The following are the details about the said cases:

Contempt Case against Petitioner No. 1

10. That Petitioner No. 1, in his capacity as Editor of a national weekly magazine, was arrayed as Respondent No. 3 in Contempt Application (Criminal) No. 17 of 2010 at the High Court of Judicature at Allahabad. This matter arose from the cover story of the October 4, 2010 issue of Outlook titled "The Six Black Sheep" in which the magazine reported allegations of corruption against six former Chief Justices of the Supreme

Court. An accompanying article titled "How to Lower the Bar" looked at corruption in the High Courts, including the Allahabad High Court.

11. Acting on a criminal miscellaneous contempt filed by a senior advocate of the Court, the Hon'ble Allahabad High Court proceeded against Petitioner No. 1 and eight others involved in the publication of the article. The offending content stated that in the Taj Corridor case, then Chief Justice of the Allahabad HC had withdrawn sanction for prosecution of the then Chief Minister Mayawati, just as the hearing in the case against her was drawing to a close. The offending paragraph reads as follows:

> "The rumour decibels in the corridors of our high courts have steadily gone up in the past few years. The issue, of course, is the moral and monetary corruption of those that sit in judgment in these highest courts. Proof may be a bit elusive but reputations have hit rock bottom. Indeed, there is no dearth of anecdotal tales in the bar councils on how some judges routinely dole out favours. The latest controversy in this long list involves the chief justice of the Allahabad HC..."

The article also carried a picture of the then Chief Justice, which read:

> "Passed order favouring Mayawati in the Taj Corridor case days after he met her, taking control of the case away from the Judges who had issued notice against the CM."

As Editor, Petitioner No. 1 accepted organisational responsibility for what was published in the magazine. He made dozens of trips to Allahabad for the case over six years. The Court declined to accept Outlook's apologies. The notices for contempt were discharged on 26.10.2016. Upon retirement, the judge in question launched a defamation case in Panjim in the same matter.

12. A Division Bench of the Hon'ble High Court of Judicature at Allahabad in **Re: In the Matter of Contempt by the Weekly Magazine Outlook** Contempt Application (Criminal) No. 17 of 2010 passed an order declining to find any error in taking cognizance against Petitioner No. 1 herein for criminal contempt of court.

Copies of the Order dated 11.10.2010 (by which notice was issued and by which the matter, having arisen by a complaint petition, was converted in to a suo motu proceeding) and of the Order dated 03.03.2011 (by which the Court declined to find any error in taking cognizance for criminal contempt in the matter) passed in Contempt Application (Criminal) No. 17 of 2010 are produced herewith and marked as **ANNEXURE – A (Colly.)**.

Contempt Case against Petitioner No. 2

13. That in March 2005, the Hon'ble High Court of Kerala initiated contempt proceedings against two former Supreme Court judges, and 13 others including the Petitioner No. 2 herein for for their statements condemning the way Mathrubhumi Editor K Gopalakrishanan was forced to appear in the court on a stretcher on November 9, 2001, following summons by the court in a contempt case, which was initiated against the Editor for publishing the proceedings of the Kollam Magistrate's Court in the Kalluvathukkal liquor tragedy case. The High Court however closed the contempt proceedings in 2005. A copy of the news report dated 24.03.2005 describing the case is produced herewith and marked as **ANNEXURE – B**.

Contempt Case against Petitioner No. 3

14. That in August 1990, a contempt petition was filed by Mr. Subramanian Swamy against the Petitioner No. 3, the then editor of The Indian Express. At the same time, the Hon'ble Supreme Court also initiated a suo motu contempt proceeding under Section 2(c) of the Contempt of Courts Act, 1971 against Petitioner No. 3. The contempt proceedings arose from an editorial written by the Petitioner No. 3 about the functioning of a Commission of Enquiry headed by the then sitting

Judge of the Hon'ble Supreme Court – Justice Kuldip Singh. The Commission of Enquiry was set up under the Commission of Enquiry Act, 1952 to probe into the alleged acts of omissions and commissions by Mr. Ramakrishna Hegde, the former Chief Minister of Karnataka. The charge against Petitioner No. 3 herein was that he had written an editorial with the caption "If shame had survived", thereby criticising Justice Kuldip

Singh, as the Commissioner, for conducting the enquiry in a improper manner and for ignoring important facts and evidence.

15. The Hon'ble Supreme Court in its judgment dated 23.07.2014 reported as [(2014) 12 SCC 344] inter alia held that truth is a valid defence in contempt proceedings and that the court may permit truth as a defence if two conditions are satisfied viz. 1.) public interest and 2.) the request for invoking the said defence is bona fide. Thus, the truthful editorial written by the Petitioner No. 3 criticising the sitting Chairman of a Commission of Enquiry, (who was also a sitting Supreme Court judge) was held not to be contempt. A copy of the judgment dated 23.07.2014 passed in **Subramanian Swamy v. Arun Shourie**, reported as (2014) 12 SCC 344 is produced herewith and marked as **ANNEXURE – C**.

