In Re: S. Mulgaokar vs Unknown on 21 February, 1978

Equivalent citations: (1978)3SCC339, [1978]3SCR162

Bench: Chief Justice, P.S. Kailasam, V.R. Krishna Iyer

ORDER

1. The matter before us arises out of a publication in the Indian Express newspapers dat

John Stuart Mill, in his essay on "Liberty", pointed out the need for allowing even erro

'Though all the winds of doctrine were let loose to play upon the earth, so Truth be in

Political philosophers and historians have taught us that intellectual advances made by

Although our Constitution does not contain a separate guarantee of Freedom of the Press,

2. I find, however, that gross distortions of what was actually held by this Court in wh
So adverse has been the criticism that the Supreme Court Judges, some of whom had prepa

3. Judges of this Court were not even aware of the contents of the letter before it was

4. Comments about Judges of the Supreme Court suggesting that they lack moral courage to

5. It seems to me that Editors of at least responsible newspapers should be aware that i

6. This Court is armed, by Article 129 of the Constitution, with very wide and special p
Thus, the principle of Supremacy of the Constitution requires for its maintenance in fu

I also said there :
It would be a sad day for the supremacy of the Constitution and for the Rule of Law, wh

7. It seemed particularly necessary to point out the protections enjoyed by this Court a

8. The writer of an article of a responsible newspaper on legal matters is expected to k

9. This article proceeds on the assumption that there is already a formulated code of et

10. The article of 21 December, 1977, referred to above, ends by attempting to make a di

11. The supposed writer of the article was evidently so shaky about his ability to subst

12. Mr. Jethmalani appearing for A. G. Noorani, to whom we had issued no notice, tried t

13. A reason which has also weighed with me in dropping this and a similar earlier proce

14. The statement made above by me should remove the misapprehension, if there was reall

15. National interest requires that all criticisms of the judiciary must be strictly rat

16. The judiciary cannot be immune from criticism. But, when that criticism is based on

17. My opinion on matters touched by my learned brother Krishna Iyer is that, although,

18. After I had drafted my reasons for dropping the proceedings I have had the benefit o

19. The need for appropriate standards relating even to what our judgments should or sho

20. As I have already pointed out above, I think that the need for appropriate norms of

Krishna Iyer, J.

21. Silence is no sanctuary for me when speech from the Chief Justice persuades my pen into a divergent course. I profoundly appreciate and deeply respect his sense of hurt and obligation for explanation but prefer to travel along another street in stating why I agreed to jettison the contempt proceedings. My judgment is more an explanation than an expostulation and certainly not a reflection on the respondents.

22. We had unanimously directed that the above proceedings in contemplation of contempt action be dropped but the fact that we had converged to this conclusion did not rule out-as is now apparent-our divergence in the process of reasoning. Minds differ as rivers differ. Such, perhaps, in part, is the case here.

23. The contempt power, though jurisdictionally large, is discretionary in its unsheathed exercise. Every commission of contempt need not erupt in indignant committal or demand punishment, because judges are judicious, their valour non-violent and their wisdom goes into action when played upon by a volley of values, the least of which is personal protection-for a wide discretion, range of circumspection and rainbow of public considerations benignantly guide that power. Justice is not hubris; power is not petulance and prudence is not pussilanimity, especially when judges are themselves prosecutors and mercy is a mark of strength, not whimper of weakness. Christ and Gandhi shall not be lost on the judges at a critical time when courts are on trial and the people ("We, the People of India") pronounce the final verdict on all national institutions. Such was the sublime perspective, not plural little factors, that prompted me to nip in the bud the proceeding started for serving a larger cause of public justice than punitive action against a publisher, even assuming (without admitting) he was guilty. The preliminary proceeding has been buried publicly; let it lie in peace. Many values like free press, fair trial, judicial fearlessness and community confidence must generously enter the verdict, the benefit of doubt, without absolutist insistence, being extended to the defendant. Such are the dynamics of power in this special jurisdiction. These diverse indicators, carefully considered, have persuaded me to go no further, by a unilateral decision of the bench. This closure has two consequences. It puts the lid on the proceedings without pronouncing on the guilt or otherwise of the opposite parties. In a quasi-criminal action, a presumption of innocence operates. Secondly, whatever belated reasons we may give for our action, we must not proceed to substantiate the accusation, if any. To condemn unheard is not fairplay. Bodyline bowling, perhaps, is not cricket. So my reasons do not reflect on the merits of the charge.

