REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. Nos. **4-5, 10**, 11, 12-13, 16-17, 18, 19, 20-21, 22-23, 24-25, 26-27, 30-31, 32-33, 34, 35-36, 37-38, 39-40, 41-42, 43-44, 45-46, 47-48, 49-50, 55-56, 57, 58, 59, 61 and 62
in
C.A. No. 9813 of 2011 and C.A. No. 9833 of 2011

Sahara India Real Estate Corp. Ltd. & Ors. …Appellants

Vs.

Securities & Exchange Board of India & anr. …Respondents

with
I.A. Nos. 14 and 17 in C.A. No. 733 of 2012

J U D G M E N T

S. H. KAPADIA, CJI

Introduction

1. Finding an acceptable constitutional balance between free press and administration of justice is a difficult task in every legal system.

Factual background

2. Civil Appeal Nos. 9813 and 9833 of 2011 were filed challenging the order dated 18.10.2011 of the Securities Appellate Tribunal whereby the appellants (hereinafter for short "Sahara") were directed to refund amounts invested with the appellants in certain Optionally Fully Convertible Bonds (OFCD) with interest by a stated date.

3. By order dated 28.11.2011, this Court issued show cause notice to the Securities and Exchange Board of India (SEBI), respondent No. 1 herein, directing Sahara to put on affidavit as to how they intend to secure the liabilities incurred by them to the OFCD holders during the pendency of the Civil Appeals.

4. Pursuant to the aforesaid order dated 28.11.2011, on 4.01.2012, an affidavit was filed by Sahara explaining the manner in which it proposed to secure its liability to OFCD holders during the pendency of the Civil Appeals.

5. On 9.01.2012, both the appeals were admitted for hearing. However, IA No. 3 for interim relief filed by Sahara was kept for hearing on 20.01.2012.

6. On 20.01.2012, it was submitted by the learned counsel for SEBI that what was stated in the affidavit of 4.01.2012 filed by Sahara inter alia setting out as to how the liabilities of Sahara India Real Estate Corporation Ltd. (SIRECL) and Sahara Housing and Investment Corporation (SHICL) were to be secured was insufficient to protect the OFCD holders.

7. This Court then indicated to the learned counsel for Sahara and SEBI that they should attempt, if possible, to reach a consensus with respect to an acceptable security in the form of an unencumbered asset. Accordingly, IA No. 3 got stood over for three weeks for that purpose.

8. On 7.02.2012, the learned counsel for Sahara addressed a **personal** letter to the learned counsel for SEBI at Chennai enclosing the proposal with details of security to secure repayment of OFCD to investors as pre-condition for stay of the

impugned orders dated 23.06.2011 and 18.10.2011 pending hearing of the Civil Appeals together with the Valuation Certificate indicating fair market value of the assets proposed to be offered as security. This was communicated by e-mail from Delhi to Chennai. Later, on the same day, there was also an official communication enclosing the said proposal by the Advocate-on-Record for Sahara to the Advocate-on-Record for SEBI.

9. A day prior to the hearing of IA No. 3 on 10.02.2012, one of the news channels flashed on TV the details of the said proposal which had been communicated only inter parties and which was obviously not meant for public circulation. The concerned television channel also named the valuer who had done the valuation of the assets proposed to be offered as security.

10. On 10.02.2012, there was no information forthcoming from SEBI of either acceptance or rejection of the proposal.

11. The above facts were inter alia brought to the notice of this Court at the hearing of IA No. 3 on 10.02.2012 when Shri F.S. Nariman, learned senior counsel for Sahara orally submitted that disclosure to the Media was by SEBI in **breach of confidentiality** which was denied by the learned counsel for SEBI. After hearing the learned counsel for the parties, this Court passed the following order:

> "We are distressed to note that even "without prejudice" proposals sent by learned counsel for the appellants to the learned counsel for SEBI has come on one of the TV channels. Such incidents are increasing by the day. Such reporting not only affects the business sentiments but also interferes in the administration of justice. In the above circumstances, we have requested learned counsel on both sides to make written application to this Court in the form of an I.A. so that appropriate orders could be passed by this Court with regard to reporting of matters, which are sub-judice."

12. Pursuant to the aforesaid order, IA Nos. 4 and 5 came to be filed by Sahara. According to Sahara, IA Nos. 4 and 5 raise a question of general public importance. In the said IA Nos. 4

and 5, Sahara stated that the time has come that this Court should give appropriate directions with regard to reporting of matters (in electronic and print media) which are *sub judice*. In this connection, it has been further stated: "it is well settled that it is inappropriate for comments to be made publicly (in the Media or otherwise) on cases (civil and criminal) which are *sub judice*; this principle has been stated in Section 3 of the Contempt of Courts Act, which defines criminal contempt of court as the doing of an act whatsoever which prejudices or interferes or tends to interfere with the due course of any judicial proceeding or tends to interfere or interfere with or obstruct or tends to interfere or obstruct the administration of justice". In the IAs, it has been further stated that whilst there is no fetter on the fair reporting of any matter in court, matters relating to proposal made inter-parties are privileged from public disclosure. That, disclosure and publication of pleadings and other documents on the record of the case by third parties (who are not parties to the proceedings in this court) can (under the rules of this Court) only take place on an application to the court and pursuant to the directions given by the court (see

Order XII, Rules 1, 2 and 3 of Supreme Court Rules, 1966). It was further stated that in cases like the present one a thin line has to be drawn between two types of matters; firstly, matters between company, on the one hand, and an authority, on the other hand, and, secondly, matters of public importance and concern. According to Sahara, in the present case, no question of public concern was involved in the telecast of news regarding the proposal made by Sahara on 7.02.2012 by one side to the other in the matter of providing security in an ongoing matter. In the IAs, it has been further stated that this Court has observed in the case of State of Maharashtra v. Rajendra J. Gandhi [(1997) 8 SCC 386] that: "A trial by press, electronic media or public agitation is the very antithesis of rule of law". Consequently, it has been stated in the IAs by Sahara that this Court should consider giving guidelines as to the manner and extent of publicity which can be given to pleadings/ documents filed in court by one or the other party in a pending proceedings which have not yet been adjudicated upon.

