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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 253/2017

DR. SHASHI THAROOR ..... Plaintiff
Through: Mr. Salman Khurshid, Senior Advocate with Mr. Gaurav Gupta, Mr. Muhammad Ali Khan, Mr. Jaspal Singh, Mr. Namrah Nasir, Ms. Azra Rehman, Mr. Omar Hoda and Ms. Sakshi Kotiyal, Advocates.

versus

ARNAB GOSWAMI AND ANR ..... Defendants
Through: Mr. Sandeep Sethi, Senior Advocate with Ms. Malvika Trivedi, Mr. Debarshi Dutta, Mr. Mrinal Ojha, Mr. Rajat Pradhan and Ms. Sriparna Dutta, Advocates.

Reserved on : 24th October, 2017
% Date of Decision: 1st December, 2017

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

I.As. 6674/2017, 8809/2017 and 10378/2017

1. Present suit has been filed seeking compensation and damages from and against the defendants for making defamatory remarks against the plaintiff as well as for permanent and prohibitory

injunction restraining the defendants from reporting any news or broadcasting any show related to the death of Mrs. Sunanda Pushkar till the investigation is complete and also to restrain the defendants from maligning and defaming the plaintiff in any manner.

2. With consent of parties, the three interim applications being I.A. Nos. 6674/2017, 8809/2017 and 10378/2017 were taken up for hearing and disposal.

RELIEFS IN I.A. 6674/2017

3. In I.A. 6674/2017 under Order 39 Rules 1 and 2 CPC accompanying the suit, the plaintiff prays for the following reliefs:-

> *"A) Grant an ad interim ex-parte injunction in favour of the Plaintiff and against the Defendants for restraining the Defendants from reporting any news or broadcasting any show related to the death of the Deceased till the pendency of the present proceedings;*
>
> *B) Grant an ad interim ex-parte injunction in favour of the Plaintiff and against the Defendants for restraining the Defendants from maligning and defaming the Plaintiff in any manner; and*
>
> *C) Pass such other and further Orders as may be deemed appropriate by this Hon'ble Court."*

HEARING ON 29TH MAY, 2017

4. On 29th May, 2017, this Court after hearing both the parties orally observed that the defendants can air stories containing facts relating to investigation into Mrs. Sunanda Pushkar's death, but cannot call the plaintiff a criminal or condemn him as guilty. This Court had

also stated that the defendants must bring down the rhetoric. At that stage, Mr. Sandeep Sethi, learned senior counsel appearing for the defendants had stated that he would advise his clients accordingly. Consequently, the Court did not pass any formal order.

RELIEFS IN I.A. 8809/2017

5. During the pendency of the proceedings, the plaintiff filed another interlocutory application under Order 39 Rules 1 and 2 CPC being I.A. 8809/2017 praying for the following reliefs:-

> *"a) Direct the Defendants not to make any defamatory publications against the Plaintiff in any manner;*
>
> *b) Direct the Defendants not to cast aspersions on the Plaintiff and not to state or imply that the Plaintiff is directly or indirectly responsible for the death of the Deceased.*
>
> *c) Direct the Defendants to refrain from indulging in misleading news reporting in any form whatsoever;*
>
> *d) Direct the Defendants to not post any material related to the present Civil Suit on its Twitter, Facebook and any other social media website;*
>
> *e) Direct the Defendants to refrain from misrepresenting the facts of the case and broadcasting outright lies and to confine their reporting only to the established facts as reported by the Police and accepted in a Court;*
>
> *f) Direct the Defendants not to mention the expression "Murder of Sunanda Pushkar" anywhere since it is yet to be established by a competent Court of law that the death of the Deceased was a 'Murder', in order to ensure that the*

Trial of the case is not prejudiced;

g) Direct the Defendants to refrain from inciting their journalists or guests on their channel to assume criminal guilt on the basis of their false assertions;

h) Direct the Defendants to refrain from posting or reporting any content which is contrary to the assurance which was given by the Counsel for the Defendants on the first date of hearing, i.e., on 29.05.2017; and

i) Pass such other and further order(s) as this Hon'ble Court may deem fit and appropriate herein.

HEARING ON 04TH AUGUST, 2017

6. The aforesaid application was filed on the ground that despite the assurance given by learned senior counsel for defendants on 29th May, 2017, the defendants continued to engage in defaming and maligning the plaintiff. Learned senior counsel for plaintiff urged that the Court must direct the defendants not to use the expression "*murder of Sunanda Pushkar*" as it is yet to be established by a competent Court that her death was murder and to ensure that the trial, if any, was not prejudiced. Learned senior counsel for plaintiff had further alleged that the journalists of the defendant channel were *'haunting him*' and virtually coercing him into making a statement.

7. On the other hand, learned senior counsel for defendants had stated that the defendants stood by what was assured by him in Court and they had not called the plaintiff either a murderer or any names in any of the news broadcast.

8. Since the allegation of the learned senior counsel for plaintiff was that plaintiff was being coerced into making a statement, this Court orally observed that any person including an accused has a right to silence under the Indian Constitution. As the next date of hearing was 16th August, 2017, this Court did not pass any formal order.

RELIEFS IN I.A. 10378/2017 IDENTICAL TO THOSE SOUGHT IN I.A. 8809/2017

9. On 7th September, 2017, the plaintiff filed another interlocutory application under Order 39 Rules 1 and 2 CPC being I.A. 10378/2017 praying for the identical reliefs sought for in I.A. 8809/2017.

ARGUMENTS ON BEHALF OF THE PLAINTIFF

10. Mr. Salman Khurshid, learned senior counsel for plaintiff, while arguing the aforesaid three applications, stated that the plaintiff is an eminent personality in Indian and International Politics. He stated that the plaintiff is aggrieved by the defamatory remarks made by defendants against him. Some of the remarks of the defendants described as defamatory by learned senior counsel for the plaintiff are as follows:-

a) "*Shashi Tharoor your game is up. Come out now, wherever you are hiding from. You knew Shashi that I know that your hands were not clean.*"

b) "*We are also going to prove Shashi Tharoor that you knew Sunanda Pushkar was lying motionless in Room*

No.307 since about 7'o clock in the morning. We also will prove today Shashi Tharoor that it's a damn lie that Sunanda Pushkar asked everybody to leave Leela Hotel. You asked everybody to leave Leela Hotel Shashi Tharoor."

c) "*You are exposed today Shashi Tharoor.*"

d) "*But I know he (Shashi Tharoor) is a Hypocrite, Duplicitous man.*"

e) "*Sunanda wanted to speak out that is also on Sunanda Murder Tapes today and it is proven on the Sunanda Murder Tapes that she was stopped forever as the needle of suspicion points closer and closer and closer to the inconsistencies of one duplicitous man called Shashi Tharoor.*"

f) "*Well, he (ST) is an unprincipled criminal masquerading as a politician.*"

g) "*The person trying to throttle her (Late Ms. Sunanda Pushkar) is Shashi Tharoor. I mean let's be clear here, you know.*"

h) "*Don't be a coward Shashi Tharoor.*" "*Come on, face me you coward.*"

i) "*I think all of us agree that as of now the nation wants to know why Shashi Tharoor is the only man happy with the way the Delhi Police is unprogressing the case.*"

11. He pointed out that not a single allegation had been made by the investigating authorities against the plaintiff and the plaintiff had not even been implicated or named as an accused or even a suspect in the criminal proceedings. He stated that the investigation into the death of the deceased was still in progress and the investigating agency was yet to file the police report/charge sheet under Section 173 CPC.

12. Learned senior counsel for plaintiff further stated that defendant no.1 had a history of broadcasting incorrect and unsubstantiated news reports and had even been penalized and reprimanded for it by Indian Regulatory authorities and by appropriate International Bodies. Some of the instances of the misconduct by defendant no.1 mentioned by learned senior counsel for plaintiff are as follows:-

a) Justice P.B. Sawant incident.

b) Order by NBSA regarding debate on Kanimozhi and 2-G Scam.

c) Leakage of secret defence letter.

d) Order by NBSA regarding Jasleen Kaur incident.

e) Order by NBSA regarding death of Sunanda Pushkar.

f) Order by Of-Com, U.K. for biased reporting.

13. Learned senior counsel for the plaintiff stated that in the present case on the first date of hearing, i.e., 29th May, 2017, the plaintiff did not press for any interim order as the learned senior counsel appearing for the defendants had given an assurance that no further damning and defaming comments would be made. Mr. Salman Khurshid stated that the assurance worked as the defendant media house was now careful

in how it reported about the case and the vitriol displayed earlier against the plaintiff was now missing but, he stated, some of its reporters were not exercising the same care while tweeting. He also pointed out that in their reply to the I.A. No. 8809 of 2017, the defendants had denied giving any such assurance. This, according to him, clearly demonstrated the mala fide conduct of the defendants.