24. Poise and peace and inner harmony are so quintessential to the judicial temper that huff, 'haywire' or even humiliation shall not besiege; nor, unveracious provocation, frivolous persiflage nor terminological inexactitude throw into palpitating tantrums the balanced cerebration of the judicial mind. The integral yoga of shanti and neeti is so much the cornerstone of the judicial process that criticism, wild or valid, authentic or anathematic, shall have little purchase over the mentation of the court. I quite realise how hard it is to resist, with sage silence, the shafts of acid speech; and, how alluring it is to succumb to the temptation of argumentation where the thorn, not the rose, triumphs. Truth's taciturn strategy, the testimony of history says, has a higher power than a hundred thousand tongues or pens. In contempt jurisdiction, silence is a sign of strength since our power is wide and we are prosecutor and judge.

25. Why did I concur in the short order? Why do I now strike a variant note to that of the learned Chief Justice ? I do not take up the position that scandalising the Judges does not come within the contempt clutches of the court. The Court's jurisdiction to initiate proceedings and punish for constructive contempt suo motu crystallized in the eighteenth century even though it is clear that the Court's inherent powers in this regard were not as wide as Wilmot J. made them out to be in his posthumously published opinion in R. v. Almon [1765 published in (1802) Wilmot's opinions] Fortunately, the attacks on the judiciary have been comparatively few in most countries, having regard to the character assassination of the personnel in the other great branches of Government. Even so, the law which punishes those who scandalize judges is as old as the Common Law itself. The existence of the contempt power, however, does not obligate its exercise on every occasion but triggers it only in special situations, not routinely.

26. What then are the complex of considerations dissuasive of punitive action ? To be exhaustive is a baffling project; to be pontifical is to be impractical; to be flexible is to be realistic. What, then, are these broad guidelines-not a complete inventory, but precedentially validated judicial norms?

27. The first rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. The Court will act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the judges, where the attack is calculated to obstruct or destroy the judicial process. The court is willing to ignore, by a majestic liberalism, trifling and venial offenses-the dogs may bark, the caravan will pass. The court will not be prompted to act as a result of an easy irritability. Much rather, it shall take notice look at the conspectus of features and be guided by a constellation of constitutional and other considerations when it chooses to use, or desist from using, its power of contempt.

28. The second principle must be to harmonise the constitutional values of free criticism, the fourth estate included, and the need for a fearless curial process and its presiding functionary, the judge. A happy balance has to be struck, the benefit of the doubt being given generously against the judge, slurring over marginal deviations but severely proving the supremacy of the law over pugnacious, vicious, unrepentant and malignant contemners, be they the powerful press, gang-up of vested interests, veteran columnists or Olympian establishmentarians. Not because the judge, the human symbol of a high value, is personally armoured by a regal privilege but because 'be you-the condemner ever so high, the law-the People's expression of Justice-is above you. Curial courage overpowers arrogant might even as judicial benignity forgives errant or exaggerated critics. Indeed, to criticise the judge fairly, albeit fiercely, is no crime but a necessary right, twice blessed in a democracy. For, it blessed him that gives and him that takes. Where freedom of expression, fairly exercised, subserves public interest in reasonable measure, public justice cannot gag it or manacle it, constitutionally speaking. A free people are the ultimate guarantors of fearless justice. Such is the cornerstone of our Constitution; such is the touchstone of our Contempt Power, oriented on the confluence of free speech and fair justice which is the scriptural essence of our Fundamental Law. Speaking of the social philosophy and philosophy of law in an integrated manner as applicable to contempt of court, there is no conceptual polarity but a delicate balance, and judicial 'sapience' draws the line. As it happens, our Constitution makers foresaw the need for balancing all these competing interests. Section 2(1)(c) of the Contempt of Courts Act, 1971 provides :

> Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-
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> (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court.