13. Accordingly, vide IA Nos. 4 and 5, Sahara made the following prayers:

> *"(b) appropriate guidelines be framed with regard to reporting (in the electronic and print media) of matters which are sub-judice in a court including public disclosure of documents forming part of court proceedings.*
>
> *(c) appropriate directions be issued as to the manner and extent of publicity to be given by the print/ electronic media of pleadings/ documents filed in a proceeding in court which is pending and not yet adjudicated upon;"*

14. Vide IA No. 10, SEBI, at the very outset, denied that the alleged disclosure was at its instance or at the instance of its counsel. It further denied that papers furnished by Sahara were passed on by SEBI to the TV Channel. In its IA, SEBI stated that it is a statutory regulatory body and that as a matter of policy SEBI never gives its comments to the media on matters which are under investigation or *sub judice*. Further, SEBI had no business stakes involved to make such disclosures to the media. However, even according to SEBI, in view of the incident having happened in court, this Court

should give appropriate directions or frame such guidelines as may be deemed appropriate.

15. At the very outset, we need to state that since an important question of public importance arose for decision under the above circumstances dealing with the rights of the citizens and the media, we gave notice and hearing to those who had filed the IAs; the question of law being that every citizen has a right to negotiate in confidence inasmuch as he/ she has a right to defend himself or herself. The source of these two rights comes from the common law. They are based on presumptions of confidentiality and innocence. Both, the said presumptions are of equal importance. At one stage, it was submitted before us that this Court has been acting suo motu. We made it clear that Sahara was at liberty to withdraw the IAs at which stage Shri Sidharth Luthra, learned senior counsel stated that Sahara would not like to withdraw its IAs. Even SEBI stated that if Sahara withdraws its IAs, SEBI would insist on its IA being decided. In short, both Sahara and SEBI sought adjudication. Further, on 28.03.2012, learned counsel

for Sahara filed a note in the Court citing instances (mostly criminal cases) in which according to him certain aberration qua presumption of innocence has taken place. This Court made it clear that this Court is concerned with the question as to whether guidelines for the media be laid down? If so, whether they should be self-regulatory? Or whether this Court should restate the law or declare the law under Article 141 on balancing of Article 19(1)(a) rights vis-à-vis Article 21, the scope of Article 19(2) in the context of the law regulating contempt of court and the scope of Article 129/ Article 215.

16. Thus, our decision herein is confined to IA Nos. 4, 5 and 10. This clarification is important for the reason that some accused have filed IAs in which they have sought relief on the ground that their trial has been prejudiced on account of excessive media publicity. We express no opinion on the merits of those IAs.

Constitutionalization of free speech

Comparative law: differences between the US and other common-law experiences

17. **Protecting speech** is the US approach. The First Amendment does not tolerate any form of restraint. In US, unlike India and Canada which also have written Constitutions, freedom of the press is expressly protected as an absolute right. The US Constitution does not have provisions similar to Section 1 of the Charter Rights under the Canadian Constitution nor is such freedom subject to *reasonable restrictions* as we have under Article 19(2) of the Indian Constitution. Therefore, in US, any interference with the media freedom to access, report and comment upon ongoing trials is *prima facie* unlawful. Prior restraints are completely banned. If an irresponsible piece of journalism results in prejudice to the proceedings, the legal system does not provide for sanctions against the parties responsible for the wrongdoings. Thus, restrictive contempt of court laws are generally considered incompatible with the constitutional guarantee of free speech. However, in view of cases, like O.J. Simpson, Courts have evolved procedural devices aimed at neutralizing the effect of *prejudicial publicity* like change of venue, ordering re-trial, reversal of conviction on

appeal (which, for the sake of brevity, is hereinafter referred to as **"neutralizing devices"**). It may be stated that even in US as of date, there is no absolute rule against "*prior restraint*" and its necessity has been recognized, albeit in exceptional cases [see Near v. Minnesota, 283 US 697] by the courts evolving neutralizing techniques.

18. In 1993, Chief Justice William Rehnquist observed: "constitutional law is now so firmly grounded in so many countries, it is time that the US Courts begin looking at decisions of other constitutional courts to aid in their own deliberative process".

19. **Protecting Justice** is the **English approach**. Fair trials and public confidence in the courts as the proper forum for settlement of disputes as part of the administration of justice, under the common law, were given greater weight than the goals served by unrestrained freedom of the press. As a consequence, the exercise of free speech respecting ongoing court proceedings stood limited. England does not have a written constitution. Freedoms in English law have been

largely determined by Parliament and Courts. However, after the judgment of ECHR in the case of Sunday Times v. United Kingdom [(1979) 2 EHRR 245], in the light of which the English Contempt of Courts Act, 1981 (for short "the 1981 Act") stood enacted, a balance is sought to be achieved between fair trial rights and free media rights vide Section 4(2). Freedom of speech (including free press) in US is not restricted as under Article 19(2) of our Constitution or under Section 1 of the Canadian Charter. In England, Parliament is supreme. Absent written constitution, Parliament can by law limit the freedom of speech. The view in England, on interpretation, has been and is even today, even after the Human Rights Act, 1998 that the right of free speech or right to access the courts for the determination of legal rights cannot be excluded, except by clear words of the statute. An important aspect needs to be highlighted. Under Section 4(2) of the 1981 Act, courts are expressly empowered to postpone publication of any report of the proceedings or any part of the proceedings for such period as the court thinks fit for avoiding a substantial risk of prejudice to the administration of justice in those proceedings.