Contempt Case against Petitioner No. 4

16. That in the year 2009, a contempt case [C.P. (Crl.) No. 10 of 2009] was initiated against the Petitioner No. 4 herein on account of Petitioner No. 4's interview given to Tehelka magazine in which the Petitioner No. 4 had make certain bona fide remarks regarding corruption prevalent in the Judiciary. The said contempt case is still pending adjudication before the Hon'ble Supreme Court. The said case was listed before the Hon'ble Supreme Court on 13.10.2020. The hearing of the matter was deferred till 04.11.2020. A copy of the order dated 14.07.2010 passed by the Hon'ble Supreme Court in C.P. (Crl.) No. 10 of 2009 is produced herewith and marked as **ANNEXURE - D**. A copy of the order dated 13.10.2020 passed by the Hon'ble Supreme Court in C.P. (Crl.) No. 10 of 2009 is produced herewith and marked as **ANNEXURE – E.**

17. On 22.07.2020, the Hon'ble Supreme Court issued a contempt notice to the Petitioner No. 4 herein in SCM (Crl.) No. 1 of 2020, titled **In Re Prashant Bhushan & Anr.** It appears that the said suo motu case was initiated against the Petitioner No.4 herein on the basis of a petition filed (on 09.07.2020) by one Mr. Mahek Maheshwari seeking to initiate criminal contempt proceedings

against the Petitioner herein for his remarks on the Hon'ble CJI in the tweet dated 29.06.2020.

18. That the Hon'ble Supreme Court took suo motu cognizance of the aforesaid two tweets dated 27.06.2020 and 29.06.2020 and issued notice to the Petitioner No. 4 herein after observing as follows in the order dated 22.07.2020:

> "We are, prima facie, of the view that the aforesaid statements on Twitter have brought the administration of justice in disrepute and are capable of undermining the dignity and authority of the Institution of Supreme Court in general and the office of the Chief Justice of India in particular, in the eyes of public at large.
>
> We take suo motu cognizance of the aforesaid tweet also apart from the tweet quoted above and suo motu register the proceedings.
>
> We issue notice to the Attorney General for India and to Mr. Prashant Bhushan, Advocate also."

19. The Hon'ble Supreme Court vide order in in SCM (Crl.) No. 1 of 2020, titled **In Re Prashant Bhushan & Anr** dated 14.08.2020 found the Petitioner No. 4 guilty of contempt and vide order dated 31.08.2020 sentenced the Petitioner No. 4 with a fine of Rs. 1/- (Rupee One). The Petitioner No. 4 has paid the said fine in the stipuated time period. The order dated 14.08.2020 and 31.08.2020 passed by the Hon'ble Supreme Court in SCM (Crl.) No. 1 of 2020, titled **In Re Prashant Bhushan & Anr** are produced herewith and marked as **Annexure – F and Annexure – G.**

20. That the Hon'ble Supreme Court in **D. C. Saxena v. Chief Justice of India, (1996) 5 SCC 216** has held that the definition contained in the impugned sub-section informs and guides not only prosecutions for contempt under the Contempt of Courts Act 1971 but also suo motu proceedings under Articles 129 and 215 of the Constitution in the following terms:

"**28.** …As this Court has taken suo motu action under Article 129 of the Constitution and the word 'contempt' has not been defined by making rules, it would be enough to fall back upon the definition of "criminal contempt" defined under Section 2(c) of the Act …"

21. That the Hon'ble Supreme Court has affirmed that legislative exercise of defining contempt would not be barred by Articles 129 and 215 in **Pallav Sheth v. Custodian (2001) 7 SCC 549** in the following terms:

"**30.** There can be no doubt that both this Court and High Courts are courts of record and the Constitution has given them the powers to punish for contempt. The decisions of this Court clearly show that this power cannot be abrogated or stultified. But if the power under Article 129 and Article 215 is absolute, can there by any legislation indicating the manner and to the extent that the power can be exercised? If there is any provision of the law which stultifies or abrogates the power under Article 129 and/or Article 215, there can be little doubt that such law would not be regarded as having been validly enacted. It, however, appears to us that providing for the quantum of punishment or what may or may not be regarded as acts of contempt or even providing for a period of limitation for initiating proceedings for contempt cannot be taken to be a provision which abrogates or stultifies the contempt jurisdiction under Article 129 or Article 215 of the Constitution.

31. This Court has always frowned upon the grant or existence of absolute or unbridled power. Just as power or jurisdiction under Article 226 has to be exercised in accordance with law, if any, enacted by the legislature, it would stand to reason that the power under Article 129 and/or Article 215 should be exercised in consonance with the provisions of a validly enacted law. In case of apparent

or likelihood of conflict the provisions should be construed harmoniously."

[Emphasis Supplied]

22. That Section 2(c)(i) of the Contempt of Courts Act is unconstitutional as it:

a. violates Article 19(1)(a),
b. is unconstitutionally and incurably vague, and
c. is manifestly arbitrary.