This is an extremely wide definition. But, it cannot be read apart from the conspectus of the constitutional provisions within which the Founding Fathers of the Constitution intended all past and future statutes to have meaning. All laws relating to contempt of court had, according to the provisions of Article 19(2), to be "reasonable restrictions" on the exercise of the right of free speech.

The courts were given the power-and, indeed, the responsibility-to harmonize conflicting aims, interests and values. This is in sharp contrast to the Phillimore Committee Report on Contempt of Court in the United Kingdom (1974) bund. 5794 prs. 143-5, pp. 61-2) which did not recommend the defence of public interest in contempt cases.

29. The third principle is to avoid confusion between personal protection of a libeled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt, the latter is, although overlapping spaces abound.

30. Because the law of contempt exists to protect public confidence in the administration of justice, the offence will not be committed by attacks upon the personal reputation of individual judges as such. As Professor Goodhart has put it :

> Scandalising the court means any hostile criticism of the " judge as judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander and libel.
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> (See 'Newspapers and Contempt of Court' (1935) 48, Harv. L. Rule 885, 898.) Similarly, Griffith, C. J. has said in the Australian case of Nicholls (1911) 12 C.L.R. 280, 285 that :
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> In one sense, no doubt, every defamatory publication concerning a judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a judge calculated to bring him into contempt in that sense amounts to contempt of Court.
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> Thus in In the matter of a Special Reference from the Bahama Island (1893) A.C. 138 the Privy Council advised that a contempt had not been committed through a publication in the Nassau Guardian concerning the resident Chief Justice, who had himself previously criticised local sanitary conditions. Though couched in highly sarcastic terms the publication did not refer to the Chief Justice in his official, as opposed to personal, capacity. Thus while it might have been a libel it was not a contempt.

31. The fourth functional canon which channels discretionary exercise of the contempt power is that the Fourth Estate which is an indispensable intermediary between the State and the people and necessary instrumentality in strengthening the forces of democracy, should be given free play within responsible limits even when the focus of its critical attention is the court, including the highest Court.

32. The fifth normative guideline for the judges to observe in this jurisdiction is not to be hypersensitive even where distortions and criticisms overstep the limits, but to deflate vulgar denunciation by dignified bearing, condescending indifference and repudiation: by judicial rectitude.

33. The sixth consideration is that, after evaluating the totality of factors, if the court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike, a blow on him who challenges the supremacy of the rule of law by fouling its source and stream.

34. Speaking generally, there are occasions when the right to comment may be of supreme value (for instance, the thalidomide babies cases in England) I prefer the judgment of Lord Denning M. R. in the Court of Appeal to those in the Divisional Court or House of Lords in the Thalidomide case : An. Gen. v. Times Newspapers Ltd. (1972) 3 All. E.R. 1136 (D.C.) : (1973) 1 All. E.R. 815 (C.A.) : (1973) 3 All. E.R. 54 (H.L.) and the law of contempt must adjust competing values and be modified, in its application by the requirements of a free society and the shifting emphasis on paramount public interest in a given situation.

35. Indeed, there is an interesting Australian decision R. V. Brett(1950) C.L.R. 226 which has a meaningful relevance for our case and I quote from the Australian Law Journal :

> In R. v. Brett, the publisher of a newspaper was called on to show cause why he should not be committed for contempt of court. It appeared that the newspaper, under the heading "Mr. Justice Sholl-Diehard Tory" had criticised the appointment of Mr. Justice Sholl and inferentially of all his brethren except one not specified, because they were out of touch with the life of the people arid had no experience (it was alleged) in the Criminal Court "the only court where even a semblance of the problems of the people arise", and it concluded that his appointment showed that the judiciary was "an institution forming an integral part of the repressive machinery of the State.
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> O' Bryan, J. pointed out that the fact that the article made ridiculous mistakes of fact and that its logic was greatly at fault, did hot prove that it was a contempt. The question was whether the article, honestly though mistakenly and offensively, criticised the policy of this and previous administrations in appointing judges, or whether it did indeed set out to lower the authority of the Court as such and to excite misgivings as to its partiality. With very great hesitation, his Honour came to the conclusion that a case for the exercise of the extra-ordinary summary jurisdiction of the Court had hot been made out and he discharged the order nisi.