Why is such a provision made in the Act of 1981? One of the reasons is that in Section 2 of the 1981 Act, strict liability has been incorporated (except in Section 6 whose scope has led to conflicting decisions on the question of intention). The basis of the strict liability contempt under the 1981 Act is the publication of "prejudicial" material. The definition of publication is also very wide. It is true that the 1981 Act has restricted the strict liability contempt to a fewer circumstances as compared to cases falling under common law. However, **contempt is an offence *sui generis*.** At this stage, it is important to note that the strict liability rule is the rule of law whereby a conduct or an act may be treated as contempt of court if it tends to interfere with the course of justice in particular legal proceedings, regardless of intent to do so. Sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement

order not only safeguards fairness of the later or connected trials, it prevents **possible contempt**. That seems to be the underlying reason behind enactment of Section 4(2) of the 1981 Act. According to Borrie & Lowe on the "Law of Contempt", the extent to which prejudgment by publication of the outcome of a proceedings (referred to by the House of Lords in Sunday Times's case) may still apply in certain cases. In the circumstances to balance the two rights of equal importance, viz., right to freedom of expression and right to a fair trial, that Section 4(2) is put in the 1981 Act. Apart from balancing it makes the media know where they stand in the matters of reporting of court cases. To this extent, the discretion of courts under common law contempt has been reduced to protect the media from getting punished for contempt under strict liability contempt. Of course, if the court's order is violated, contempt action would follow.

20. In the case of Home Office v. Harman [(1983) 1 A.C. 280] the House of Lords found that the counsel for a party was furnished documents by the opposition party during inspection

on the specific undertaking that the contents will not be disclosed to the public. However, in violation of the said undertaking, the counsel gave the papers to a third party, who published them. The counsel was held to be in contempt on the **principle of equalization of the right of the accused to defend himself/herself in a criminal trial with right to negotiate settlement in confidence**. [See also Globe and Mail v. Canada (Procureur général), 2008 QCCA 2516]

21. **The Continental Approach** seeks **to protect personality**. This model is less concerned with the issue of fair trial than with the need for safeguarding privacy, personal dignity and presumption of innocence of trial participants. The underlying assumption of this model is that the media coverage of pending trials might be at odds not only with fairness and impartiality of the proceedings but also with other individual and societal interests. Thus, *narrowly focussed prior restraints* are provided for, on either a statutory or judicial basis. It is important to note that in the common-law approach the protection of sanctity of legal proceedings as a part of

administration of justice is guaranteed by institution of contempt proceedings. According to Article 6(2) of the European Convention of Human Rights, presumption of innocence needs to be protected. The European Courts of Human Rights has ruled on several occasions that the presumption of innocence should be employed as a *normative parameter* in the matter of balancing the right to a fair trial as against freedom of speech. The German Courts have accordingly underlined the need to balance the presumption of innocence with freedom of expression based on employment of the above normative parameter of *presumption of innocence*. France and Australia have taken a similar stance. Article 6(2) of the European Convention of Human Rights imposes a positive obligation on the State to take action to protect the presumption of innocence from interference by non-State actors. However, in a catena of decisions, the ECHR has applied the *principle of proportionality* to prevent imposition of overreaching restrictions on the media. At this stage, we may state, that the said *principle of proportionality* has been

enunciated by this Court in Chintaman Rao v. The State of Madhya Pradesh [(1950) SCR 759].

22. **The Canadian Approach**: Before Section 1 of Canadian Charter of Rights, the balance between fair trial and administration of justice concerns, on the one hand, and freedom of press, on the other hand, showed a clear preference accorded to the former. Since the Charter introduced an express guarantee of "freedom of the press and other media of communication", the Canadian Courts reformulated the *traditional sub judice rule*, showing a more tolerant attitude towards trial-related reporting [see judgment of the Supreme Court of Canada in Dagenais v. Canadian Broadcasting Corp., [1994] 3 SCR 835 which held that a publication ban should be ordered when such an order is *necessary* to prevent a *serious* risk to the proper administration of justice when reasonably alternative measures like postponement of trial or change of venue will not prevent the risk (necessity test); and that salutary effects of the publication bans outweigh the deleterious effects on the rights and interests of the parties and the public,

including the effect on the right to free expression and the right of the accused to open trial (i.e. proportionality test)]. The traditional common law rule governing publication bans – that there be real and substantial risk of interference with the right to a fair trial – emphasized the right to a fair trial over the free expressions interests of those affected by the ban. However, in the context of post-Charter situation, the Canadian Supreme Court has held that when two protected rights come in conflict, Charter principles require a balance to be achieved that fully respects both the rights. The Canadian Courts have, thus, shortened the distance between the US legal experience and the common-law experiences in other countries. It is important to highlight that in Dagenais, the publication ban was sought under common law jurisdiction of the Superior Court and the matter was decided under the common law rule that the Courts of Record have inherent power to defer the publication. In R. v. Mentuck [2001] 3 SCR 442 that Dagenais principle was extended to the presumption of openness and to duty of court to balance the two rights. In both the above cases, Section 2(b) of the Charter which deals with freedom of the press was

balanced with Section 1 of the Charter. Under the Canadian Constitution, the Courts of Record (superior courts) have retained the common law discretion to impose such bans provided that the discretion is exercised in accordance with the Charter demands in each individual case.