14. Learned senior counsel for the plaintiff submitted that in ***Naveen Jindal Vs. M/s. Zee Media Corporation Limited &Anr., (2015) 219 DLT 605; Sidhartha Vashisht Vs. State (NCT of Delhi), AIR 2010 SC 235*** the Courts have held that the power to order restrain of publication in the media would clearly encompass the stage when the criminal case against the accused is at the preliminary enquiry or investigation stage. He also submitted that the Court deprecated the practice of the Anchors putting leading questions to panelists in order to elicit a specific kind of response against Naveen Jindal. The Court categorically rejected the argument of Zee Media that the public is interested in the private lives of public figures and the public figures should be open to such criticism and remarks. The portion of the judgment in the case of ***Naveen Jindal Vs. M/s. Zee Media Corporation Limited & Anr.,***(Supra) relied upon by the learned counsel for plaintiff is reproduced hereinbelow:-

> *"47. The nature of the programme, the questions and observations show they are likely to prejudice the police and hamper the course of investigation/inquiry which is being conducted by the police. I am persuaded to come to this conclusion on seeing the nature of questions being put by the Anchor in various TV programmes. As an example, I may refer to the questions of the Anchor in asking the ASP*

as to who is responsible for the presumed delay i.e. SSP Rai Garh, IG Police, DG Chhattisgarh, Home Secretary, Home Minister or the Chief Minister. Another example is an observation by the reporter that the Women Commission and the police have maintained silence. Another example is the observation what the High Court has said can be done in two days if the police so desire. The programmes are replete with such questions/ observations.

48. The nature of questioning done by the reporters of defendants, the extent of coverage being done by the defendants does show that an attempt is being prima facie made to prod the police if not pressurize. The plaintiff have made out a prima facie case.

49. In these facts would the plaintiff be entitled to an injunction to restrain the defendants from publishing reports or airing reports pertaining to the allegations which are pending before the police by Mrs. ABC. Legal position as explained above is quite clear. Any publication which gives excessive adverse publicity to an accused or which is likely to hamper fair trial and constitutes an interference with the course of justice could be a ground for grant of injunction. The court has ample inherent power to restrain publication in media in the event it arrives at a finding that the said publication may result in interference with the administration of justice or would be against the principle of fair trial or open justice.

50. The balance of convenience is in favour of the plaintiff. Serious prejudice will be caused to plaintiff in case injunction is not granted. Accordingly, the defendants 1 and 2, their associates are restrained by an order of injunction from publishing any article or right-ups or telecasting programmes on the allegations against the plaintiff as made by Mrs. ABC either in the complaint or before the police, till the time the police completes its

enquiry and, if necessary, investigation and files an appropriate report/document before the court. The injunction passed is of a temporary nature and is applicable only till the police completes its preliminary enquiry or any other investigation if required that may be done at a later stage. However, the defendants are free to report about the court cases or about the final conclusion of the police in the course of preliminary enquiry covered under the ambit of fair reporting on the basis of true, correct and verified information. The application stands disposed of."

15. Learned senior counsel for the plaintiff pointed out that a Coordinate Bench of this Court in ***Kartongen Kemi Och Forvaltning AB & Ors. Vs. State through CBI, 2004 (72) DRJ 693*** has held that presenting half-baked and presumptive facets of investigation involves substantial risk to the fairness of the trial.

16. He submitted that the Supreme Court in ***Sewakram Sobhani Vs. R.K. Karanjia, Chief Editor, Weekly Blitz &Ors., (1981) 3 SCC 208*** has held that a journalist is in no better position than any normal citizen and a journalist has no special privileges attached to him. According to him, the Supreme Court further held that while reporting on public figures, journalists have to undertake a higher degree of care, circumspection and responsibility.

17. In view of the aforesaid, learned senior counsel for plaintiff sought for an appropriate interim injunction, restraining the defendants from making any defamatory allegations, insinuations, opinions, casting aspersions, encouraging third parties to make allegations or repeating the allegations of such third parties etc. about the plaintiff in relation to the death of his wife which is under investigation.

18. Mr. Salman Khurshid clarified that the plaintiff does not seek a blanket gag order and does not expect the defendants, not to investigate/report fairly and impartially on matter of public importance or interest and on true and established facts reported by Courts of law or police. He, however, prayed that the defendants must not involve in rhetorical assertions and the defendants must respect plaintiff's *'Right to be left alone*'/'*Right to Silence*'.

19. He stated that since, the defendants had neither regretted nor taken back the allegations made over such a long period, there must be higher level of restraint even in reporting third party statements so as not to insinuate against the plaintiff by associations. He also prayed that the defendants must explicitly disassociate themselves from veracity/authenticity of such reports by inserting a disclaimer. He pointed out that it has been repeatedly held by Courts that it is no defence to say that the defendant heard the defamatory remarks from a third party and was merely repeating such allegations. According to him, repeating allegations of a third party also amounts to defamation.

ARGUMENTS ON BEHALF OF THE DEFENDANTS

20. Per contra, Mr. Sandeep Sethi, learned senior counsel for the defendants stated that the defendant no. 1 is a journalist of considerable repute and commanding immense respect. He pointed out that the defendant no. 1 had been awarded the prestigious Ramnath Goenka Award for excellence in journalism among other awards and he had been instrumental in breaking many stories of public interest

such as the Commonwealth Games scam; the Kargil for Profit scam; and the 2G scam.

21. He denied that the defendant no. 1 had a history of broadcasting incorrect and unsubstantiated news reports. He stated that the defendant no. 1 has been a fearless journalist and reporter and the incidents cited by the plaintiff were completely unrelated to the present case and that too without revealing the full and correct facts. His response to the incidents highlighted by the plaintiff is reproduced hereinunder:-

a) Justice P.B. Sawant's case related to an inadvertent computer error by which his photograph was displayed instead of another person's during a news story. The defendant no. 1 had apologized to Justice P.B. Sawant on behalf of the broadcaster for this inadvertent error, which involved no human interface and no malice. The defendant no. 1 did not have any role in relation to the same. The matter is presently pending before the Bombay High Court.

b) In relation to the NBSA order regarding debate on Kanimozhi and 2-G scam, the action was initiated against the broadcaster and not against the defendant no. 1 in person. No specific directions were passed against the defendant no. 1 in the order. The matter related to reporting court proceedings in pending criminal trials. The defendant no. 1 broke the story on the 2G Scam in November 2010.

c) No specific direction was passed against the defendant no. 1 with regard to alleged leakage of a secret defence letter as the

complaint was against the broadcaster. The plaintiff has suppressed that three NBA member channels, i.e., CNN IBN, Times Now and NDTV had carried news reports on the alleged leak based on a news report by the Press Trust of India. The NBSA merely issued a warning to all the channels.

d) Defendant no. 1 was not the reporter in the programme regarding Jasleen Kaur. It was an interview by a Times Now reporter Ms. Pooja. No directions or observations were made against the defendant no. 1.

e) Mr. Sharad Shah who had time and again singled out Times Now had filed the said complaint with regard to Sunanda Pushkar case. No specific directions or strictures were passed against the defendant no. 1. The subject matter of the programme was covered by the national media and a comparative statement with other channels was given to the NBSA. NBSA closed the complaint by advising the broadcaster to exercise care and caution while reporting about matters under investigation and also decided to draw up guidelines for reporting matters under investigation.

f) The Order by Of-Com, U.K. is not at all relevant to the present matter. The incident was a debate on militants, Sayed Salauddin and Hafiz Sayed. Pakistan blacked out Home Minister Rajnath Singh's address at the SAARC Home Ministers' meet in Islamabad. The defendant no. 1 debated on Mr. Nawaz Sharif using his U.N. Speech to describe Burhan Wani as a peace icon. He stated that the defendant no. 1 had

only exposed the hypocrisy of the pro-Pakistan brigade in India.

22. Mr. Sandeep Sethi contended that the plaintiff, an elected representative of the people, was expected to set examples of impeccable standards of propriety and a high degree of transparency, accountability and morality. He stated that the safety of common man was of grave public concern, especially given the mysterious death of the deceased in a secured five-star hotel, which sent across a chilling message and hence warranted media coverage.

23. He emphasised that the defendants' news reports had highlighted fresh evidence in relation to the deceased's death on 17th January, 2014 and pointed out serious irregularities and unusual delay in concluding the police investigation. He laid stress on Delhi Police file noting which highlighted glaring shortcomings in investigation.

24. Mr. Sandeep Sethi stated that there were the following material omissions and inconsistencies in the Police statements given by plaintiff and Mr. Narayan, Personal Assistant to the plaintiff and deceased, as well as, the telephonic conversions between Republic TV reporter (Ms. Prema Sridevi) and the deceased :-

(i) Plaintiff and Mr. Narayan in their police statements had not mentioned that the plaintiff had returned to Hotel Leela Palace on the date of death of deceased, whereas Mr. Narayan in the telephonic conversions had mentioned that the plaintiff had come to the Hotel.

(ii) Plaintiff in his police statement had mentioned that deceased was admitted to KIMS on 12th January, 2014, inter alia, for suspected

lupus, a fact which was also mentioned in letter dated 12th February, 2014 by Dr. Anil Gupta of Dubai, family friend of deceased, but the AIIMS report mentioned that she was not having lupus and KIMS report mentioned that deceased was hemodynamically stable when discharged.

(iii) Plaintiff in his police statement had mentioned that he and deceased had a minor argument and deceased became calm at 2 A.M. on the date of death of deceased, whereas Mr. Narayan in his police statement mentioned that plaintiff and deceased had fought till 6.30 A.M. and in his telephonic conversation with Ms. Prema, Mr. Narayan confirmed that deceased was awake till 6.30 A.M.

(iv) The recorded telephonic conversations showed that the deceased wanted to speak about herself to Ms. Prema. Mr. Narayan stated to Ms. Prema that plaintiff was stopping the deceased from speaking to the press and Ms. Prema and that deceased had messaged Ms. Prema at 4.10 A.M. on the date of her death to see her.