36. Another useful illustration from the Australian jurisdiction is contained in short report made of a decision in Australian Law Journal, 1928-29, Vol. 2, 145-146 :

> The Tasmanian case (The King v. Ogilvie) concerned statements made by the respondent at public meetings, imputing lack of impartiality to Mr. Justice Crisp, and asserting that the respondent was personally disliked by his Honour, and that respondent's clients could not get justice from him. Nicholls, C. J., in delivering the judgment of the Court, agreed with the authorities that fair comment oh judicial actions is not only justifiable, but beneficial. He then pointed out "that we regard

> these preceedings as instituted and our powers conferred, not for the benefit or comfort of the Judges personally, to protect them from criticism or even from libel, but simply to secure that this institution, the Supreme Court, which in the final analysis has to declare and enforce the rules which hold the community together, shall be challenged only in the proper ways, which are two" first, by appeal, and secondly by approach in the proper form to Parliament.

37. A quick flash back to English decisions also is instructive. As early as 1900 in Queen v. Gray (1900) Q.B.D. 36 Gray published in a newspaper an article which was "personal scurrilous abuse of a judge as a judge" Lord Russel of Killowen C. J. observed :

> It is not too much to say that it is an article of scurrilous abuse of a judge in his character of a judge- scurrilous abuse, in reference to the conduct of the judge while sitting under the Queen's Commission, and scurrilous abuse published in a newspaper in the town in which he was still sitting under the Queen's Commission. It cannot be doubted-indeed it has not been argued to the contrary by the learned Counsel who represents Howard Alexander Gray-that the article does constitute a contempt of Court; but, as these applications are, happily, of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of Court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of Court. Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L. C. characterised as "scandalising a Court or a Judge.
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> The learned Law Lord, however, indicated a guideline which is extremely important :
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> Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that an contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of Court and no-body has suggested, or could suggest that it falls within the right of public criticism in the sense I have described. It is not criticism : I repeat that it is personal scurrilous abuse of a judge as a judge....
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> (emphasis added) The tone of R. v. Gray (supra) sharply contrasted with the much more liberal tone adopted by the Privy Council in McLeod v. St. Aubyn [1899] A.C. 549 even though certain aspects of the latter decision assume a somewhat imperialist

tone. Dr. Rajeev Dhavan has observed :

> For some strange reason the Privy Council judgment was neither referred to by the Chief Justice or even cited to the Court even though a time lag of nine months separates the two judgments.
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> A harmonious blend and a balanced co-existence of a free press and fearless justice desiderates that the law ought not to be too astute in such cases and that public criticism has a part to play, even if it oversteps the limit, in preserving the democratic health of public institutions. But beyond a point, the wages of contempt is committal.

38. In Ambard v. Attorney-General for Trinidad (1936) A.C. 322 the Privy Council pronounced on a case of public criticism of the administration of justice. Lord Atkin stated, with admirable accuracy, the law on this branch of contempt of Court :

> But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercise the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way : the wrong headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men.
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> Indeed, Lord Morris in Mcleod v. St. Aubyn (supra) has commented :
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> Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.

39. In will not condemn the Indian people with the contempt manifest in Lord Morris' Observation regarding small colonies and coloured populations. We are cultured people with traditions and canons and may at least be equated in these matters with English men.