23. The Petitioners No. 2 to 4 had approached the Hon'ble Supreme Court in Writ Petition(s) (Civil) No(s). 791/2020. The Hon'ble Supreme Court was pleased to pass the following order in Writ Petition(s) (Civil) No(s). 791/2020 on 13.08.2020:

"Dr. Rajeev Dhavan, learned senior counsel appearing on behalf of the petitioners seeks leave of this Court to withdraw the writ petition with liberty to approach the High Court.

The writ petition is dismissed as withdrawn. We have not permitted this petition to be filed before this Court again. Liberty is granted to approach the High Court, if the petitioner so desires."

The Order dated 13.08.2020 passed by the Hon'ble Supreme Court in Writ Petition(s) (Civil) No(s). 791/2020 is produced herewith and marked as **Annexure – H**.

24. The Petitioners have not filed any other or similar Petition before this Hon'ble Court, or any other Court, except as narrated hereinabove, seeking the same reliefs as are prayed for, in the present Writ Petition. The Petitioners have no other alternative or legally adequate or efficacious remedy for the enforcement of rights guaranteed by the Constitution, as prayed for, in the present Writ Petition. This Hon'ble Court has the requisite jurisdiction under Article 226 to entertain and decide the present Writ Petition. The Petitioners have paid the requisite Court Fee.

25. Therefore, the Petitioners pray to prefer this Writ Petition on the following amongst other grounds without prejudice to one another.

GROUNDS

A. VIOLATION OF ARTICLE 19(1)(a)

1. That the impugned sub-section violates the right to free speech and expression guaranteed under Article 19(1)(a) and does not amount to a reasonable restriction under Article 19(2) on the following grounds:

First, the impugned sub-section fails the test of overbreadth. **Second**, the impugned sub-section abridges the right to free speech and expression in the absence of tangible and proximate harm.

Third, the impugned sub-section creates a chilling effect on free speech and expression.

Fourth, the offence of "scandalizing the court" cannot be considered to be covered under the category of "contempt of court" under Article 19(2).

Fifth, even if the impugned sub-section were permissible under the ground of contempt in Article 19(2), it would be disproportionate and therefore unreasonable.

Finally, the offence of "scandalizing the court" is rooted in colonial assumptions and objects, which have no place in legal orders committed to democratic constitutionalism and the maintenance of an open robust public sphere.

B. SECTION 2(C)(i) OF THE CONTEMPT OF COURTS ACT 1971 FAILS THE TEST OF OVERBREADTH

2. That the impugned sub-section fails the test of overbreadth. It is settled law that any legislation having the effect of restricting the right to free speech and expression on any of the grounds enumerated in Article 19(2) must be couched in the narrowest possible terms and cannot cast a "wide net". It is liable to be struck down as overbroad if it does so (**Superintendent Central Prison v. Ram Manohar Lohiya (1960) 2 SCR 821**; **Kameshwar Prasad v. State of Bihar 1962 Supp (3) SCR 369**; **Shreya Singhal v. Union of India (2015) 5 SCC 1**; **Anuradha Bhasin v. Union of India W.P.(C) 1031 of 2019**;

Chintaman Rao v. State of Madhya Pradesh, 1950 SCR 79; **State of Madras v. V.G. Row, 1952 SCR 597**).

3. That a Constitution Bench of the Hon'ble Supreme Court has held in **Kameshwar Prasad v. State of Bihar** that:

> "5. …The approach to the question regarding the constitutionality of the rule should be whether the ban that it imposes on demonstrations would be covered by the limitation of the guaranteed rights contained in Art. 19(2) and 19(3). In regard to both these clauses the only relevant criteria which has been suggested by the respondent-State is that the rule is framed -in the interest of public order". A demonstration may be defined as "an expression of one's feelings by outward signs". A demonstration such as is prohibited by, the rule may be of the most innocent type-peaceful orderly such as the mere wearing of a badge by a Government servant or even by a silent assembly say outside office hours-demonstrations which could in no sense be suggested to involve any breach of tranquillity, or of a type involving incitement to or capable of leading to disorder. If the rule had confined itself to demonstrations of type which would lead to disorder then the validity of that rule could have been sustained but what the rule does is the imposition of a blanket-ban on all demonstrations of whatever type-innocent as well as otherwise-and in consequence its validity cannot be upheld."
>
> [Emphasis Supplied]

4. That the impugned sub-section has an extremely wide import and is incapable of objective interpretation and even-handed application. For instance, a mere interrogation by a traffic constable about whether the red beacon on the hood of a judge's car was authorised was held to be contempt on the grounds of "scandalising the court". (**Suo Motu Action by High Court of Allahabad v. State of U.P. AIR 1993 All 211**).

5. That even though a Constitution Bench of the Supreme Court has distinguished between defamation of an individual judge and the offence of contempt of court in **Brahma Prakash Sharma v. State of U.P. 1953**

SCR 1169, the offence has been applied in instances where speech has been directed not against the court but against an individual judge (**D.C. Saxena v. the Chief Justice of India (1996) 5 SCC 216**). Contempt proceedings have also been initiated on the basis of criticism of former judges of the Hon'ble Supreme Court and the High Courts, on the grounds that even though they have ceased to exercise judicial functions, criticism of them would nevertheless scandalise the court.