23. **The Australian Approach:** The Australian Courts impose publication bans through the exercise of their inherent jurisdiction to regulate their own proceedings. In Australia, contempt laws deal with reporting of court proceedings which interfere with due administration of justice. Contempt laws in Australia embody the concept of **"sub judice contempt"** which relates to the publication of the material that has a tendency to interfere with the pending proceedings.

24. **The New Zealand Approach:** It recognizes the Open Justice principle. However, the courts have taken the view that the said principle is not absolute. It must be balanced against the object of doing justice. That, the right to freedom of expression must be balanced against other rights including the

fundamental public interest in preserving the integrity of justice and the administration of justice.

Indian Approach to prior restraint

(i) Judicial decisions

25. At the outset, it may be stated 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. Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. 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. 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. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like right to a fair trial. Further, even Articles 14 and 21 are subject

to the test of *reasonableness* after the judgment of this Court in the case of Maneka Gandhi v. Union of India [(1978) 1 SCC 248].

Decisions of the Supreme Court on "prior restraint"

26. In Brij Bhushan v. State of Delhi [AIR 1950 SC 129], this Court was called upon to balance *exercise* of freedom of expression and pre-censorship. This Court declared the statutory provision as unconstitutional inasmuch as the restrictions imposed by it were outside Article 19(2), as it then stood. However, this Court did not say that pre-censorship *per se* is unconstitutional.

27. In Virendra v. State of Punjab [AIR 1957 SC 896], this Court upheld pre-censorship imposed for a *limited period* and right of representation to the government against such restraint under Punjab Special Powers (Press) Act, 1956. However, in the same judgment, another provision imposing pre-censorship but without providing for any time limit or right to represent against pre-censorship was struck down as unconstitutional.

28. In the case of K.A. Abbas v. Union of India [AIR 1971 SC 481], this Court upheld *prior restraint* on exhibition of motion pictures subject to Government setting up a corrective machinery and an independent Tribunal and reasonable time limit within which the decision had to be taken by the censoring authorities.

29. At this stage, we wish to clarify that the reliance on the above judgments is only to show that *"prior restraint"* per se has not been rejected as constitutionally impermissible. At this stage, we may point out that in the present IAs we are dealing with the concept of "prior restraint" per se and not with cases of misuse of powers of pre-censorship which were corrected by the Courts [see Binod Rao v. Minocher Rustom Masani reported in 78 Bom LR 125 and C. Vaidya v. D'Penha decided by Gujarat High Court in Sp. CA 141 of 1976 on 22.03.1976 (unreported)]

30. The question of prior restraint arose before this Court in 1988, in the case of Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd. [AIR 1989 SC 190] in the context of publication in one of the national dailies

of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was **sub judice** in this Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be "based on reasonable grounds for keeping the administration of justice unimpaired" and that, there must be reasonable ground to believe that the danger apprehended is real and imminent. The Court went by the doctrine propounded by Holmes J of "**clear and present danger**". This Court treated the said doctrine as the basis of balance of convenience test. Later on, the injunction was lifted after subscription to debentures had closed.

31. In the case of Naresh Shridhar Mirajkar v. State of Maharashtra [AIR 1967 SC 1], this Court dealt with the power of a court to conduct court proceedings *in camera* under its **inherent** powers and also to **incidentally** prohibit publication of the court proceedings or evidence of the cases outside the

court by the media. It may be stated that *"open* Justice" is the cornerstone of our judicial system. It instills faith in the judicial and legal system. However, the right to open justice is not absolute. It can be restricted by the court in its inherent jurisdiction as done in Mirajkar's case if the necessities of administration of justice so demand [see Kehar Singh v. State (Delhi Administration), AIR 1988 SC 1883]. Even in US, the said principle of open justice yields to the said necessities of administration of justice [see: Globe Newspaper Co. v. Superior Court, 457 US 596]. The entire law has been reiterated once again in the judgment of this Court in Mohd. Shahabuddin v. State of Bihar [(2010) 4 SCC 653], affirming judgment of this Court in Mirajkar's case.

32. Thus, the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. In Mirajkar, the High Court ordered that the deposition of the defence witness should not be reported in the newspapers. This order of the High Court was challenged in this Court under Article 32. This Court held that apart from Section 151

of the Code of Civil Procedure, the High Court had the *inherent power* to restrain the press from reporting where administration of justice so demanded. This Court held vide para 30 that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. That, such orders prohibiting publication for a **temporary period** during the course of trial are permissible under the *inherent powers* of the court whenever the court is satisfied that interest of justice so requires. As to whether such a temporary prohibition of publication of court proceedings in the media under the inherent powers of the court can be said to offend Article 19(1)(a) rights [which includes freedom of the press to make such publication], this Court held that an order of a court passed to protect the interest of justice and the administration of justice **could not be treated as violative of Article 19(1)(a)** [see para 12]. The judgment of this Court in Mirajkar is delivered by a Bench of 9-Judges and is binding on this Court.