40. A very valuable and remarkably fresh approach to this question of criticism of Courts in intemperate language and invocation of contempt of court against the contemner, a person of high position, is found in Regina v. Metropolitan Police Commissioner ex. p. Black-burn (1968) 2 W.L.R. 1204. Lord Denning's judgment is particularly instructive in the context of the obnoxious comments made by Quintin Hogg in an article in "Punch" about the members of the Court of Appeal. The remarks about the Court of Appeal were highly obnoxious and the barbed words thrown at the

judges obviously were provocative. Even so, in a brief but telling judgment, Lord Denning held this not to be contempt of court. It is illuminating to excerpt a few observations of the learned judge :

> This is the first case, so far as I know, where this Court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise : more particularly as we ourselves have an interest in the matter.
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> Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.
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> It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political. We must rely on our conduct itself to be its own vindication.
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> Exposed as we are to the winds of criticism, nothing which is said by this person or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

41. The Indian precedents must naturally receive referential attention from us and so I switch over to the cases of this Court which have relevance to that branch of the contempt jurisprudence bearing upon scandalising the judges. After a brief survey, I will summarise the conclusions. In Sambhu Nath Jha v. Kedar Prasad Sinha & Qrs. .

It would follow from the above that the courts have power to take action against a person who does an act or publishes a writing which is calculated to bring a court or judge into contempt or to lower his authority or to obstruct the due course of justice or due administration of law...in such cases, the court would exercise circumspection and judicial restraint in the matter of taking action for contempt of court. The court has to take into account the surrounding circumstances and the material facts of the case and on conspectus of them to come to a conclusion whether because of some contumacious conduct or other sufficient reason the person proceeded against should be punished for contempt of court.

42. In Perspective Publications Ltd. v. State of, Maharashtra [1971] 2 S.C.R. 779 Grover, J., speaking on behalf of the Court, reviewed the entire case law and stated the result of the discussion of the cases on contempt as follows :

(1) It will not be right to say that committals for contempt for scandalizing the court have become obsolete.

(2) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

(4) A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the Court.

The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as Contempt.

(5) Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. To borrow from the language of Mukherjee, J. (as he then was)(Brahma Prakash Sharma's Case)(1953) S. C. R.,1169) the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

Hidayatullah, C. J., in R. C. Cooper v. Union of India observed :

> There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a judge but because of his training and the assistance he gets from learned Counsel he is apt to avoid mistakes more than others.... We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant.

> Those who err in their criticism by indulging in vilification of the institution of courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism.

43. In Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh (1953) S.C.R. 1169, 1178, 1180 this Court said :

> It seems, therefore, that there are two primary considerations which should weigh with the court when it is called upon to exercise the summary powers in cases of contempt committed by "scandalising" the court itself. In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties would not be contempt of such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created. "The path of criticism", said Lord Atkin (Ambard v. Attorney-General for Trinidad and Tobago, (1936) A.C. 322 at 335) is a public way. The wrong -headed are permitted to err therein; provided that members of the public abstain from imputing motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice, or attempt to impair the administration of justice, they are immune.
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> In the second place, when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt. The distinction between a like and a contempt was pointed out by a Committee of the Privy Council, to which a reference was made by the Secretary of State in 1892 (In the matter of a special reference from the Bahama Islands (1893) A. C. 138). A man in the Bahama Islands, in a letter published in a colonial newspaper criticised the Chief Justice of the Colony in an extremely ill-chosen language which was sarcastic and pungent. There was a veiled insinuation that he was an incompetent judge and a shirker of work and the writer suggested in a way that it would be a providential thing if he were to die. A strong Board constituting of 11 members reported that the letter complained of, though it might have been made the subject of proceedings for libel, was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law and therefore did not constitute a contempt of court. The same principle was reiterated by Lord Atkin in the case of Devi Prashad v. King Emperor (70 I. A., 216) referred to above. It was followed and approved of by the High Court of Australia in King v. Nicholls (12 Com. L.R. 280), and has been accepted as sound by this Court in Reddy v. The State of Madras (1952) S. C. R., 452). The position therefore is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libeler in a proper

> action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it Is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration or justice by reason of such defamatory statement; it is interference with the proper administration of law.
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> (Mr. Mookerjee J. in In re : Motilal Ghosh and Others ILR, 45, Cal., 269 at 283.)