6. That former judges do not continue to be considered as "the court" for contempt proceedings. The Hon'ble Supreme Court held in **Subramanian Swamy v. Arun Shourie (2014) 12 SCC 344** that even a retired Supreme Court judge heading a Commission of Inquiry would could have no recourse to the law of contempt, as the

Commission would not amount to a "court" for the purposes of the impugned sub-section:

> "**22.** As is seen from above, the Commission has the powers of civil court for the limited purpose as set out in that section. It is also treated as a civil court for the purposes of Section 5(4). The proceedings before the Commission are deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Penal Code. But the real issues are: whether the above provisions particularly and the 1952 Act generally would bring the Commission comprising of a sitting Supreme Court Judge within the meaning of "court" under Section 2(c)(i)?
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> …
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> **25.** Though the 1971 Act does not define the term "court" but in our opinion, the "court" under that Act means the authority which has the legal power to give a judgment which, if confirmed by some other authority, would be definitive. The court is an institution which has power to regulate legal rights by the delivery of definitive judgments, and to enforce its orders by legal sanctions and if its procedure is judicial in character in such matters as the taking of evidence and the administration of oath, then it is a court. The Commission constituted under the 1952 Act does not meet these pre-eminent tests of a court."

7. That the Bombay High Court in **In Re: Reference by Judicial Magistrate First Class Kirkee 1987 Mh. L.J. 358** has held that a retired judge would not amount to "the court":

> "4. Mr. Irani says that the impugned statement does not scandalise or tend to scandalize, nor does it lower or tend to lower the authority of any court. In the instant case, the impugned statement does not refer to a particular court, but refers to a Magistrate who was holding the post at the relevant time. In a given case, even casting aspersions on a Magistrate, instead of on a court would amount to scandalizing or lowering the authority of that Court because he is presiding over a particular Court. In the instant case, the Magistrate against whom the allegations have been made had not only ceased to be a judicial officer but has in fact died. If this is so, says Mr. Irani, it cannot be said that the impugned statement amounts to contempt of court within the meaning of Section 2(c)(i) of the Contempt of Courts Act. In our opinion, this contention is well founded. The learned Magistrate, who convicted the Respondent in the year 1968 had , admittedly, ceased to be a member of the judiciary. As already mentioned above, in fact he has expired. He was therefore not sitting in any Court at the time when the impugned statement was made…"
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> [Emphasis Supplied]

8. That the overbroad language of the impugned sub-section leaves open the possibility of it being used to punish speech which does not interfere with judicial proceedings or the administration of justice. In effect, the impugned sub-section grants courts at every level an absolute power to quell all criticism of the courts and of judges.

C. SECTION 2(C)(i) OF THE CONTEMPT OF COURTS ACT 1971 CRIMINALISES SPEECH IN THE ABSENCE OF PROXIMATE AND TANGIBLE HARM

9. That the right to free speech and expression cannot be abridged on the basis of a mere speculation of harm. Nor can the right to free speech be restricted in the absence of real and proximate harm. The impugned sub-section restricts speech on the basis of no more than its a "tendency" to

scandalise or lower the authority of the courts. This is constitutionally impermissible in the absence of some evidence or connection which removes alters the harm from a purely speculative one to a real, proximate and likely one.

10. That the Hon'ble Supreme Court has observed in **S. Rangarajan v. P. Jagjivan Ram (1989) 2 SCC 574** that:

> "45. …Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. 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 powder keg"."

[Emphasis Supplied] **11.** That the test of public confidence by which the applicability of the impugned offence to speech is determined is incapable of meeting the standard set out in **S. Rangarajan** (**Supra**). The said test ignores the requirement for real damage and draws speech into the net of the offence prematurely and on the basis of the effect of the speech on public sentiment alone. Until an injury to sentiments crystallises into a likelihood of tangible and material harm, the speech remains protected by Article 19(1)(a) and criminalisation of such speech remains incapable of amounting to a reasonable restriction under Article 19(2).

12. That the real test for constitutionally permissible restrictions of speech, even if it technically amounts to contempt has been laid down by the US Supreme Court as a "clear and present danger to the administration of justice". In **Bridges v. California 341 US 242 (1941)**, the US Supreme Court, while deciding a case in which contempt citations had been brought against a newspaper and a labour leader for statements made about pending judicial proceedings, Justice Black, for a five-to-four majority, began by applying the clear and present danger test, which he interpreted to require that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." It is this connection of harm which is inherent in Sections 2(c)(ii) and

2(c)(iii) of the Contempt of Courts Act, 1971. It is really such a test which must be satisfied for speech to be restricted on the ground of Contempt of Court under Article 19(2).