25. Mr. Sethi suggested that the scene of crime had been compromised. He referred to the statement of Rajan Rao, who was an alleged friend of plaintiff and Vikas Ahlawat, his OSD, to show that he admitted visiting the place of occurrence on 17th January, 2014 immediately after the demise of Ms. Sunanda Pushkar.

26. Mr. Sandeep Sethi emphasised that Dr. Sudhir Gupta, (Professor & HOD, AIIMS, who had performed autopsy on the

deceased) in interviews given to the defendants on 9th May, 2017 and 31st July, 2017 had stated that he was under tremendous political pressure to pass-off the death of deceased as natural and the said fact had also been recorded in his police statement.

27. Mr. Sandeep Sethi stated that the fact that the plaintiff had tried to bring to the notice of AIIMS the contents of email dated 26th January, 2014 sent by one Dr. Rajeev Bhasin that as the deceased did not have food for over three days and only had coconut water, the same could have slowed down her heart rate and if the deceased took Alprax, it could have contributed to the slowing down of her heart rate and made it difficult for her to call for help was suspicious.

28. Mr. Sandeep Sethi contended that the impugned stories aired by the defendants were true and asserted that the defendants would plead and prove the allegations therein.

29. He stated that the nine remarks highlighted by the plaintiff's senior counsel were not derogatory. He stated that the plaintiff had handpicked and had selectively quoted them without providing the context. The relevant portion of the tabular chart tendered by learned senior counsel for the defendants is reproduced hereinbelow:-

Sl. No.	Particulars	Response
1	ShashiTharoor your game is up. Come out now, wherever you are hiding from. Shashi Tharoor I have the pleasure of informing you that every	As per the transcript at p. 48 of the plaint, the word *whoever* was used in place of wherever as mentioned above. The Advocates for Plaintiff have omitted to mention the portions mentioned in red font, which were

	conversation of your Man Friday has been recorded Shashi Tharoor. You knew Shashi that I know that your hands were not clean. Today I have started an independent channel. Till now you could have tried to put pressure here there. Tried your usual dirty tricks. (*Page 48 of Plaint*)	mentioned in the broadcast and which point out that there was basis and material based on which the said comment were made. The said comments were made as the Defendant No. 1 had started an independent channel from 6 May 2017 and there was significant evidence in the form of AIIMS report, KIMS report, taped conversations which pointed out omissions and inconsistencies in the version emanating from the said material and the version put forth by the plaintiff and his Man Friday, Narayan Singh as elaborated in Para no. 41 to 49 at p. 159 to 170 of the WS filed on behalf of Defendant No. 1 in Part I Vol. 2.
2.	We are going to prove Shashi Tharoor that you knew Sunanda Pushkar was lying motionless in room no 307 since about 7 o'clock in the morning and 6 o'clock in the evening and I have a phone conversation Shashi Tharoor, in which you say and he says he is desperately calling you and saying to you she is not waking up and you are saying "don't disturb her, let her sleep." Was that out of concern or something else Shashi Tharoor? We also will	The portion mentioned in red font has been omitted by the Advocates for the Plaintiff. The said portion was also used in the broadcast. The said comments were made in light of the facts emanating from the conversion between Man Friday, Narayan Singh and Prema Sridevi in Tape 16 at p. 278 of documents enclosed with WS of Defendant no. 1 in Part III Vol. 4 and Tape 18 at p. 280 of documents enclosed with WS of Defendant no. 1 in Part III Vol. 4 which is as follows:- <u>TAPE 16</u> *NARAYAN - Hello*

	prove today Shashi Tharoor that it's a damn lie that Sunanda Pushkar asked everybody to leave the Leela Hotel. You asked everybody to leave Leela Hotel Shashi Tharoor. (*Page 49 of Plaint*)	*PREMA SRIDEVI - Hello* *NARAYAN - Yes madam* ***PREMA SRIDEVI - Did she wake up?*** ***NARAYAN - We are waking her up. It's been a while so we're going to call sir and ask if we can wake her up.*** *PREMA SRIDEVI - What?* ***NARAYAN - Madam is still sleeping as of now and so I am taking sir's permission to wake her up. And am waking her up.*** ***PREMA SRIDEVI - From which sir?*** ***NARAYAN - Tharoor sir.*** *PREMA SRIDEVI - Where is Tharoor sir?* *NARAYAN - He is outside?* *PREMA SRIDEVI - Is he coming?* *NARAYAN - I don't know as of now but will call and tell you.* *PREMA SRIDEVI - Don't tell him anything about what is happening downstairs. Then he won't let her speak.* *CALL ENDS* <u>TAPE 18</u> *NARARYAN : Hello* *PREMA SRIDEVI : Hello* *NARAYAN: Yes madam* ***PREMA SRIDEVI: Narayan, it's 5 pm.*** *NARAYAN: Madam what do I tell you? How do I tell you? What do we do?* *PREMA SRIDEVI - Is she still sleeping?* *NARAYAN: Yes she is* ***PREMA SRIDEVI: She's has been sleeping from 6.30 in the morning?*** *(Long pause)* ***NARAYAN: Not sure when she slept?***

		We are asking sir if we should wake her up but he is saying not to wake her up and to let her sleep. So, we messaged boss asking when he is coming. ***PREMA SRIDEVI: Which room are you guys in?*** ***NARAYAN: 307*** *PREMA SRIDEVI : So you guys also have space to sleep there?* *NARAYAN: Outside, there is a verandah. We had slept there.* *PREMA SRIDEVI: What is the scene now?* *NARAYAN: What?* *PREMA SRIDEVI: What is the scene?* *NARAYAN: What?* *PREMA SRIDEVI: What is the scene?* *NARAYAN: As of now she is still sleep* *CALLS ENDS*
3.	You are exposed today Shashi Tharoor....(*Page 50 of plaint*)	The said comments were made based on the suspicious facts emanating from the taped conversations between deceased, Republic TV reporter, Prema Sridevi and plaintiff's man Friday i.e. Narayan Singh.
4.	But I know he (Shashi Tharoor) is a hypocrite, duplicitous man. He is not going to do any of it. "His wife is found dead in a Hotel room. The investigation leades nowhere in 3 years 3 months 22 days later and all that Shashi Tharoor can think about	The portion highlighted in red font has been omitted by the Advocates for the plaintiff. The said portion was also used in the broadcast. As per the transcript of broadcast mentioned at p. 52 of Plaint, the word MAN was not used in the broadcast. The portion highlighted in red font has been omitted by the Advocates for the

	right now is for his Twitter Tweet is about the encouragement to budding poets. (*Page 52 of plaint*)	Plaintiff. The said comments were made by Defendant No. 1 to express his surprise and anguish that despite the investigative authorities making no head way in the matter, the Plaintiff did not seem to be concerned about the same.
5.	For every question we ever asked on Tharoor, we were told to believe all was well. The fact is that all was far from well. Sunanda wanted to speak out that is also on Sunanda Murder Tapes today and it is proven on the Sunanda Murder Tapes that she was stopped forever as the needle of suspicion points closer and closer and closer to the inconsistencies of one duplicitous man called Shashi Tharoor. I have just five questions for him tonight.... (*Page 54-55 of Plaint*)	The portion highlighted in red font has been omitted by the Advocates for the Plaintiff. The said portion was also used in the broadcast. The said comments were made based on the facts emanating from Tape 1 at p. 261 of documents enclosed with the WS of Defendant No. 1 in Part III Vol. 4. The said conversion happened on 16 January 2017. <u>TAPE 1</u> *Phone rings twice* *Sunanda Pushkar answers call* *PREMA SRIDEVI: Hello* *SUNANDA PUSHKAR: Hello (in a muffled voice)* *PREMA SRIDEVI: Am I talking to Sunanda Pushkar?* *SUNANDA PUSHKAR: Yes (in a muffled voice)* *PREMA SRIDEVI: Hi Sunanda, this is Prema Sridevi calling from TIMES NOW. Basically, Arnab had given me your number and he wanted me to talk to you.*

		SUNANDA PUSHKAR: Can you hear me? Connect him. *PREMA SRIDEVI: I am actually near the Leela Hotel. I wanted to meet you.* *SUNANDA PUSHKAR: No, I am actually very sick. I just rushed from the hospital and there's pest control going on at home. So I am really sick.* ***PREMA SRIDEVI: Ok. Errrm. I am so sorry to hear that. Are you at the Leela now? Or are you.....*** ***SUNANDA PUSHKAR: I am at the Leela now darling (unclear)*** ***PREMA SRIDEVI: Can I just drop in for some time? Because he (Arnab) wanted me to meet you and talk to you for some time.*** ***SUNANDA PUSHKAR: Yes, yes. I would like to talk about it myself.*** *PREMA SRIDEVI: Yes....err.....I..... I'll just come in. Where exactly are you? Which floor?* *SUNANDA PUSHKAR: I am on the 9th floor.* *PREMA SRIDEVI: 9th floor. Ok ok. I'll be there.* *SUNANDA PUSHKAR: What time?* *PREMA SRIDEVI: I'm just right outside Leela. I'll hardly take 10 minutes.* *SUNANDA PUSHKAR: Ok* *PREMA SRIDEVI: Ok.Bye*
6.	....Now we are told that he is putting out a tweet and he is 'It's an exasperating farrago of distortions, misrepresentations and outright lies being	The portion highlighted in red font has been omitted by the Advocates for the Plaintiff. The said portion was also used in the broadcast. The said comments were made after the Plaintiff had put out a tweet at 9.18