44. There is no doubt that condign and quick punishment for scandalising publication has been awarded by this Court, (Vide C. K. Daphtary and Ors. v. O.P. Gupta (1971) Supp. S.C.R. 76, 92-93

45. Another one is Shri Baradakanta Mishra v. The Registrar of Orissa High Court and Anr. . In the latter case, I had occasion to examine the root principles of Indian Contempt jurisprudence and I summed up thus :

> Judges and Courts have diverse duties. But functionally, historically and jurisprudentially, the value which is clear to the community and the function which deserves to be cordoned off from public molestation, is judicial. Vicious criticism of personal and administrative acts of Judges may indirectly mar their image and weaken the confidence of the public in the judiciary but the countervailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally over-zealour, criticism cannot be overlooked. Justice is no cloistered virtue.
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> . . . . . .
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> The Court being the guardian of people's rights, it has been held repeatedly that the contempt jurisdiction should be exercised "with scrupulous care and only when the case is clear and beyond reasonable doubt.

46. I relied on an observation made by Justice Gajendragadkar, C.J., to Special Reference No. 1 of 1964 and proceeded to state the key to the jurisdiction :

> We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise Judges

> never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct If judges decay the contempt power will not save them and so the other side of the coin is that Judges, like Caesar's wife, must be above suspicion.
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> To wind up, the key word is "justice", not "judge"; the key-not thought is unobstructed public justice, not the self-defence of a judge; the cornerstone of the contempt law is the accommodation of two constitutional values-the right of free speech and the right to independent justice. The ignition of contempt action should be substantial and mala fide interference with fearless judicial action, not fair comment or trivial reflections on the judicial process and personnel.

47. Indeed, I am convinced that democratic institutions, including the Court system and judges, must suffer criticism and benefit from it This approach has been emphasised by me in that case :

> Even so, if Judges have frailties-after all they are human-they need to be corrected by independent criticism. If the judicature has serious shortcomings which demand systemic correction through socially-oriented reform initiated through constructive criticism, the contempt power should not be an interdict. All this, far from undermining the confidence of the public in Courts, enhances it and, in the last analysis, cannot be repressed by indiscriminate resort to contempt power. Even bodies like the Law Commission or the Law Institute and researchers, legal and sociological, may run 'contempt' risks because their professional work sometimes involves unpleasant criticism of judges, judicial processes and the system itself and thus hover perilously around the periphery of the law if widely construed. Creative legal journalism and activist statesmanship for judicial reform cannot be jeopardised by an undefined apprehension of" contempt action.

48. American legal history has lessons for us but when national conditions vary adaptation, not imitation, is the creative alternative, to avoid breakdown on the rock of real life. New York is not New Delhi and New York Times deals with different customers from the Times of India. The law of contempt fluidly flows into the mould of life. This fact once noted, there is instructive thought in the American cases.

49. Their lofty approach, grounded on constitutional values, has an appeal for us. The issue is one of the gravest moment for free peoples and to choose between the cherished basics of free expression and fair hearing is a trying task. For a free press it may be argued as did the U.S. judges :

> What is at stake here is a societal function of the First Amendment in preserving free public discussion of governmental affairs.... (P)ublic debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as

> well as the right of free expression.... An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large.
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> It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. That function is recognized by specific reference to the press in the text of the Amendment and by the precedents of this Court.
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> The argument further asserts that a curtailment of press freedom is a serious matter. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

50. We, may glance at the vigorous dissent of Mr. Justice Frankfurter to this reasoning in Bridges v. California [1941] 319 U.S. 252, 279, 283, 284 Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in the matter immediately pending before him. The view of the majority deprives California of means for securing to its citizens justice according to law-means which, since the Union was founded, have been the possession, hitherto unchallenged, of all the states. This sudden break with the uninterrupted course of constitutional history has no constitutional warrant. To find justification for such deprivation of the historic powers of the stales is to misconceive the idea of freedom of thought and speech as guaranteed by the Constitution....

A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market".... A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and

protected by observing such methods and traditions.