13. That, by criminalising criticism of the court in sweeping and absolute terms, the impugned sub-section raises a prior restraint on speech on matters of public and political importance. The Hon'ble Supreme Court has observed in **R. Rajagopal v. State of T.N. (1994) 6 SCC 632** that restrictions on speech on such matters bear a heavy presumption against constitutionality even if they are allegedly defamatory: "We may now consider whether the State or its officials have the authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials, as the case may be? We think not. No law empowering them to do so is brought to our notice. As observed in New York Times v. United States 24 (1971) 403 US 713, popularly known as the Pentagon papers case, "any system of prior restraints of (freedom of) expression comes to this Court bearing a heavy presumption against its constitutional validity" and that in such cases, the Government "carries a heavy burden of showing justification for the imposition of such a restraint"."

14. That the Hon'ble Supreme Court, restating the position adopted in the Constitution Bench decision in **Kameshwar Prasad (Supra)**, held in **Shreya Singhal v. Union of India** (**2015**) **5 SCC 1** that: "93. The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited."

15. That the language of a "tendency" to scandalise or lower the authority of the Courts used in the impugned sub-section fails the test of proximate cause or "spark in a powder keg". Views which only tend to scandalise are even more removed from the real harm requirement than those which amount to scandalising the court without having any effect on public order. Further, dissenting and critical views are almost always likely to have such a tendency, and the impugned sub-section has the effect of targeting speech of this kind as a result.

D. SECTION 2(C)(i) OF THE CONTEMPT OF COURTS ACT 1971 HAS A CONSTITUTIONALLY IMPERMISSIBLE CHILLING EFFECT.

16. That the Hon'ble Supreme Court has held in **P.N. Duda v. P. Shiv Shankar (1988) 3 SCC 167** that:

> "9. "Justice is not a cloistered virtue. she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." - said Lord Atkin in **Ambard v. Attorney-General for Trinidad and Tobago, [1936] A.C. 322** at 335. Administration of justice and Judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by their conscience and oath of their office, that is, to defend and uphold the Constitution and the laws without fear and favour…
>
> 11.…The Court must harmonise the constitutional values of free criticism, and the need for a fearless curial process and its presiding functionary, the judge. To criticise a judge fairly albeit fiercely, is no crime but a necessary right. Where freedom of expression subserves public interest in reasonable measure, public justice cannot gag it or manacle it. The Court must avoid confusion between personal protection of a libelled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt but latter is, although overlapping spaces abound."
>
> [Emphasis Supplied]

17. That the Hon'ble Supreme Court has held that the judiciary as an institution must be open to public criticism. However, the overbreadth of the words of the provision and the resulting reality of its inconsistent application has the effect of threatening dissenters and critics into silence on pain of criminal penalty. This has a chilling effect on free speech and expression, and silences legitimate criticism and dissent to the detriment of the health of the democracy.

18. That the Hon'ble Supreme Court in **Anuradha Bhasin v. Union of India Writ Petition (Civil) No. 1031 of 2019** has affirmed that the argument

of the chilling effect may make up a substantive component of arguments in free speech cases:

> "…We may note that the argument of chilling effect has been utilized in various contexts, from being purely an emotive argument to a substantive component under the free speech adjudication. The usage of the aforesaid principle is adopted for impugning an action of the State, which may be constitutional, but which imposes a great burden on the free speech…"

[Emphasis Supplied] **19.** That there is a need to protect speakers from the chilling effect of the offence of "scandalising the court". The test suggested for the existence of a chilling effect in **Anuradha Bhasin (Supra)** by the Hon'ble Supreme Court is satisfied by the offence of scandalising the court. The

Hon'ble Supreme Court set out the following test:

> "…one possible test of chilling effect is comparative harm. In this framework, the Court is required to see whether the impugned restrictions, due to their broadbased nature, have had a restrictive effect on similarly placed individuals during the period."

The threat of criminal penalty associated with the offence of scandalising the court places a real and immediate burden on the exercise of the free speech right. It demonstrably deters the airing of critical viewpoints by members of the general public, creates serious disincentives to journalism about the judiciary and so impoverishes the public sphere.

20. That the impugned sub-section is consequently liable to be struck down on account of having a chilling effect on free speech and expression as it stifles legitimate criticism of the judiciary by the threat of criminal sanction.

E. THE OFFENCE SET UP UNDER SECTION 2(C)(i) OF THE CONTEMPT OF COURTS ACT 1971 DOES NOT CONTROL THE MEANING OF "CONTEMPT OF COURT" UNDER ARTICLE 19(2).

21. That the offences of "scandalizing" or "lowering or tending to lower the authority of the court" were not specifically or expressly contemplated as reasonable restrictions under the ground of "contempt of court" in Article

19(2). The category of "contempt of court" was added by means of an amendment to Draft Article 13(2) (final Article 19(2)) and was intended to:

> "…cover one category of what might be called lapses in the exercise of freedom of speech and expression, namely, a person might be speaking on a matter which is sub judice and thereby interfere with the administration of justice."
> (**T.T. Krishnamachari on Draft Article 13, Constituent Assembly of India Debates (Proceedings) - Volume X, Monday the 17th October, 1949**).