	broadcast by an unprincipled showman masquerading as a journalist. Well he is an unprincipled criminal masquerading as a politician. He also said that 'I am angered that someone would exploit a human tragedy for personal gains and TRPs.' Shashi Tharoor I am also equally angered that you are not interested in how your wife was killed and I am also angered that you knew that she was in Room 307 and that you knew that a person who was dead could not have moved to 345 and I am angered today equally angered and more angered that a duplicitous person like you would not have the sense to question how a person who was dead and how that person who happened to be your own wife had walked from one room to another and I am equally angered today that Shashi Tharoor you lied and you didn't have	P.M. on 8 May 2017 against the Defendant No. 1, which read as: "*Exasperating farrago of distortions, misrepresentations & outright lies being broadcast by an unprincipled showman masquerading as a journalist"* and in response to another tweet put out by the Plaintiff on 8 May 2017, which read as,: "*I am angered that someone would exploit a human tragedy for personal gains & TRPs. I challenge him to prove his false claims in a court of law.*"

	the temerity or the decency to tell everyone or anyone that you went back to the hotel to meet your wife and it is also true that all of these facts have been put by your Personal Assistant. (*Page 58-59 of Plaint*).	
7.	....Im so amazed. Im so amazed. She is saying she is feeling sick. She was not saying that she was sick enough of dying. For God's sake don't be ridiculous now. And she says in one phone call in fact that if you remember the conversation there Smrita, when she says that Arnab has asked me to speak to you she actually says connect him on the line she is that keen on give us story and she says where are you? How often, you've been a journalist for more than 2 decades Smrita. When does the person say when are you going to come? When the person is really keen to be saying something. The person trying to	The portion highlighted in red font has been omitted by the Advocates for the Plaintiff. The said portion was also used in the broadcast. The said facts were mentioned by the Defendant No. 1 based on the facts emanating from Tape 1 at p. 261 of documents enclosed with the WS in Part III Vol. 4, as mentioned in serial no. 11 above and Tape 15 at p. 277 of documents enclosed with WS of Defendant no. 1 in Part III Vol. 4, as mentioned in serial no. 8 above.

	throttle her (late Mrs. Sunanda Pushkar) is Shashi Tharoor. I mean let's be clear there, you know. (*Page 64 of Plaint)*	
8.	....How can a lady who is lying motionless or sleeping or not even responding tell somebody to go and get her clothes? How is that possible Shashi Tharoor? Tell me now. Answer my question? Don't be a coward Shashi Tharoor.... (*Page 79 of Plaint*)	The said comments were made as despite being called upon by the Defendant No. 1 to present his side of the story, the Plaintiff had failed to do the same.
9.	....Is it possible that you went through your testimony in three lines? ....How can you describe what happened in seventy two hours in three lines? I have your testimony. You mentioned 14, 15, 16, 17 and there are four quick lines Shashi Tharoor and here it is Shashi Tharoor... Come on face me you coward. (*Page 80 of Plaint*)	The said comments were made in relation to the testimony given by the Plaintiff to the Delhi Police as mentioned at p. 200 of the documents enclosed with WS of Defendant No. 1 in Part III Vol. IV.
10.	I think all of us agree that as of now the nation wants to know Why Shashi Tharoor is the only man happy	The said comments were made by the Defendant No. 1 to express his surprise and anguish that despite the investigative authorities having made no head way in the matter, the Plaintiff did

	with the way the Delhi Police is unprogressing the case. [Stated in the broadcast dated 4 September 2017] (*Page 34 of I.A. 8809 of 2017*).	not seem to be concerned about the same.

30. Mr. Sandeep Sethi stated that the plaintiff had sought to selectively target the defendants as the murder of the deceased was widely reported by several media houses and the plaintiff having acquiesced to the same cannot singularly target the defendants for reporting the death of deceased as a case of murder.

31. Learned senior counsel for the defendants stated that the plaintiff harboured personal animosity against the defendants since 2010, as defendant no. 1 had probed the alleged misuse of office by the plaintiff to ensure that INR 70 crores, equivalent to 19% equity in a IPL Kochi franchise was paid to the deceased consequent to which the plaintiff was reportedly asked to resign.

32. Mr. Sandeep Sethi stated that the defendant no. 1 had been cautious and had acted as per statement made by him while reporting the death of deceased. In support of his contention, he referred to the following remarks of the defendant no. 1 made in various broadcasts dated- (8 May 2017)-"*.....And the fact is why is Shashi Tharoor so disturbed? Have we said that he has carried out the murder? No....*",(13 May 2017) "*.....I'm not saying that he's the killer. I'm not saying he's the murderer. I'm not saying he's the chief conspirator*" (31 July 2017) "*Now viewers, I am not concluding, I am not making any inference. I am not saying who the murderer is or the main*

conspirator behind the Sunanda murder is, at least not yet...."

33. Mr. Sandeep Sethi emphasised that the plaintiff was deliberately misconstruing and giving colour to the statement made by him which was given in good faith and also acted upon by the defendants as repeatedly acknowledged by learned senior counsel for the plaintiff. According to him, since the assurance had been acted upon, and since the plaintiff also accepted the same, nothing remained in the injunction applications.

AFTER ARGUMENTS HAD CONCLUDED, A COPY OF THE DIVISION BENCH JUDGEMENT IN THE CASE OF SUBRAMANIAN SWAMY & ANR. VS. DELHI POLICE & ORS HANDED OVER

34. After the arguments had concluded, Mr. Salman Khurshid, learned senior counsel for plaintiff mentioned the matter and handed over a photocopy of the Division Bench judgment dated 26th October, 2017 passed in the case of ***Subramanian Swamy & Anr. Vs. Delhi Police & Ors, W.P.(Crl) 1938/2017***. By the said judgment, a Division Bench of this Court dismissed Dr. Swamy's Public Interest Litigation seeking constitution of a Special Investigation Team (SIT) to investigate the murder of Ms. Sunanda Pushkar on the ground that there were no rare and compelled circumstances warranting such a direction. The Division Bench in the aforesaid order also pointed out that a previous writ petition being W.P.(C) 769/2015 seeking similar relief had already been dismissed.

COURT'S REASONING

FREEDOM OF EXPRESSION INCLUDES THE FREEDOM OF THE MEDIA AND CONSTITUTES ONE OF THE ESSENTIAL FOUNDATIONS OF OUR DEMOCRATIC SOCIETY.

35. Having heard learned counsel for parties, this Court is of the view that *Freedom of Expression* and *Democracy* are the cornerstone of our Constitution. The Constitution framers were of the opinion that a well informed citizenry would govern itself better. The reality of open and free public discussion and debate was considered central to the operation of our democracy. In fact, freedom of expression as defined in Article 19 of the Constitution does not specifically mention freedom of press, but the Supreme Court in a catena of cases has held that freedom of the media is included in Article 19(1)(a) and constitutes one of the essential foundations of our democratic society ***[See: Indian Express Newspaper (Bombay) (P) Ltd. Vs. Union of India, (1985) 1 SCC 641]***.

THE CONSTITUTIONAL GUARANTEE OF FREE SPEECH DOES NOT CONFER A RIGHT TO DEFAME PERSONS

36. The Constitutional guarantee of free speech does not confer a right to defame persons and harm their reputations by false and baseless allegations and by innuendoes and insinuations. *Shakespeare* aptly summed up the importance of one's reputation and good name as under:-

> *"Good name in man and woman, dear my lord,*
> *Is the immediate jewel of their souls.*
> *Who steals my purse steals trash....*
> *But he that filches from me my good name*
> *Robs me of that which not enriches him,*
> *And makes me poor indeed."*

37. In India there can be criminal prosecution for defamation with imprisonment for up to two years and a fine. There is also the civil remedy of damages for defamation.

THERE IS NEED TO STRIKE A BALANCE BETWEEN THE COMPETING RIGHTS.

38. Thus, while free speech is a fundamental right, such right is neither untrammeled nor superior to other fundamental rights in the Constitution. It is hemmed in by restrictions in Article 19(2). Other rights, such as the right to fair trial, may be antithetical to it in several instances. There is need to strike a balance between the competing rights.

39. The Apex Court while upholding the constitutional validity of Sections 499 and 500 IPC in ***Subramanian Swamy Vs. Union of India, Ministry of Law and Others, (2016) 7 SCC 221*** has held as under:-

> *"195. One cannot be unmindful that right to freedom of speech and expression is a highly valued and cherished right but the Constitution conceives of reasonable restriction. In that context criminal defamation which is in existence in the form of Sections 499 and 500 IPC is not a restriction on free speech that can be characterised as disproportionate. Right to free speech cannot mean that a citizen can defame the other. Protection of reputation is a fundamental right. It is also a human right. Cumulatively it serves the social interest. Thus, we are unable to accept that provisions relating to criminal defamation are not saved by doctrine of proportionality because it determines a limit which is not impermissible within the criterion of reasonable restriction. It has been held in D.C. Saxena v. Chief Justice of India [D.C. Saxena v. Chief*

Justice of India, (1996) 5 SCC 216] , though in a different context, that if maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. The reason is obvious viz. that society accepts free speech and expression and also puts limits on the right of the majority. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression. The Court had further observed that the State has legitimate interest, therefore, to regulate the freedom of speech and expression which liberty represents the limits of the duty of restraint on speech or expression not to utter defamatory or libellous speech or expression. There is a correlative duty not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation."

40. In the case of ***Surya Prakash Khatri Vs. Madhu Trehan, 2001 (92) DLT*** a Full Bench of this Court has held as under:-

"23. It is thus needless to emphasise that a free and healthy press is indispensable to the functioning of a true democracy. In a democratic set up there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. To achieve this objective the people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and viewpoints on such matters and issues and select their further course of action.