...The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press as these phases of liberty have heretofore been conceived even by the stoutest liberatarians. In fact, these liberties themselves depend upon an untrammeled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted" by extra-judicial considerations.

Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts, are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive melee of passion and pressure. The need is great that courts be criticized, but just as great that they be allowed to do their duty.

51. The representative thinking on the subject is neatly summed up by John R. Brown, Chief Judge :

> Thus does Alexander again confront the Gordian Knot. For our history demands that breaches of the unqualified commands of the First Amendment cannot be tolerated and freedom of the press must be given the broadest scope that a liberty-loving people can allow.... On the other hand, our fundamental concepts of absolute fairness in trials dictate that the environment within which justice is administered must be maintained unpolluted by the potential infamous notoriety and biased predilections which a completely unfettered but omnipresent press can irrevocably engender in an age of the mass media....

52. It is apparent from this long discussion that the future of Free Press and of Fair Justice desiderates a juristic socio-political national debate, not ex-cathedra admonitions from the Bench or assertions from the Bar. We must evolve a know-how for the co-existence of free speech and free justice in tune with the Preamble and Article 19. Scurrilous attacks on judges or on parties to pending cases foul the course of justice. Mischievous half-truths, brazen untruths and virulent publicity by partisan media, political organs and spokesmen for vested interests can be traumatic to the cause of social justice.

53. In an area of competing social values absolutist approaches are sure to err. And yet benign neglect of courts to arrest injurious publicity may be misread as importance and timely affirmative action may stem the rot. Sheppard Sheppard v. Mawell [1966] 384, U.S., 333 is an American case in point Remember, a 'free' press is often a monopoly press and has been made gargantuan by modern technology. Of course, we must also remember, courts work in public and publishing their proceedings fairly cannot be taboo. Please remember, further, that those who cry 'wolf' against

Contempt Power are more often the Proprietariat, not the Proletariat, with exceptions which prove the rule.

54. Prejudicial publicity, indulged in by a 'free' press owing no institutional responsibility or public accountability, cannot be all that good, especially when judges are personally vilified, assured that the 'robes' traditionally, and for good reasons, do not and should not wrestle with calumniating columnists or yellow journalists. Likewise, a litigant or judge, run down by powerful vested interests wearing the mask of mass media owned by them or hiring the pen of arch spokesmen of political or economic reactionaries, cannot run riot, raising the alarm that free speech is in peril and get away with it. Heroism on the face may often be villainy at heart and the law cannot retreat from its justice-function scared by slogans. Balancing of values is difficult, delicate but indispensable. Neither the Press nor the courts are above the People. Otherwise, even gutter talk or. to borrow the phraseology of justice Stevens in Nebraska Nebraska Press Association v. Stuarts [1976] 96 Sup. Ct. 2791, shabby, intrusive or perversely motivated media practices, may be dignified as free press and given protective constitutional status, leaving the citizen litigant demoralised and citizen judge powerless, panicked by the ballyhoo of Press restraint.

55. The Court is not an inert abstraction; it is people in judicial power. And when drawing up standards for Press freedom and restraint, as an 'interface' with an unafraid court, we must not forget that in our constitutional scheme the most fundamental of all freedoms is the free quest for justice by the small man. 'When beggars die, there are comets seen' and 'when the bull elephants fight, the grass is trampled'. The contempt sanction, once frozen by the high and mighty press' campaign, the sufferer, in the long run, is the small Indian who seeks social transformation through a fearless judicial process. Social justice is at stake if foul press unlimited were to reign. As Justice Frankfurter stated, may be 'judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions' (a question I desist from deciding here), but when comment darkens into coercive imputation or calculated falsehood, threats to impartial adjudication subtly creeps. Not because judges lack firmness nor that the dignity of the bench demands enhanced respect by enforced silence, as Justice Black observed in the Los Angeles Times 314 U.S. 263 case but because the course of justice may be distorted by hostile attribution. Said Justice Jackson in Craige v. Harney 331. U.S. 367:

> I do not know whether it is the view of the Court that a judge must be thick skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work ? And if fame-a good public name-is, as Milton said, the "last infirmity of noble mind," it is frequently the first infirmity of a mediocre one.
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> I do not dogmatise but indicate the perils. Of course, the evil must be substantive and substantial, not chimerical or peripheral.