22. That the Constituent Assembly Debates on Draft Article 13(2) make clear that the ground of "contempt of court" had been introduced to cover a lacuna by permitting restrictions on persons speaking on matters which were sub judice, and which could consequently lead to interference with the administration of justice. This intention was noted by Mr. Krishnamachari:

> "We, therefore, felt, Sir, that we would restrict ourselves to merely remedying a lacuna rather than extending the scope of the exceptions mentioned in clause (2) and that is why we have decided to drop the original amendment 415 and we have tabled amendment No. 449 in which contempt of court will figure on a par with libels, slander, defamation or any mater which offends against decency or morality, or which undermines the security of, or tends to overthrow, the State."

23. That the impugned sub-section was introduced in 1971, a full forty years after the last prosecution for "scandalising the court" under common law in the UK (**R v. Colsey, The Times 9 May 1931**). The offence had fallen into disuse under common law, and was not contemplated as a ground for restriction under Article 19(2) during the adoption of the Constitution, as Mr. Krishnamachari's explanation regarding the ground of "contempt of court" makes abundantly clear. The meaning of "contempt of court" under Article 19(2) cannot post-facto be extended by legislation to include "scandalising the court".

24. That it would be wholly unconstitutional to allow legislation to expand the scope of restrictions at the cost of the breadth and vigour of the fundamental right that they curtail. Judges of the Hon'ble Supreme Court have recognised and affirmed as early as in 1951 and as recently as 2020 that it is the rights which are fundamental, and the not the restriction (**Sushila Aggarwal and Others v. State (NCT of Delhi) and Another Special Leave Petition (Criminal) Nos. 72817282/2017, S. Ravindra Bhat, J. (Concurring); Ram Singh v. State of Delhi 1951 AIR 270, 1951 SCR 451 Vivian Bose, J. (Dissenting)**).

F. SECTION 2(C)(i) OF THE CONTEMPT OF COURTS ACT 1971 FAILS THE TEST OF PROPORTIONALITY.

25. That the Hon'ble Supreme Court has held in **State of Madras v. V.G. Row 1952 SCR 597** that for any restriction under Article 19(2) must not be disproportionate in order to be reasonable:

> "It is important in this context to bear in mind 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."

26. That the principle of proportionality has evolved into a four-pronged test, as set down in **Modern Dental College and Research Centre v. State of Madhya Pradesh (2016) 7 SCC 353** and affirmed in **K.S. Puttaswamy v. Union of India (2019) 1 SCC 1**. In substance, the proportionality test consists of the following prongs:

> i. The existence of a legitimate state aim; ii. The existence of a rational nexus between the aim and the infringement of the right ('the rationality prong');
>
> iii. That the infringement is the least restrictive measure available for the fulfilment of the aim (i.e., alternatives must be unquestionably foreclosed) ('the necessity prong'); and

iv. That a balance is struck between the extent of the restriction and the benefit that the State hopes to achieve by its imposition ('balancing').

27. That, in view of the colonial foundations of and justifications for the offence as well as its sweeping breadth, the aim of the impugned subsection is to immunise courts from criticism and to maintain public confidence in the courts by this route (rather than leaving confidence to follow from the manner which courts' functions are discharged) does not satisfy the first prong.

28. That, in addition to creating a chilling effect as outlined above, the impugned sub-section impacts dignity and liberty under Article 21. Not only does conviction under the impugned sub-section lead to imprisonment, but it also impacts the fundamental right to reputation of the speaker or dissident. The right to reputation has been held to be fundamental to the right to life and personal liberty under Article 21 (**Om Prakash Chautala v. Kanwar Bhan (2014) 5 SCC 417**).

29. That the impugned sub-section clearly breaches the rationality prong, as there is often only a tenuous nexus between the restriction on free speech and the end that is sought to be achieved. This has already been discussed in detail in above (Section titled **Fails the test of Overbreadth**, **Absence of Proximate Harm** above).

30. That the impugned sub-section also clearly breaches the necessity prong. This requires that the restriction impair the fundamental right to a minimal degree. In **Internet and Mobile Association of India v. Reserve Bank of India W.P.(C) No. 528 of 2018**, the Hon'ble Court described the exercise to be undertaken by it as follows:

> "…we are obliged to see if there were less intrusive measures available and whether RBI has at least considered these alternatives."

31. Section 2(c)(ii) and (iii) of the Contempt of Courts Act 1971 already contain provisions defining contempt to include interference with ongoing judicial proceedings or the administration of justice. Thus, the existence of the impugned sub-section is unnecessary, and it serves as a catch-all provision to punish speech that may not interfere with either any judicial proceedings

or the administration of justice. Sections 2(c)(ii) and 2(c)(iii) are less intrusive measures and under which all genuine offences of criminal contempt can be effectively dealt with and the capacity of the courts to function can be preserved.

32. That that the offence of "scandalising the court" has been held unconstitutional in Canada in **R. v. Kopyto (1987) 62 O.R. (2d) 449 (C.A.)** on the grounds that it fails the test of proportionality, and casts an undue burden on free speech and expression guaranteed under the Canadian Charter of Rights and Freedoms. Cory, J. commented that the judiciary was not a "frail flower" and that the public in democracies must be trusted not to take scurrilous comments seriously.