33. At this stage, it may be noted that the judgment of the Privy Council in the case of Independent Publishing Co. Ltd. v. AG of Trinidad and Tobago [2005 (1) AC 190] has been doubted by the Court of Appeal in New Zealand in the case of Vincent v. Solicitor General [(2012) NZCA 188 dated 11.5.2012]. In any event, on the inherent powers of the Courts of Record we are bound by the judgment of this Court in Mirajkar. Thus, Courts of Record under Article 129/Article 215 have inherent powers to prohibit publication of court proceedings or the evidence of the witness. The judgments in Reliance Petrochemicals Ltd. and Mirajkar were delivered in civil cases. However, in Mirajkar, this Court held that **all Courts** which have inherent powers, i.e., the Supreme Court, the High Courts and Civil Courts can issue prior restraint orders or proceedings, prohibitory orders in **exceptional circumstances** temporarily prohibiting publications of Court proceedings to be made in the media and that such powers do not violate Article 19(1)(a). Further, it is important to note, that, one of the Heads on which Article 19(1)(a) rights can be restricted is in relation to "contempt of court" under Article 19(2). Article 19(2) preserves

common law of contempt as an "existing law". In fact, the Contempt of Courts Act, 1971 embodies the common law of contempt. At this stage, it is suffice to state that the Constitution framers were fully aware of the *Institution of Contempt* under the common law which they have preserved as "existing law" under Article 19(2) read with Article 129 and Article 215 of Constitution. The reason being that contempt is an offence ***sui generis***. The Constitution framers were aware that the law of contempt is only one of the ways in which administration of justice is protected, preserved and furthered. That, it is an important adjunct to the criminal process and provides a sanction. *Other* civil courts have the power under Section 151 of Code of Civil Procedure to pass orders prohibiting publication of court proceedings. In Mirajkar, this Court referred to the principles governing Courts of Record under Article 215 [see para 60]. It was held that the High Court is a Superior Court of Record and that under Article 215 it has all the powers of such a court **including** the power to punish contempt of itself. At this stage, the word "including" in Article 129/Article 215 is to be noted. It may be noted that

each of the Articles is in two parts. The first part declares that the Supreme Court or the High Court *"shall be a Court of Record and shall have all the powers of such a court".* The second part says "***includes*** *the powers to punish for contempt*". These Articles save the pre-existing powers of the Courts as courts of record and that the power **includes** the power to punish for contempt [see Delhi Judicial Service Association v. State of Gujarat [(1991) 4 SCC 406] and Supreme Court Bar Association v. Union of India [(1998) 4 SCC 409]. As such a declaration has been made in the Constitution that the said powers **cannot be taken away** by any law made by the Parliament **except to the limited extent** mentioned in Article 142(2) in the matter of investigation or punishment of any contempt of itself. If one reads Article 19(2) which refers to law in relation to Contempt of Court with the first part of Article 129 and Article 215, it becomes clear that the power is conferred on the High Court and the Supreme Court to see that "the administration of justice is not perverted, prejudiced, obstructed or interfered with". To see that the administration of justice is not prejudiced or perverted clearly includes power

of the Supreme Court/High Court to prohibit temporarily, statements being made in the media which would prejudice or obstruct or interfere with the administration of justice in a given case pending in the Supreme Court or the High Court or even in the subordinate courts. In view of the judgment of this Court in A.K. Gopalan v. Noordeen [(1969) 2 SCC 734], such statements which could be prohibited temporarily would include statements in the media which would prejudice the right to a fair trial of a suspect or accused under Article 21 from the time when the criminal proceedings in a subordinate court are imminent or where suspect is arrested. This Court has held in Ram Autar Shukla v. Arvind Shukla [1995 Supp (2) SCC 130] that the law of contempt is a way to prevent the due process of law from getting perverted. That, the words "due course of justice" in Section 2 (c) or Section 13 of the 1971 Act are wide enough and are not limited to a particular judicial proceedings. That, the meaning of the words "contempt of court" in Article 129 and Article 215 **is wider than** the definition of "criminal contempt" in Section 2 (c) of the 1971 Act. Here, we would like to add a caveat. The contempt of

court is a special jurisdiction to be exercised sparingly and with caution **whenever an act adversely affects the administration of justice** [see Nigel Lowe and Brenda Sufrin, Law of Contempt (Third Edition)]. Trial by newspaper comes in the category of acts which interferes with the course of justice or due administration of justice [see Nigel Lowe and Brenda Sufrin, page 5 of Fourth Edition]. According to Nigel Lowe and Brenda Sufrin [page 275] and also in the context of second part of Article 129 and Article 215 of the Constitution the object of the contempt law is not only to punish, it **includes** the power of the Courts **to prevent** such acts which interfere, impede or pervert administration of justice. Presumption of innocence is held to be a human right. [See : Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (2005) 5 SCC 294]. If in a given case the appropriate Court finds infringement of such presumption by excessive prejudicial publicity by the newspapers (in general), then under inherent powers, the Courts of Record suo motu or on being approached or on report being filed before it by subordinate court can under its inherent powers under Article 129 or Article 215 pass orders of

postponement of publication for a limited period if the applicant is able to demonstrate substantial risk of prejudice to the pending trial and provided he is able to displace the presumption of open Justice and to that extent the burden will be on the applicant who seeks such postponement of offending publication.