56. A concluding note. I have launched on this long, inconclusive essay in contempt jurisprudence bearing on scandalizing the judges qua judges, aware that not high falstaffian rhetoric but hard-headed realism, illumined by constitutional values, must set the limit and interpret the statute.

It is a disturbing development in our country that the media and some men in the trade of traducement are escalatingly scandalizing judges with flippant or motivated write-ups wearing a pro bono public veil and mood of provocative mock-challenge. The court shall not meditate nor hesitate but shall do stern justice to such 'professional' contemners, not shrink because they are scurrilous, influential or incorrigible. Even so, to be gentle is to be just and the quality of mercy is not strained. So, it is that a benign neglect not judicial genuflexion, is often the prescription, and to inhibit haphazardness or injustice it is necessary that the Bar and the Press evolve a dignified consensus on the canons of ethics in this area, with due regard to the Constitution and the laws, so that the Bench may give it a close look and draw the objective line of action. The process of arriving at these norms by those mighty forces who influence public opinion, cannot be delayed and until then the law laid down in precedents of this Court will go into action when judge-baiting is indulged in by masked men or media might. Freedom is what Freedom does and Justice fails when Judges quail.For sure, my plea is not for judicial pachydermy, but for dignified detachment which ignores ill-informed criticism in its tolerant stride, but strikes when offensive excesses are established. Frankly, all these are hypothetical and have no specific reference to the present case. These obiter-dicta are intended to indicate the pros and cons, not to pontificate on the precise limits for exercise of contempt power and to emphasize what Chief Justice Warren Burger mentioned in Nebraska Press Association 96 S. Ct. 2803 as 'something in the nature of a fiduciary duty' of the press to act responsibly and I may add, respectfully.

An afterward.

57. An afterward has become necessitous because the learned Chief Justice has, in his reasons, made some critical observations on men and matters based on his rich experience, high responsibility and urge to right wrongs. While respecting his feeling of hurt and attempt to set the record straight regarding his prior judgment and letters on canons of judicial ethics, I desist from comments on the author or the article, including its correctness and propriety, for fear that an indelible word, writ incautiously, may fester into an incurable wound. I am in no mood to pronounce on these subjects or to judge these generalities. Many an arrow at random sent hits a mark the archer never meant, and ex cathedra generalizations run the genetic risk of notice imperfections. The Almighty does not share His omniscience with the Judiciary.

P.S. Kailasam, J.

58. I had the benefit of reading the Judgments proposed to be delivered by My Lord the Chief Justice and Justice Krishna Iyer.

59. I would have been contented with stating that, in my view, on taking into account the facts and circumstances of the case this is not a fit case to be proceeded with under the Contempt of Courts Act, 1971. But now it has become necessary for me to state whether I agree with the judgments to be delivered.

60. My learned Brother Justice Krishna Iyer in his concluding note has expressed that he had launched on this long inconclusive essay which relates to hypothetical questions and has no specific

reference to the present case. The Judgment which he himself characterises as obiter dicta may be left alone without any comments.

61. When the matter was taken up in the Court on 27th January, 1978, the contempt proceedings were dropped without calling upon the learned Counsel who was appearing for the respondent in response to the notice. Without hearing the parties concerned, it is not right and proper to make any comments about the facts of the case. In this view I refrain from referring to the publication in "The Indian Express" or about the article in the newspaper by Shri A. G. Noorani.

62. Contempt, proceedings will stand dropped.

See further R. Dhavan : "Contempt of Court and the Phillimore Committee Report" (1976) 5 Anglo American Law Review, 186 at 194 and the literature cited there.

See R. Dhavan : "Contempt of Court and the Phillimore Committee Report" (1976) 5 Anglo American Law Review 186 at 205.