The primary function, therefore, of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion and can be an instrument of social change. It may be pointed out here that Mahatma Gandhi in his autobiography has stated that one of the objectives of the newspaper is to understand the proper feelings of the people and give expression to it; another is to arouse among the people certain desirable sentiments; and the third is to fearlessly express popular defects. It therefore turns out that the press should have the right to present anything which it thinks fit for publication. But it has to be remembered that this freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of speech and expression would amount to an uncontrolled license. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the journalists. In an organized society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of law. (See. In re Harijai Singh and another, AIR 1997 SC 73). The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reasons that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself. To quote from the report of Mons Lopez to the

Economic and Social Council of the United Nations" If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation and discipline. It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression."

41. This Court is of the opinion that it is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence. In fact, presumption of innocence and a fair trial are at the heart of criminal jurisprudence and in a way important facets of a democratic polity that is governed by rule of law. Journalists are free to investigate but they cannot pronounce anyone guilty and/or pre judge the issue and/or prejudice the trial. The grant of the fairest of the opportunity to the accused to prove his innocence is the object of every fair trial. Conducting a fair trial is beneficial both to the accused as well as to the society. A conviction resulting from unfair trial is contrary to the concept of justice.

42. In ***Attorney General v. BBC: 1981 A.C 303 (HL),*** the Attorney General had brought proceedings for an injunction to restrain the defendants from broadcasting a programme dealing with matters which related to an appeal pending before a Local Valuation Court on the ground that the broadcast would amount to contempt of court. In

that context, (though the House of Lords held that contempt law did not apply to the Valuation Court), Lord Scarman observed that '*administration of justice*' should not at all be hampered with. Lord Denning in the Court of Appeal had observed that professionally trained Judges are not easily influenced by publications. But, disagreeing with that view of Lord Denning, Lord Dilhorne stated (pp 335) in yet other oft-quoted passage as follows:

> "*It is sometimes asserted that no Judge will be influenced in his Judgment by anything said by the media* and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. *This claim to judicial superiority over human frailty is one that I find some difficulty in accepting*. Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of Judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that *he may be subconsciously affected by it. It is the law, and it remains the law until it is changed by Parliament, that the publications of matter likely to prejudice the hearing of a case before a court of law will constitute contempt of court punishable* by fine or imprisonment or both".

43. No doubt, as stated above, Lord Denning M.R. stated in the Court of Appeal that Judges will not be influenced by the media publicity, a view which was not accepted by the House of Lords.

44. In fact, Borrie and Lowe in their Commentary on Contempt of Court (3rd Edn, 1996) state that Lord Denning's view is *"more a statement of policy rather than literal truth"*.

45. Cardozo, one of the greatest Judges of the American Supreme Court, in his *"Nature of the Judicial Process"* (Lecture IV, Adherence to Precedent. The Subconscious Element in the Judicial Process) (1921) (Yale University Press) referring to the "*forces which enter into the conclusions of Judges"* observed that "*the great titles and currents which engulf the rest of men, do not turn aside in their curse and pass the Judges by"*.

46. Moreover, today massive flow of information is largely in only one direction. According to Mr. Algore, the former Vice President of the United States of America in his book *The Assault on Reason*, the "*well-informed citizenry*" is in danger of becoming the "*well-assumed audience*" and the republic of letters (newspapers) has been invaded and occupied by the empire of television. An extract of the book is reproduced hereinbelow:-

> *"Consider the rules by which our present public forum now operates and how different they are from the norms our Founders knew during the age of print. Today's massive flows of information are largely in only one direction. The world of television makes it virtually impossible for individuals to take part in what passes for a national conversation.*

> *Individuals receive, but they cannot send. They absorb, but they cannot share. They hear, but they do not speak. They see constant motion, but they do not move themselves. The "well-informed citizenry" is in danger of becoming the "well-assumed audience".*

47. The Law Commission of India in its 200th Report on Trial By Media Free Speech and Fair Trial under Criminal Procedure Code, 1973 August 2006 has concluded, *"The freedom of the media not being absolute, media persons, connected with the print and electronic media have to be equipped with sufficient inputs as to the width of the right under Article 19(1)(a) and about what is not permitted to be published under Article 19(2). Aspects of constitutional law, human rights, protection of life and liberty, law relating to defamation and Contempt of Court are important from the media point of view. It is necessary that the syllabus in Journalism should cover the various aspects of law referred to above. It is also necessary to have Diploma and Degree Course in Journalism and the Law"*.

48. Consequently, a potential clash between freedom of expression and laws or measures protecting reputation, which is the purpose of the law of defamation, is inevitable. Legal systems of various countries have dealt with the jurisdiction to grant interim injunctions to restrain publication differently.

RULE IN ENGLAND FOR AN INJUNCTION IS IT IS NOT SUFFICIENT FOR A CLAIMANT TO ESTABLISH THAT THE WORDS ARE CAPABLE OF BEING DEFAMATORY; THE COURT MUST BE SATISFIED THAT IT WOULD INEVITABLY COME TO THE CONCLUSION THAT THEY WERE DEFAMATORY.

49. According to *The Common Law Library Gatley on Libel and Slander*, the jurisdiction to grant interim injunctions to restrain publication of defamatory statements is "*of a delicate nature*", which "*ought only to be exercised in the clearest cases*". That was stated by Lord Esher M.R. in ***Coulson Vs. Coulson, (1887) 3 T.L.R. 846*** and it encapsulates the general approach of the English courts. The reluctance to grant peremptory injunctions is rooted in the importance attached to the right of free speech, and the consideration that damages are liable to be an adequate remedy. Thus, the English Court will only grant an interim injunction where:

(1) the statement is unarguably defamatory;

(2) there are no grounds for concluding the statement may be true;

(3) there is no other defence which might succeed;

(4) there is evidence of an intention to repeat or publish the defamatory statement.

50. The practice established in applications for interim injunction by ***American Cyanamid v Ethicon*,*(1975) A.C. 396*** of not considering the merits of the case once it had been shown there was a serious issue to be tried, but determining where the balance of convenience lay between the parties as regards the imposition of a restraining order,

has been rejected as inappropriate in defamation cases [***Trevor Vs. Solomon, (1977) 248 E.G. 779 CA***], as has the rights *'balancing'* approach which has been adopted in privacy and harassment cases [***Greene Vs. Associated Newspapers Ltd, (2005) Q.B. 972***].

51. The reason for this pre-condition was forcefully explained by Lord Esher in the following passage in his judgment in ***Coulson Vs. Coulson*** (supra)*:*

> *".....It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable."*

52. Consequently, it is not sufficient for a claimant in England to establish that the words are capable of being defamatory; the court must be satisfied that it would inevitably come to the conclusion that they were defamatory.

53. Another general rule in England is where the defendant contends that the words complained of are true, and asserts that he will plead and seek at trial to prove the defence of justification, the court will not grant an interim injunction, unless, exceptionally, the court is satisfied that such a defence is one that cannot succeed. This was the decision in ***Bonnard v Perryman, (1891) 2 Ch. 269***. Lord Coleridge explained:

> *"The right of free speech is one which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and*

repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed."

"It ought to only be exercised in the clearest cases, where any jury would say that the matter complained of was libellous and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant. It followed from those three rules that the Court could only on the rarest occasion exercise the jurisdiction."

54. This statement of the law has been endorsed and applied consistently since 1891. [See ***Fraser Vs. Evans, (1969) 1 QB 349***; ***Crest Homes Ltd. Vs. Ascott, (1980) FSR 396***; ***Herbage Vs. Pressdram Ltd., (1984) 1 WLR 1160***; ***Holley Vs. Smyth, (1998) QB 726***; ***Monson Vs. Tussauds Ltd, (1894) 1 QB 671***; ***Burns Vs. Associated Newspapers, (1926) 42 TLR 37***; and ***Khashoggi Vs. IPC Magazines, (1986) 1 WLR 1412***].

55. According to *Gatley on Libel and Slander*, in recent times the rigidity of the rule has been criticised as incompatible with the proper application of European Convention on Human Rights and Fundamental Rights (ECHR) law, which requires the court to strike a balance between competing rights, notably Art.8 (respect for private life) and Art.10 (freedom of expression). But though it has been judged that it is not enough for a defendant in the face of a statement of the claimant that the words are untrue merely to assert that the words are true or to state that he intends to justify without identifying

the ambit or extent of that defence, the Court of Appeal in ***Greene Vs. Associated Newspapers Ltd., (2004) EWCA (Civ.) 1462*** has unequivocally re-asserted the absolute nature of the rule in defamation cases which it held was unaffected by the Human Rights Act 1998. For the moment, therefore, the proposition that a claimant cannot obtain an interim injunction to restrain the publication of defamatory words in the face of a statement from the defendant, verified as true, that he can and will justify the alleged libel, can be regarded as an invariable rule, unless it is plain that the plea of justification is bound to fail. The claimant need not state that he will justify the particular words or allegation comprising the alleged libel; it is sufficient for him to declare his intention to justify the core or sting of the alleged libel, provided, of course, that the core or sting is a wider or more general meaning than that conveyed by the particular matters described in the words complained of, and is a meaning the words are capable of bearing.

56. In England, injunctions on the ground of privacy/misuse of private information have also been granted like in ***Campbell Vs. Mirror Group Newspapers, (2004) 2 A.C. 457***. A tabloid, has dubbed the system of privacy injunction as '*cheater's charter*'.