34. The above discussion shows that in most jurisdictions there is power in the courts to postpone reporting of judicial proceedings in the interest of administration of justice. Under Article 19(2) of the Constitution, law in relation to contempt of court, is a reasonable restriction. It also satisfies the test laid down in the judgment of this Court in R. Rajagopal v. State of T.N. [(1994) 6 SCC 632]. As stated, in most common law jurisdictions, discretion is given to the courts to evolve **neutralizing devices** under contempt jurisdiction such as postponement of the trial, re-trials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the courts to devise such methods is to see that the

administration of justice is not perverted, prejudiced, obstructed or interfered with. At the same time, there is a presumption of Open Justice under the common law. Therefore, courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognized as a human right in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (supra) vis-à-vis presumption of Open Justice. Such an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of Open Justice and only in such cases the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution. Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the

context of the rights of the individuals to be protected from prejudicial publicity or mis-information, in other words, where the court is satisfied that Article 21 rights of a person are offended. There is no general law for courts to postpone publicity, either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on extent of prejudice, the effect on individuals involved in the case, the over-riding necessity to curb the right to report judicial proceedings conferred on the media under Article 19(1)(a) and the right of the media to challenge the order of postponement.

(ii) Contempt of Courts Act, 1971

35. Section 2 defines "contempt", "civil contempt" and "criminal contempt". In the context of contempt on account of publications which are not fair and accurate publication of court proceedings, the relevant provisions are contained in Sections 4 and 7 whereas Section 13 is a general provision which deals with defences. It will be noticed that Section 4 deals with "**report of a judicial proceeding**". A person is not

to be treated as guilty of contempt if he has published such a report which is fair and accurate. Section 4 is subject to the provisions of Section 7 which, however, deals with publication of "**information**" relating to "proceedings in chambers". Here the emphasis is on "information" whereas in Section 4, emphasis is on "report of a judicial proceeding". This distinction between a "report of proceedings" and "information" is necessary because Section 7 deals with proceedings *in camera* where there is no access to the media. In this connection, the provisions of Section 13 have to be borne in mind. The inaccuracy of reporting of court proceedings will be contempt only if it can be said on the facts of a particular case, to amount to substantial interference with the administration of justice. The reason behind Section 4 is to grant a privilege in favour of the person who makes the publication provided it is fair and accurate. This is based on the presumption of "open justice" in courts. Open justice permits fair and accurate reports of court proceedings to be published. The media has a right to know what is happening in courts and to disseminate the information to the public which enhances the public

confidence in the transparency of court proceedings. As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents **possible contempt** by the Media.

(iii) "Order of Postponement" of publication- its nature and Object

36. As stated, in US such orders of postponement are treated as restraints which offend the First Amendment and as stated courts have evolved neutralizing techniques to balance free speech and fair trial whereas in Canada they are justified on the touchstone of Section 1 of the Charter of Rights. What is the position of such Orders under Article 19(1)(a) and under Article 21?

37. Before examining the provisions of Article 19(1)(a) and Article 21, it may be reiterated, that, the right to freedom of speech and expression, is absolute under the First Amendment in the US Constitution unlike Canada and India where we have the *test of justification* in the societal interest which saves the law despite infringement of the rights under Article 19(1)(a). In India, we have the test of "reasonable restriction" in Article 19(2). In the case of Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal [(1995) 2 SCC 161] it has been held that "it is true that Article 19(2) does not use the words "national interest", "interest of society" or "public interest" but the several grounds mentioned in Article 19(2) for imposition of restrictions such as security of the State, public order, law in relation to contempt of court, defamation etc. are ultimately referable to **societal interest** which is another name for public interest" [para 189]. It has been further held that, "the said grounds in Article 19(2) are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully be exercised by the citizens of this country" [para 151].

38. In the case of E.M.S. Namboodripad v. T. Narayanan Nambiar [AIR 1970 SC 2015] it has been held that "the existence of law containing its own *guiding principles*, reduces the discretion of the Courts to the minimum. But where the law [i.e. 1971 Act] is silent the Courts have discretion" [para 30]. This is more so when the said enactment is required to be interpreted in the light of Article 21. We would like to quote herein below para 6 of the above judgment which reads as under :

> "The law of contempt stems from the right of the courts to punish by imprisonment or fines persons guilty of words or acts which either obstruct or *tend to obstruct* the administration of justice. This right is exercised in India by all courts when contempt is committed in facie curaie and by the superior courts **on their own behalf** or on behalf of courts subordinate to them **even if committed outside the courts**. Formerly, it was regarded as inherent in the powers of a court of record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts."

39. The question before us is whether such "postponement orders" constitute restrictions under Article 19(2) as read broadly by this Court in the case of Cricket Association of Bengal (supra)?

40. As stated, right to freedom of expression under the First Amendment in US is absolute which is not so under Indian Constitution in view of such right getting restricted by the test of reasonableness and in view of the Heads of Restrictions under Article 19(2). Thus, the *clash model* is more suitable to American Constitution rather than Indian or Canadian jurisprudence, since First Amendment has no equivalent of Article 19(2) or Section 1 of the Canadian Charter. This has led the American Courts, in certain cases, to evolve techniques or methods to be applied in cases where on account of excessive prejudicial publicity, there is usurpation of court's functions. These are techniques such as retrials being ordered, change of venue, ordering acquittals even at the Appellate stage, etc. In our view, orders of postponement of publications/ publicity in

appropriate cases, as indicated above, keeping in mind the timing (the stage at which it should be ordered), its duration and the right of appeal to challenge such orders is just a **neutralizing device**, when no other alternative such as change of venue or postponement of trial is available, evolved by courts as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced.

(iv) Width of the postponement orders

41. The question is - whether such "postponement orders" constitute restriction under Article 19(1)(a) and whether such restriction is saved under Article 19(2)?