33. That the impugned sub-section is clearly disproportionate to the aim that the Contempt of Courts Act sought to achieve, namely, to balance the fundamental right to free speech and expression with the status and dignity of courts and interests of the administration of justice (**Statement of Objects and Reasons**, **The Contempt of Courts Act, 1971**). These aims are amply served by Sections 2(c)(ii) and 2(c)(iii), with the impugned sub-section being wholly extraneous to the object of ensuring the dignity of court in genuine cases of criminal contempt. Therefore, the impugned sub-section fails to meet the test of proportionality.

G. THE OFFENCE OF "SCANDALIZING THE COURT" IS ROOTED IN COLONIAL ASSUMPTIONS AND OBJECTS WHICH HAVE NO REGARD TO RESPECTING FUNDAMENTAL RIGHTS IN A DEMOCRACY, INCLUDING FREEDOM OF SPEECH, EQUALITY AND EQUAL TREATMENT.

34. That the offence of "scandalising the court" is premised on the idea that the speech by ordinary citizens about the judicial process must be curtailed in order to protect the "dignity" and "majesty" of courts, and that the populations which courts serve would not proceed with respect or concern for public institutions unless their speech is restricted by the threat of criminal sanction.

35. That the offence of "scandalizing the court" punishable by a summary procedure has its origins in the common law understanding that judges were an extension of the Crown, and consequently deserved decisive and convenient means by which to maintain their "honour" and "glory". In **R. v. Almon (1765) Wilmot 243, 270; 97 ER 94, 105**, the Court explained the rationale of the offence of scandalising as follows: "But the principle upon which attachments issue for libels upon courts is of a more enlarged and important nature — it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public."

36. That the offence was obsolete in England by the end of the nineteenth century, and was only considered suitable to "coloured" people from the colonies, who were considered to not have the same rights as Englishmen, and were patronisingly viewed as unable to participate in institutions of a democratic society. This logic – based on the lack of rights as well as of competence or maturity of the colonised – is evident in the observations of the Privy Council in **McLeod v. St Aubyn [1899] AC 549**:

> "Committals for contempt of court by scandalising the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. <u>But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court.</u>"

37. That the Privy Council has itself acknowledged the underlying subtext of racism in **McLeod v. St Aubyn [1899] AC 549** in **Dhooharika v. Director of Public Prosecutions [2014] UKPC 11** and observed:

> "The reference to "coloured populations" would be wholly inappropriate today."

38. That the above makes it clear that the offence as invented in common law and received into Indian law is grounded on the unacceptable and undemocratic infantilisation of citizens who receive information and views

in the Indian public sphere. The offence seeks to shield citizens presumed - without foundation - to be an audience incapable of the discernment necessary to choose between good and bad arguments in the public sphere. This is based on the specious understanding that the people of India, despite having the competence (in constitutional law and in fact) to participate in public debate, to receive information about candidates and, on that basis and to choose their government by voting would be unable to discern and approach commentary concerning the courts with the same competence. It is both anachronistic and untenable that this offence should continue to exist alongside the constitutional guarantee of free expression and the basic feature of a democratic and republican government.

39. That, the offence of "scandalising the court" has either been abolished or drastically circumscribed in many common law jurisdictions. Further, the UK Parliament has abolished the offence through the **Crime and Courts Act, 2013** (**Section 33**), acting on the recommendations of the UK Law Commission (**The Law Commission**, **Contempt of Court: Scandalising the Court, 18 December 2012**). The UK Law Commission recommended the abolition of the offence, despite that fact that it had fallen into disuse. This recommendation was founded on the following considerations, inter alia:

> "(1) The offence of scandalising the court is in principle an infringement of freedom of expression that should not be retained without strong principled or practical justification.
>
> …
>
> (3) There are uncertainties about the conditions for the offence, which will need to be resolved if the offence is retained.
>
> …
>
> (6) The offence may be regarded as self-serving on the part of the judges; this risk would be reduced but not removed if the offence were restated in statute, as the offence would no longer be judge-made, though it would still be enforced by them.
>
> (7) Prosecutions for this offence, or for any offence devised to replace it, are likely to have undesirable effects. These include re-publicising the allegations, giving a platform

> to the contemnor and leading to a trial of the conduct of the judge concerned.
>
> …
>
> (11) There are several statutory offences covering the more serious forms of behaviour covered by scandalising, and civil defamation proceedings are available in the case of false accusations of corruption or misconduct."

40. That Supreme Court has observed that the modern offence of "scandalising the court" originates from **Almon (Supra)** (**Delhi Judicial Service Association v. State of Gujarat (1991) 4 SCC 406, at paragraph 20**). In view of the colonial and unconstitutionally repressive character of the rationales that justify the offence and are applicable in drawing the bounds of its subjective words, the impugned sub-section deserves to be struck down.

41. The whole object of imposing reasonable restrictions on freedom of speech on the ground of contempt of court is to protect the administration of justice. "Scandalising the Court" has been used and is likely to be used to stifle criticism and freely discuss the acts of the judiciary. The whole object of the fundamental right to free speech is for citizens to be able to freely critique the functioning of public institutions as well as any individual manning those institutions without fear of criminal prosecution.