RULE IN AUSTRALIA AND NEW ZEALAND

57. In Australia it has been said that the rule in ***Bonnard v Perryman*** (supra) does not apply. But the rule has come under scrutiny by the High Court in ***Australian Broadcasting Corp. Vs. O'Neill, (2006) HCA 46*** considering the legal principles applicable to

the grant of interim injunctions in defamation cases. The court undertook an extensive review of both English and Australian case law, demonstrating how the latter had absorbed in large measure the reasoning behind the rule in ***Bonnard v Perryman*** (supra), that freedom of speech was paramount, without converting it into a rigid and inflexible maxim. The majority's opinion stands as under:-

> *"Inflexibility is not the hallmark of a jurisdiction that is to be exercised on the basis of justice and convenience...Formulations of principles which, for purposes of legal analysis, gather together considerations which must be taken into account may appear rigid if the ultimate foundation for the exercise of the jurisdiction is overlooked. In the context of a defamation case, the application of those organising principles will require particular attention to the considerations which courts have identified as dictating caution. Foremost among those considerations is the public interest in free speech. A further consideration is that, in the defamation context, the outcome of a trial is especially is likely to turn upon issues that are, by hypothesis, unresolved. Where one such issue is justification, it is commonly an issue for jury decision. In addition, the plaintiff's general character may be found to be such that, even if the publication is defamatory, only nominal damages will be awarded."*

58. However, Heydon J., in a powerful and polemical dissenting judgment argued for the abandonment of the rule as being wholly inappropriate in the modern world:

> *"Attention could be given to the significance of changed social conditions - to the fact that the judges who decided the cases which culminated in Bonnard v Perryman had just finished living through an era when the leading political journalists were Robert Cecil and Walter*

Bagehot; the name of Harmsworth was unknown; there were no relatively cheap mass circulation newspapers operated by large publicly owned companies; and no radio or television outlets were operated by those companies and by the state...Those who decided Bonnard v Perryman had lived through a time when there was no electronic media and no problem of cross-media ownership; the print organs were much more fragmented that now, were directed to a population with much lower literacy than now, were much less able to reach most of the adult population, and were much less able speedily to disseminate defamatory material. In short, attention would have to be directed to whether in modern conditions the mass media are more able to inflict harm which is not also grave but irreparable, and if so, whether it ought to be less difficult for plaintiffs to obtain urgent interlocutory relief to prevent such harm."

59. The position in New Zealand is colourably the same as in England.

RULE IN CANADA IS THAT INJUNCTIVE RELIEF TO RESTRAIN ALLEGED DEFAMATION IS AN EXCEPTIONAL REMEDY THAT IS TO BE GRANTED IN ONLY THE "RAREST AND CLEAREST OF CASES"

60. In Canada, the rule in Bonnard v. Perrymen remains the standard for granting interim injunctions. In ***Compass Group Canada (Health Services) Ltd. v. Hospital Employees Union 2004 BCSC, 128 A.C.W.S. (3d) 578***, the court affirmed that injunctive relief to restrain alleged defamation is an exceptional remedy that is to be granted in only the "*rarest and clearest of cases*". It further held that the burden lay with the plaintiff to demonstrate that the material complained of was so "*manifestly defamatory that any jury verdict to the contrary*

would be considered perverse by the Court of Appeal".

61. The high standard has been applied in ***Hutchens v. SWCAM.COM 2011 ONSC 56, 196 A.C.W.S. (3d) 1131***,where the court noted that the "*balance of convenience*" factor that applies to the usual application for an interim injunction does not apply to a plaintiff who seeks to restrain allegedly defamatory speech. It required that for an application for an interlocutory injunction to succeed, the allegations must be impossible to justify.

RULE IN UNITED STATES OF AMERICA IS THAT EVERY INACCURATE STATEMENT IS NOT ACTIONABLE UNLESS IT IS MADE WITH MALICE, I.E. WITH ACTUAL KNOWLEDGE OF THE FALSITY OF THE STATEMENT OR WITH RECKLESS DISREGARD OF THE TRUE STATE OF AFFAIRS

62. The United States Supreme Court in its landmark decision in ***New York Times v. Sullivan, 376 US 254*** ruled that in the case of a public official every inaccurate statement is not actionable unless it is made with malice, i.e. with actual knowledge of the falsity of the statement or with reckless disregard of the true state of affairs. The reasoning is that erroneous statements are unavoidable in free debate in a democracy and must be tolerated because debate on public issues should be uninhibited, robust, and wide open and freedom of the press must have "*the breathing space it needs to survive*".

RULE IN INDIA

IN INDIA, THE COURTS HAVE THE POWER TO PASS PRE-PUBLICATION OR PRE-BROADCASTING INJUNCTION OR PRIOR RESTRAINT ORDER IN SUB-JUDICE MATTERS. THE TWO-PRONGED TEST OF NECESSITY AND PROPORTIONALITY HAVE TO BE SATISFIED BEFORE ORDERING POSTPONEMENT OF PUBLICATION. MOREOVER, THE INJUNCTION ORDER SHOULD ONLY BE PASSED IF REASONABLE ALTERNATIVE METHODS OR MEASURES WOULD NOT PREVENT THE SAID RISK.

63. In India, the Courts have the power to pass pre-publication or pre-broadcasting injunction or prior restraint orders in sub-judice matters if a Court is satisfied that the interest of justice so requires.

64. The prejudice that results from reporting has been taken into account by the Indian Supreme Court in ***R.K. Anand Vs. Registrar, Delhi High Court, (2009) 8 SCC 106*** while explaining the meaning of "trial by media" as under:-

> *"293. .....:*
> *"The impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny."*

65. In Jessica Lal murder case i.e., ***Manu Sharma Vs. State (NCT of Delhi) (2010) 6 SCC 1***, the Supreme Court observed that an effort

should be made to maintain the distinction between trial by media and informative media. The Apex Court also found that trial by media did, though to a limited extent, affect the rights of the accused. The relevant portion of the aforesaid judgment is reproduced hereinbelow:-

> *" 298. Despite the significance of the print and electronic media in the present day, it is not only desirable but the least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.*
>
> *xxxx xxxx xxxx xxxx*
>
> *303. Summary of our conclusions:*
>
> *xxxx xxxx xxxx xxxx*
>
> *(11) Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held as impermissible."*

66. The Supreme Court in ***Reliance Petrochemicals vs. Proprietors of Indian Express Newspapers Bombay, (1988) 4 SCC 592*** observed that the test for 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 of clear present and imminent danger.

67. Subsequently, the Supreme Court of India in ***Sahara India Real Estate vs. SEBI, (2012) 10 SCC 603*** held that prior restraint per se is not unconstitutional, but it should be passed only when necessary to prevent real and substantial risk to the fairness of the trial and that too 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 necessity and the proportionality test were summarised as under:-

> *"They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial if reasonable alternative methods.... will not prevent the said risk……*
>
> *the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint."*

68. In both ***Reliance Petrochemicals*** (supra) and ***Sahara India Real Estate*** (supra), the Apex Court held that Courts have inherent power to pass prior restraint injunction order in matters which are sub-judice to safeguard fairness of trial and to prevent possible contempt.

69. In fact, the Press Council of India's Reference Guide on the norms of journalistic conduct itself states, "*in a conflict between the fair trial and freedom of speech, fair trial has to necessarily prevail because any compromise of fair trial for an accused will cause immense harm and defeat the justice delivery system*".

ONE OF THE PERMISSIBLE HEADS OF RESTRICTIONS ON FREEDOM OF EXPRESSION IS DEFAMATION. FOR A CLAIM OF DEFEMATION TO SUCCEED, A PUBLIC FIGURE HAS TO PROVE ADDITIONALLY THAT THE REPRESENTATION WAS PRECIPITATED BY MALICE

70. The Indian Constitution is not absolute with respect to freedom of speech and expression, as enshrined in the First Amendment to the American Constitution. One of the permissible heads of restrictions on freedom of expression is defamation. As regards the essential ingredients of defamation, Salmond has stated in ***The Law of Torts,*** *"The test of defamatory nature of a statement is its tendency of excite against the plaintiff the adverse opinions or feeling of other persons. The typical form of defamation is an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct".*

71. In the context of public figures like the plaintiff, the Supreme Court observed in ***Kartar Singh & Ors. Vs. State of Punjab, 1956 SCR 476*** that "*those who fill a public position must not be too thin skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they know from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time" (Per Cock-burn, C.J. in Seymour v. Buttenworth and see the dicta of the Judges in R. v. Sir R. Carden, "whoever fills a public position renders himself open thereto. He must accept an attack as a necessary, though unpleasant, appendage to his office" (Per Bramwell, B., in Kelly v. Sherlock. Public men in such positions may*

as well think it worth their while to ignore such vulgar criticisms and abuses hurled against them rather than give importance to the same by prosecuting the persons responsible for the same".

72. Consequently, as observed in ***Silkin v. Beaverbook Newspapers Ltd. & Another, [1998] 1 W.L.R. 743***, *"the test to be applied in respect of public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury."*

73. The Supreme Court of India in ***R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632*** has ruled that no action for libel lies "*even where the publication is based upon facts and statements which are not true, unless the public official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (a member of the press or the media) to prove that he acted after a reasonable verification of the facts; it is not necessary to prove that what has been written is true*".