42. At the outset, we must understand the nature of such orders of postponement. Publicity postponement orders should be seen, in the context of Article 19(1)(a) not being an absolute right. The US *clash model* based on collision between freedom of expression (including free press) and the right to a fair trial will not apply to Indian Constitution. In certain cases, even accused seeks publicity (not in the pejorative sense) as

openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a litigation including the judges are under scrutiny and at the same time people get to know what is going on inside the court rooms. These aspects come within the scope of Article 19(1) and Article 21. When rights of equal weight clash, Courts have to evolve balancing techniques or measures based on re-calibration under which both the rights are given equal space in the Constitutional Scheme and this is what the "postponement order" does subject to the parameters, mentioned hereinafter. But, what happens when courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognized as a human right. These presumptions existed at the time when the Constitution was framed [existing law under Article 19(2)] and they continue till date not only as part of rule of law under Article 14 but also as an Article 21 right. The constitutional protection in Article 21 which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the

right to free speech under Article 19(1)(a), by virtue of force of it being a constitutional provision. Given that the *postponement order*s curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is *real and substantial risk* of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is "the end and purpose of all laws". However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders *outweigh* the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. It is not possible for this Court to enumerate categories of publications amounting to contempt. It would require the courts in each case to see the

content and the context of the offending publication. There cannot be any straightjacket formula enumerating such categories. In our view, keeping the above parameters, if the High Court/ Supreme Court (being Courts of Record) pass postponement orders under their inherent jurisdictions, such orders would fall within "reasonable restrictions" under Article 19(2) and which would be in conformity with societal interests, as held in the case of Cricket Association of Bengal (supra). In this connection, we must also keep in mind the language of Article 19(1) and Article 19(2). Freedom of press has been read into Article 19(1)(a). After the judgment of this Court in Maneka Gandhi (supra, p. 248), it is now well-settled that test of reasonableness applies not only to Article 19(1) but also to Article 14 and Article 21. For example, right to access courts under Articles 32, 226 or 136 seeking relief against infringement of say Article 21 rights has not been specifically mentioned in Article 14. Yet, this right has been deduced from the words "equality before the law" in Article 14. Thus, the test of reasonableness which applies in Article 14 context would equally apply to Article 19(1) rights. Similarly, while judging

reasonableness of an enactment even Directive Principles have been taken into consideration by this Court in several cases [see recent judgment of this Court in Society for Un-aided Private Schools of Rajasthan v. U.O.I. 2012 (4) SCALE 272. Similarly, in the case of Dharam Dutt v. Union of India reported in (2004) 1 SCC 712, it has been held that rights not included in Article 19(1)(c) expressly, but which are deduced from the express language of the Article are concomitant rights, the restrictions thereof would not merely be those in Article 19(4)]. Thus, *balancing* of such rights or equal public interest by **order of postponement of publication or publicity** in cases in which there is *real and substantial risk* of prejudice to the proper administration of justice or to the fairness of trial and within the above enumerated parameters of necessity and proportionality would satisfy the test of reasonableness in Articles 14 and 19(2). One cannot say that what is reasonable in the context of Article 14 or Article 21 is not reasonable when it comes to Article 19(1)(a). Ultimately, such orders of postponement are only to *balance* conflicting public interests or rights in Part III of Constitution. They also satisfy the

requirements of justification under Article 14 and Article 21. Further, we must also keep in mind the words of Article 19(2) "in relation to contempt of court". At the outset, it may be stated that like other freedoms, clause 1(a) of Article 19 refers to the common law right of freedom of expression and does not apply to any right created by the statute (see page 275 of Constitution of India by D.D. Basu, 14th edition). The above words "*in relation to*" in Article 19(2) are words of widest amplitude. When the said words are read in relation to contempt of court, it follows that the law of contempt is treated as reasonable restriction as it seeks to prevent administration of justice from getting perverted or prejudiced or interfered with. Secondly, these words show that the expression "contempt of court" in Article 19(2) indicates that the object behind putting these words in Article 19(2) is to regulate and control administration of justice. Thirdly, if one reads Article 19(2) with the second part of Article 129 or Article 215, it is clear that the contempt action does not exhaust the powers of the Court of Record. **The reason being that contempt is an offence sui generis**. Common law defines what is the scope of

contempt or limits of contempt. Article 142(2) operates only in a limited field. It permits a law to be made restricted to investigations and punishment and does not touch the inherent powers of the Court of Record. Fourthly, in case of criminal contempt, the offending act must constitute interference with administration of justice. Contempt jurisdiction of courts of record forms part of their inherent jurisdiction under Article 129/ Article 215. Superior Courts of Record have *inter alia* inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts. The test is that the publication (**actual and not planned** publication) must create a *real and substantial risk* of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even **fair and accurate** reporting of the trial (say murder trial) could nonetheless give rise to the "real and substantial risk of serious prejudice" to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus,

postponement orders safeguard fairness of the connected trials. **The principle underlying postponement orders is that it prevents possible contempt**. Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect. Such postponement orders operate on **actual publication**. Such orders direct postponement of the publication for a limited period. Thus, if one reads Article 19(2), Article 129/ Article 215 and Article 142(2), it is clear that Courts of Record "have all the powers **including** power to punish" which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content. Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same time such neutralizing devices or techniques evolved by the Courts effectuate a balance between conflicting public interests. It is well settled that precedents of this Court under Article 141 and the Comparative Constitutional law helps courts not only to understand the provisions of the Indian Constitution it also helps the Constitutional Courts to evolve principles which as