H. THAT THE PROVISION, DESPITE SETTING OUT PENAL CONSEQUENCES, IS INCURABLY VAGUE

42. That the impugned sub-section, despite setting out penal consequences, is incurably vague. It uses vague terminology whose scope and limits are impossible to demarcate. In particular, the phrase "scandalises or tends to scandalise" invites subjective and greatly differing readings and application which is incapable of being certain and even-handed. Thus, the offence violates the Article 14 demands of equal treatment & nonarbitrariness.

43. That it is an established proposition of law that a statute using vague terms such that it is difficult to define or limit its scope is liable to be held to be

invalid. (**State of Bombay v. F.N. Balsara 1951 SCR 682**; **State of Madhya Pradesh v. Baldeo Prasad 1961 SCR (1) 970**).

44. That in **Kartar Singh v. State of Punjab (1994) 3 SCC 569**, the Hon'ble Supreme Court has held that:

> "130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning..."

45. That the impugned sub-section clearly fails the test outlined by the Constitution Bench in **Kartar Singh (Supra)**. The prohibitions in the impugned sub-section lack any clear definition, and do not provide persons with a reasonable opportunity or adequate warning regarding what is prohibited. The impugned sub-section is consequently liable to be struck down on account of vagueness.

46. That the whole of the impugned sub-section is vague and incapable of redress. No possibility of carving out and saving a constitutionally valid portion of the provision exists. Where legislation creates an offences of this kind and there is no constitutionally fit part to be severed, the Hon'ble Supreme Court has held that the whole offence is liable to be struck down as unconstitutional. (**Shreya Singhal (Supra)**).

I. THAT THE PROVISION FAILS THE TEST OF MANIFEST ARBITRARINESS

47. That the impugned sub-section fails the test of manifest arbitrariness laid down by the Hon'ble Supreme Court in **Shayara Bano v. Union of India (2017) 9 SCC 1** and followed in **Navtej Singh Johar v. Union of India (2018) 10 SCC 1** in which a widely and vaguely worded offence of colonial vintage criminalised otherwise lawful and constitutionally protected activity. The Hon'ble Supreme Court had observed in **Shayara Bano (Supra)** that:

> "272. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the Rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judges' Bench decision in McDowell (supra) when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between state action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to individuals and citizens in Part III of the Constitution."

48. That it is a settled position that a statute enacting an offence or imposing a penalty has to be strictly constructed. The Hon'ble Supreme Court has observed in **Sakshi v. Union of India (2004) 5 SCC 518** that:

> "19. …The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than they would ordinarily bear."

49. That the broad and ambiguous wording of the impugned sub-section violates Article 14 by leaving the offence open to differing and inconsistent applications. This uncertainty in the manner in which the law applies renders it manifestly arbitrary and violates the right to equal treatment. Such a violation is evident in the cases relating to punishment for the offence of "scandalising the court". For instance, in **P. Shiv Shankar (Supra)**, the respondent was not held guilty of scandalising the court despite referring to Supreme Court judges at a public function as "antisocial elements i.e. FERA violators, bride burners and a whole

horde of reactionaries" on account of the fact that he was Law Minister. However, in **D.C. Saxena (Supra)**, the respondent was held guilty of criminal contempt for alleging that a Chief Justice was corrupt and that an F.I.R. under the I.P.C. should be registered against him.

J. ABSENCE OF GUIDELINES TO CONTROL DISCRETION & FOSTER CERTAINTY IN THE APPLICATION OF CRIMINAL CONTEMPT

50. That it is well-settled that the administration of criminal offences must be supported by an express and unambiguous statement of the applicable procedure.

51. That the Hon'ble Supreme Court has affirmed in **Pallav Sheth (Supra)** that the suo motu power in Articles 129 and 215 is not to be treated as an "absolute or unbridled power".

52. That, in light of the foregoing two grounds, two concerns relating to the manner of hearing of criminal contempt cases deserve to be addressed. In the contempt jurisdiction:

i. Judges may often be seen to be acting in their own cause, thus violating the principles of natural justice and adversely affecting the public confidence they seek to preserve through the proceeding.

ii. The bench taking suo motu action on behalf of the Court as a whole, initiates it without the concurrence of the full court.

53. Therefore, it is essential, that in respect of Section 2(c) of the Contempt of Courts Act, 1971 as a whole (that is, Section 2(c), i.e. including 2(c)(ii) and 2(c)(iii) whose constitutional validity has not been challenged herein), guidelines and rules must be framed. These guidelines and rules must be framed so as to avoid the violation of principles of natural justice as well as arbitrary exercise of power by individual judges.

PRAYERS

In view of the above facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to:

1. Issue an appropriate writ or direction declaring Section 2(c)(i) of the of the Contempt of Courts Act, 1971 as being violative of Articles 19 and 14 of the Constitution of India;
2. Frame rules and guidelines that define the process that superior courts must employ while taking criminal contempt action, keeping in mind principles of natural justice and fairness.
3. Pass such other order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the instant case.

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