74. The principle of privilege permits certain professions with a degree of latitude in response to claims of defamation. In the case of journalists, for example, they are provided some latitude (qualified privilege) through the dilution of the 'truth' defence, in that they can resist a claim for defamation on the ground that the statement or publication is based on a reasonable verification of facts and that it was not produced with a reckless disregard for truth or precipitated by actual malice.

COORDINATE BENCHES OF THIS COURT IN NAVEEN JINDAL AND SWATANTER KUMAR HAVE GRANTED INJUNCTIONS IN DEFAMATION SUITS.

75. Coordinate Benches of this Court in ***Naveen Jindal Vs. M/s. Zee Media Corporation Limited & Anr.,***(Supra) and ***Swatanter Kumar Vs. The Indian Express Ltd. & Ors., 207 (2014) DLT 221*** have granted injunctions in defamation suits.

76. In fact, a Coordinate Bench of this Court in ***Naveen Jindal Vs. M/s. Zee Media Corporation Limited & Anr.***(supra) has held that the power of the High Court to order restrain of publication in the media would clearly encompass the stage when the criminal case against the accused is at the preliminary enquiry or investigation stage. In the aforesaid case, injunction was granted as investigation was sought to be influenced inasmuch as the Investigating Officer was sought to be interrogated/interviewed on Television by a party to the lis.

77. Keeping in view the aforesaid judgments, this Court is of the opinion that the two-pronged test of necessity and proportionality have to be satisfied before ordering postponement of publication, namely, necessity to prevent real and substantial risk to fairness of trial and salutary effect of such an injunction outweighs deleterious effect to the free expression. This Court would like to clarify that tests like necessity, proportionality and balance of convenience are not end points but points of departure. Moreover, the injunction order should only be passed if reasonable alternative methods or measures would not prevent the said risk.

EVEN IF A COURT IS INCLINED TO GRANT INJUNCTION, THERE IS NEED TO TAKE CARE THAT IT DOES NOT RESULT IN A "GAG ORDER" OR "SUPER-INJUNCTION"

78. There is need to take care that the injunction order, even if granted does not result in a "*gag order*" or "*super-injunction*" which not only anonymises the names of the parties to a case but prevents discussion of the fact that any legal proceedings are ongoing is issued in rarest of rare cases or where law mandates. After the Trafigura episode, in which a company obtained a super-injunction against papers reporting about toxic waste dumping in West Africa, the then Master of the Rolls Lord Neuberger chaired a report which recommended that only in the "*rarest of rare cases*", such as where there is a possibility of criminals being 'tipped off' should such super-injunction be issued.

THIS COURT IS OF THE VIEW THAT NO BLANKET WINNING RIGHT CAN BE DECLARED BECAUSE THE RIGHTS ARE NEITHER ABSOLUTE NOR IN ANY HIERARCHAL ORDER, SINCE THEY ARE OF EQUAL VALUE. THERE IS NEED TO BALANCE WHICH HAS TO BE DONE ON CASE TO CASE BASIS.

79. Keeping in view the aforesaid, this Court is of the view that no blanket winning right can be declared because the rights are neither absolute nor in any hierarchal order, since they are of equal value. There is need to balance which has to be done on case to case basis.

AS FAR AS THE ALLEGED DEFAMATORY REMARKS A) TO I) MENTIONED BY LEARNED SENIOR COUNSEL FOR PLAINTIFF ARE CONCERNED, THIS COURT IS OF THE OPINION THAT IN VIEW OF THE DEFENCES OF PERSONAL ANIMOSITY AND PROVOCATION, THE MATTER WOULD REQUIRE A DETAILED TRIAL.

80. As far as the alleged defamatory remarks a) to i) mentioned by learned senior counsel for plaintiff are concerned, this Court is of the opinion that in view of the defences of personal animosity and that the remarks in question had been made in response to *'derogatory tweets'* put out by the plaintiff himself, the matter would require a detailed trial. For instance, it is the defendant No.1's case that he described the plaintiff as *'an unprincipled criminal masquerading as a politician'* in response to the plaintiff's prior tweet that *'It's an exasperating farrago of distortions, misrepresentations and outright lies being broadcast by an unprincipled showman masquerading as a journalist'.* Consequently, the defences of provocation and the context in which the said remarks had been made would have to be examined in depth at the trial stage.

81. Undoubtedly, TV viewers who want to watch *'action films'* should not watch TV debates on current affairs on the ground that it contains more action and violence than any action film. There is need to lift the level of TV debates, but other than expressing a fond hope, the Court can do no more.

82. It is pertinent to mention that in the written statement, the defendant no. 1 has clarified that he has never imputed that the plaintiff is guilty in the Sunanda Pushkar case. In fact, the defendant

no. 1 has gone on record to state that the plaintiff is not the one being accused of any wrongdoing. The relevant portion of the written statement of the defendant no. 1 is reproduced hereinbelow:-

> *"The Defendant No. 1 states that he has never imputed that the Plaintiff is guilty in the matter and on the contrary has gone on record to state that the Plaintiff is not the one being accused of any wrongdoing. The Defendant No. 1, as a responsible journalist, only highlighted the obvious questions that remained (and remain) unanswered in the case."*

83. Further, keeping in view the voluminous material placed by both the parties on record, this Court at the present stage cannot conclude that the defendant no.1 has a history of broadcasting incorrect and unsubstantiated news reports.

IN THE PRESENT CASE, THIS COURT PRIMA FACIE FINDS THAT THE DEFENDANTS HAVE HIGHLIGHTED THE EVIDENCE WHICH IS RELEVANT AND MATERIAL ON A MATTER OF SUBSTANTIAL IMPORTANCE WITH RESPECT TO A PUBLIC FIGURE. THERE IS NO MATERIAL TO PRIMA FACIE CONCLUDE THAT THE STORIES HAVE BEEN AIRED BY THE DEFENDANTS WITH A RECKLESS DISREGARD FOR TRUTH OR PRECIPITATED BY ACTUAL MALICE OR THAT THE DEFENCE OF JUSTIFICATION/TRUTHFULNESS IS ONE THAT CANNOT SUCCEED.

84. In the present case, this Court prima facie finds that the defendants have highlighted the following evidence with respect to the death of Ms. Sunanda Pushkar, wife of the plaintiff, a public figure and who at the relevant time was the Minister of State for Human Resource Development in the Union Cabinet:-

a) In the postmortem report, the Medical Board constituted by the AIIMS has opined that the cause of death to the best of their knowledge and belief is due to poisoning and the circumstantial evidence suggests alprazolam poisoning. AIIMS post-mortem report of deceased mentioned that deceased had around fifteen injuries including an injection mark and concluded as follows:-

> *"The causes of death to the best of my knowledge and belief is in this case is poisoning. The circumstantial evidence are suggestive of alprazolam poisoning. All the injuries mentioned are caused by the blunt force, simple in nature, not contributing to death and are produced in scuffle, except injury number 10 which is an injection mark. Injury number 12 is a teeth bite mark. The injuries number 1 to 15 are of various duration ranging from 12 hours to 4 days."*

b) The Kerala Institute of Medical Sciences report of the deceased showed that the deceased was hemodynamically stable when discharged. Consequently, death of the deceased on account of lupus, as suggested by the plaintiff, was improbable.

c) Dr. Sudhir Gupta, Professor and HOD AIIMS who conducted the postmortem had alleged in his interviews to the defendants that political pressure was applied upon him. The relevant extracts of Dr. Sudhir Gupta are reproduced hereinbelow:-

> *"<u>Police Statement</u>*
>
> *"Director, AIIMS was taking little interest in finding cause of death."*
>
> *"Director met me and gave me e-mails of Shashi Tharoor suggesting LUPUS and low BP emails were sent by some doctors. Director, AIIMS wanted to give*

me emails. I told him that the emails could only be given by IO and I did not entertain that. I could only receive papers from IO. Later I got these emails from IO alongwith other papers. He also told me that you will be removed if you do not go by natural death story....."

Broadcast dated 9th May, 2017

"Dr. Sudhir Gupta : Pressure on me was...Pressure on me was declare this death as a natural death or we are going to remove you from the head of department..... and we will replace you.....

Broadcast dated 31st July, 2017

"Gupta - He (plaintiff) contacted me through Dr. RC Deka, ex-director, and more or less suggested that after first analysis report came negative, then he said I can declare the death natural and I can justify the haemorrhage...."

"Gupta- I have mentioned this to the police, police has asked me, 'did Shashi Tharoor also influence you? I said yes."

d) 19 tapes of telephonic conversations between the reporter, the deceased herself and Mr. Narayan, Personal Assistant of the deceased which allegedly show inconsistencies in statements of the plaintiff.

e) The CCTV footage of Main Porch is available till 17:44 hours of 15th January, 2014 only and then of 21st January from 12:12 hours to 12:18 hours. No CCTV footage of Main Porch on 16th January, 2014 is available. The CCTV footage of Corridor is available of 17th January only till 23:57 hours and then the

footage is of 19th January.

f) Delhi Police file noting on glaring shortcomings in investigation. The relevant portion of the said note reads as under:-

" <u>SHORTCOMINGS IN SUNANDA PUSHKAR CASE</u>

1. No medicine was seized on 18 January 2014.

2. Alprax and other medicines were seized on 19th January 2014.

3. Laptop, Mobile phones of Sunanda Pushkar were seized on the following dates:-

- *Laptop (Apple) 25.1.2014*
- *Blackberry mobile Vodafone SIM no.9999557007 (Delhi no.)-28.01.14*
- *Blackberry mobile Airtel SIM no.9447777007 (Kerala No.)-28.1.14*
- *Blackberry mobile Vodafone SIM no.971566441889 (Dubai No.)-28.1.14*

4. The reason for delay in seizure is not explained, however, the data has been deleted when it was seized.

5. Eatables were seized only on 5.11.14.

6. The CCTV footage of Main Porch is available till 1744 hrs. of 15th January 2014 only and then of 21st January from 1212 to 1218 hrs.