stated by Ronald Dworkin are propositions describing rights [in terms of its content and contours] (See "Taking Rights Seriously" by Ronald Dworkin, 5th Reprint 2010). The postponement orders is, as stated above, a **neutralizing device** evolved by the courts to balance interests of equal weightage, viz., freedom of expression vis-à-vis freedom of trial, in the context of the law of contempt. One aspect needs to be highlighted. The shadow of the law of contempt hangs over our jurisprudence. The media, in several cases in India, is the only representative of the public to bring to the notice of the court issues of public importance including governance deficit, corruption, drawbacks in the system. Keeping in mind the important role of the media, Courts have evolved several neutralizing techniques including postponement orders subject to the twin tests of necessity and proportionality to be applied in cases where there is *real and substantial risk* of prejudice to the proper administration of justice or to the fairness of trial. Such orders would also put the Media to notice **about possible contempt**. However, it would be open to Media to challenge such orders in appropriate proceedings. Contempt is an

offence sui generis. Purpose of Contempt Law is not only to punish. Its object is to preserve the sanctity of administration of justice and the integrity of the pending proceeding. **Thus, the postponement order is not a punitive measure, but a preventive measure as explained hereinabove**. Therefore, in our view, such orders of postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement of justification under Article 19(2) and they also help the Courts to balance conflicting societal interests of right to know vis-à-vis another societal interest in fair administration of justice. One more aspect needs to be mentioned. Excessive prejudicial publicity leading to usurpation of functions of the Court not only interferes with administration of justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such case, Courts are duty bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by this Court as a human right under Article 21, subject to the applicant proving **displacement of such a**

presumption in appropriate proceedings. Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case. For aforestated reasons, we hold that subject to above parameters, postponement orders fall under Article 19(2) and they satisfy the test of reasonableness.

(v) Right to approach the High Court/ Supreme Court

43. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article

19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of *real and substantial risk* of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.

Maintainability

44. As stated above, in the present case, we heard various stake holders as an important question of public importance arose for determination. Broadly, on maintainability the following contentions were raised: (i) the proceedings were not maintainable as there is no lis; (ii) there is a difference between law-making and framing of guidelines. That, law can be made only by Parliament. That, guidelines to be framed by the Court, therefore, should be self-regulatory or at the most advisory. (iii) under Article 142, this Court cannot invest courts or any

other authority with jurisdiction, adjudicatory or otherwise, which they do not possess.

45. Article 141 uses the phrase "law declared by the Supreme Court." It means law made while interpreting the statutes or the Constitution. Such judicial law-making is part of the judicial process. Further under Article 141, law-making through interpretation and expansion of the meanings of open-textured expressions such as "law in relation to contempt of court" in Article 19(2), "equal protection of law", "freedom of speech and expression" and "administration of justice" is a legitimate judicial function. According to Ronald Dworkin, "Arguments of principle are arguments intended to establish an individual right. Principles are propositions that describe rights." [See "Taking Rights Seriously" by Ronald Dworkin, 5th Reprint 2010, p. 90]. In this case, this Court is only *declaring* under Article 141, the constitutional limitations on free speech under Article 19(1)(a), in the context of Article 21. The exercise undertaken by this Court is an exercise of **exposition of constitutional limitations** under Article 141 read with Article

129/Article 215 in the light of the contentions and large number of authorities referred to by the counsel on Article 19(1)(a), Article 19(2), Article 21, Article 129 and Article 215 as also the "law of contempt" insofar as interference with administration of justice under the common law as well as under Section 2(c) of 1971 Act is concerned. What constitutes an offending publication would depend on the decision of the court on case to case basis. Hence, guidelines on reporting cannot be framed across the Board. The shadow of "law of contempt" hangs over our jurisprudence. This Court is duty bound to clear that shadow under Article 141. The phrase "in relation to contempt of court" under Article 19(2) does not in the least describe the true nature of the offence which consists in interfering with administration of justice; in impending and perverting the course of justice. That is all which is done by this judgment. We have exhaustively referred to the contents of the IAs filed by Sahara and SEBI. As stated above, **the right to negotiate and settle in confidence is a right of a citizen and has been equated to a right of the accused to defend himself in a criminal trial**. In this case, Sahara has

complained to this Court on the basis of breach of confidentiality by the Media. In the circumstances, it cannot be contended that there was no lis. Sahara, therefore, contended that this Court should frame guidelines or give directions which are advisory or self-regulatory whereas SEBI contended that the guidelines/directions should be given by this Court which do not have to be coercive. In the circumstances, constitutional adjudication on the above points was required and it cannot be said that there was no lis between the parties. We reiterate that the exposition of constitutional limitations has been done under Article 141 read with Article 129/Article 215. When the content of rights is considered by this Court, the Court has also to consider the enforcement of the rights as well as the remedies available for such enforcement. In the circumstances, we have expounded the constitutional limitations on free speech under Article 19(1)(a) in the context of Article 21 and under Article 141 read with Article 129/Article 215 which preserves the inherent jurisdiction of the Courts of Record in relation to contempt law. We do not wish to enumerate categories of publication amounting to contempt as the Court(s)

has to examine the content and the context on case to case basis.

Conclusion

46. Accordingly, IA Nos. 4-5 and 10 are disposed of.

47. For the reasons given above, we do not wish to express any opinion on the merit of the other IAs. Consequently, they are dismissed.

.....CJI
(S. H. Kapadia)

.....J.
(D.K. Jain)

.....J.
(Surinder Singh Nijjar)

.....J.
(Ranjana Prakash Desai)

.....J.
(Jagdish Singh Khehar)

New Delhi;
September 11, 2012