7. No CCTV footage of Main Porch on 16th January, 2014 is available.

8. The CCTV footage of Corridor is available of 17th

January only till 2357 hrs then the footage is of 19 the January."

85. Irrespective of the style of reporting and the remarks made, this Court is prima facie of the view that reporting in the present matter is a case of legitimate investigative journalism as even three and a half years after the death of Ms. Sunanda Pushkar, wife of a then sitting Union Minister, no charge-sheet has been filed. The police may have its own reasons for not completing the investigation, but this is a case where defendants cannot be denied the right to telecast a story as it is a matter of substantial importance with respect to a public figure. Further, the documents and materials highlighted by the defendants seem prima facie relevant and material. There is no material to prima facie conclude that the stories have been aired by the defendants with a reckless disregard for truth or precipitated by actual malice.

86. This Court is prima facie of the view that the present case falls within the exception provided by the Division Bench in ***Court on its own motion Vs. State and Ors., 2009 Crl. L.J. 677***. The relevant portion of the said Division Bench judgment is reproduced hereinbelow:-

" 64. We are unable to appreciate the relevance of this case, except to the extent that "investigative journalism" has been adversely commented upon. But, the real questions that this decision raises are: what is the media to do in a case where investigations go on interminably? Is the media expected to remain a silent spectator during the entire period? What if the investigations are shoddy or patently one-sided or are carried out with a 'sweep it under the carpet' attitude 'what about the rights of the

victim of a vilification campaign' is he without recourse to any remedy in law? We propose to deal with these questions at the appropriate stage.

xxxx xxxx xxxx xxxx

77. On the basis of the case law cited before us on the issue of media ethics and conduct, infractions thereof which tend to or constitute interference with the administration of justice so as to constitute contempt, the following norms emerge:

xxxx xxxx xxxx xxxx

5. It follows from the above that before a cause is instituted in a Court of law, or is otherwise not imminent, the media has full play in the matter of legitimate 'investigative journalism'. This is in accord with our Constitutional principles of freedom of speech and expression and is in consonance with the right and duty of the media to raise issues of public concern and interest. This is also in harmony with a citizen's right to know particularly about events relating to the investigation in a case, or delay in investigation or soft-pedaling on investigations pertaining to matters of public concern and importance.

87. This Court has also held in ***Khushwant Singh v. Menaka Gandhi, AIR 2002 Delhi 58*** that where the defendant contends that the words complained of are true, and asserts that he will plead and seek at trial to prove the defence of justification, the court will not grant an interim injunction, unless, exceptionally, the court is satisfied that such a defence is one that cannot succeed.

88. In ***His Holiness Shamar Rimpoche v. Lea Terhune and Others, AIR 2005 Del 167***, a Coordinate Bench of this Court has held

as under:-

> *"This court is fully bound by the judgment of the Division Bench in Khushwant Singh's case (supra). The sum and substance of the said judgment is that in a case of an article/publication of an allegedly offending and defamatory nature, pre publication injunction of restraint should not be granted in case the defendant who supports the publication cites truth as a defence and pleads justification. In such a case as per Khushwant Singh's case, damages are the appropriate remedy."*

89. Consequently, in the present case an interlocutory injunction cannot be granted at this prima facie stage to restrain publication.

DIVISION BENCH JUDGMENT IN SUBRAMANIAN SWAMY & ANR.(SUPRA) OFFERS NO ASSISTANCE TO THE PLAINTIFF AS THE PARAMETERS/TESTS STIPULATED THEREIN CANNOT BE APPLIED TO THE PRESENT CASE. THE DIVISION BENCH HELD THAT THE PUBLIC INTEREST LITIGATION WAS A POLITICAL INTEREST LITIGATION AND DR. SUBRAMANIAM SWAMY HAD NOT DISCLOSED THE FULL AND COMPLETE FACTS AND HAD NOT IMPLEADED THE PLAINTIFF DESPITE MAKING GRAVE AND SWEEPING ALLEGATIONS AGAINST HIM.

90. This Court is of the opinion that the Division Bench's judgment in ***Subramanian Swamy & Anr.*** (supra) has no relevance to the present case as in the said Public Interest Litigation, the petitioner had prayed for constitution of a multi-disciplinary SIT consisting of Intelligence Bureau, Enforcement Directorate, RAW, Delhi Police and headed by CBI to investigate the death of Late Sunanda Pushkar.

91. The parameters/tests stipulated in the said judgment cannot be applied to the present case. Moreover, in the said case the Division

Bench held that the Public Interest Litigation was a 'political interest litigation' and Dr. Subramaniam Swamy had not disclosed the full and complete facts and had not impleaded the plaintiff despite making grave and sweeping allegations against him. Consequently, the said division bench judgment offers no assistance to the plaintiff.

IN A LIVE DEBATE OR AN INTERVIEW IT IS NOT POSSIBLE TO RUN A DISCLAIMER AS NO BROADCASTER CAN PREDICT OR KNOW IN ADVANCE WHAT A PARTICIPANT OR AN INTERVIEWER IS GOING TO STATE

92. As far as learned senior counsel for the plaintiff's prayer for running a scroll disclaiming the remarks/comments made by third party is concerned, this Court is of the view that in a live debate or an interview it is not possible to run a disclaimer as no broadcaster can predict or know in advance what a participant or an interviewer is going to state.

EVERY INDIVIDUAL/ACCUSED HAS A RIGHT TO SILENCE. UNDER THE INDIAN CONSTITUTION, NO PERSON CAN BE COMPELLED TO GIVE TESTIMONY OR ANSWER QUESTIONS WHICH MAY INCRIMINATE HIM. UNDOUBTEDLY, AN INDIVIDUAL AFFECTED BY THE STORY MUST BE GIVEN AN OPTION TO GIVE HIS VERSION, BUT HE CANNOT BE COMPELLED TO SPEAK, IF DOES NOT WANT TO.

93. However, there is merit in the argument of learned senior counsel for the plaintiff that the defendants cannot coerce or insist that the plaintiff must make a statement. A perusal of the transcript reveals that the defendant no. 1 in his telecast has repeatedly insisted that the plaintiff being a public figure cannot contend that he has a right to

silence. Even Mr. Sandeep Sethi, learned senior counsel for the defendants had stated that as the plaintiff is privy to special facts, he should come clean.

94. In the opinion of this Court, every individual/accused has a right to silence. Under the Indian Constitution, no person can be compelled to give testimony or answer questions which may incriminate him. Undoubtedly, an individual affected by the story must be given an option to give his version, but he cannot be compelled to speak, if he does not want to. The *'culture of thrusting a microphone'* in the face of a person needs to be deprecated.

95. The Apex Court in ***Nandini Satpathy Vs. P.L. Dani & Another*** reported in ***(1978) 2 SCC 424*** has held that a person who adopts a stance of silence, runs a calculated risk, but he cannot be compelled to speak. The relevant portion of the said judgment is reproduced as under:-

> *"57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation — not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read "compelled testimony" as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for*

violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes "compelled testimony", violative of Article 20(3).

xxx xxx xxx

59. We have explained elaborately and summed up, in substance, what is self-incrimination or tendency to expose oneself to a criminal charge. It is less than "relevant" and more than "confessional". Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. We hold further that the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation under way is not with reference to that. We have already explained that in determining the incriminatory character of an answer the accused is entitled to consider — and the Court while adjudging will take note of — the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effect guilty in import. However, fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate."

CONCLUSION

96. Keeping in view the aforesaid mandate of law and the prima facie findings, this Court is of the opinion that in the present case the defendants have the right to air their stories and the same cannot be curbed, but it has to be tempered and balanced.

97. This Court is of the view that it is important that when criminal investigation has commenced, media reporting should be sensitive to the indeterminacy of the questions raised in the proceedings. Press cannot *'convict anyone'* or insinuate that he/she is guilty or make any other unsubstantiated claims. Press has to exercise care and caution while reporting about matters under investigation or pending trial.

98. This Court refrains from saying anything more as Mr. Sandeep Sethi, learned senior counsel for defendants had assured this Court on 29th May, 2017 that the defendants in future would exercise restraint as well as bring down the *'rhetoric'* and even according to Mr. Salman Khurshid, learned senior counsel for plaintiff, subsequent to the said statement the *'previous vitriolic attack'* was missing. The statement made by Mr. Sandeep Sethi is accepted by this Court and defendants are held bound by the same.

99. However, before airing any story pertaining to the plaintiff, the defendants shall give the plaintiff a written notice, by electronic mode, asking for his version. If the plaintiff refuses or does not reply within a reasonable time, he will not be compelled to speak and the story will be aired with the disclosure that the plaintiff has refused to speak to the defendants.

100. This Court clarifies that all observations in the present case are *prima facie* in nature and are in the context of the disputes between the parties hereto. None of the observations in the present case shall be used in any criminal proceeding, if any, filed by the State.

101. With the aforesaid observations, present applications being I.As. 6674/2017, 8809/2017 and 10378/2017 stand disposed of.

MANMOHAN, J

DECEMBER 01, 2017
js/rn