Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 1767 of 2021
(Arising out of SLP (C) No. 6731 of 2021)

The Chief Election Commissioner of India ....Appellant

Versus

M.R Vijayabhaskar & Ors. ....Respondents

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

This judgment has been divided into the following sections to facilitate analysis:

A Factual Background

B Proceedings before the Supreme Court

C Legal Position & Analysis

C.1 Open Courts and the Indian Judiciary

C.2 Freedom of Expression of the Media

C.3 Public Discourse, Media Reporting and Judicial Accountability

C.4 Freedom and constraints of judicial conduct

D Conclusion

1 Leave granted.

A Factual Background

2 A delicate question of balancing the powers of two constitutional authorities in this appeal has raised larger issues of the freedom of speech and expression of the media, the right to information of citizens and the accountability of the judiciary to the nation. The authority of a judge to conduct judicial proceedings and to engage in a dialogue during the course of a hearing and the freedom of the media to report not just judgments but judicial proceedings have come up for discussion. What are the contours which outline judicial conduct? What are the concerns courts must be alive to in an age defined by the seamless flow of information? What purpose does the media serve in a courtroom? Above all, in a constitutional framework founded on a classical scheme of checks and balances, can a constitutional body – in this case the Election Commission of India[1] – set up a plea that constitutional status is an immunity from judicial oversight? Each of these components will be addressed in this judgment.

3 This Special Leave Petition[2] arises from an order dated 30 April 2021 of a Division Bench of the High Court of Judicature at Madras. The High Court entertained a writ petition[3] under Article 226 of the Constitution to ensure that COVID-related protocols are followed in the polling booths at the 135- Karur Legislative Assembly Constituency in Tamil Nadu. During the hearings, the Division Bench is alleged to have made certain remarks, attributing responsibility to the EC for the present surge in the number of cases of COVID-19, due to their

[1] "**EC**"
[2] "**SLP**"
[3] WP No. 10441 of 2021

failure to implement appropriate COVID-19 safety measures and protocol during the elections. At issue are these oral remarks made by the High Court, which the EC alleges are baseless, and tarnished the image of the EC, which is an independent constitutional authority.

4 On 26 February 2021, the EC announced general elections to the Legislative Assemblies of Tamil Nadu, Kerala, West Bengal, Assam and Puducherry[4]. The schedule of elections in the State of Tamil Nadu involved polling on 6 April 2021 and counting of votes on 2 May 2021. While preparing for the elections, the EC issued a letter dated 12 March 2021[5] to the presidents and general secretaries of all national and State political parties emphasizing on the observance of instructions related to COVID-19 protocol during the elections. During the polling phase, the EC issued another letter dated 9 April 2021[6] to political parties stating that norms of social distancing, wearing of masks and other COVID-19 related restrictions, were not being followed by candidates set up by political parties. It also noted that in case the breach of norms continued, the EC would consider banning public meetings and rallies. Eventually, the EC by an order dated 16 April 2021[7] banned rallies, public meetings and street plays during the days of the campaign between 7 pm and 10 am. Another letter[8] was issued on the same day re-emphasizing strict adherence to COVID-19 related safety protocols.

[4] Press Note No. ECI/PN/16/2021
[5] Letter No. 4/21/2021/SDR/VOL-I
[6] Letter No. 4/2021/SDR/Vol.I
[7] Order No. 464/WB-LA/2021
[8] Letter No. 464/WB-LA/2021

5 A writ petition was filed before the Madras High Court by the respondent, who is the District Secretary and was a candidate of the AIADMK for the 135-Karur Legislative Assembly Constituency. Given the surge in the number of COVID-19 cases, the respondent had sent a representation on 16 April 2021 to the EC to take adequate precautions and measures to ensure the safety and health of officers in the counting booths. Since no response was received, the respondent approached the High Court and sought a direction to ensure fair counting of votes on 2 May 2021 at the 135- Karur Legislative Assembly Constituency by taking effective steps and arrangements in accordance with COVID-19 protocols.

6 The petition was heard by a Division Bench of the High Court, comprising of Justice Sanjib Banerjee, Chief Justice of the Madras High Court, and Justice Senthilkumar Ramamoorthy, on 26 April 2021 and an order was passed in the following terms:

> "4. […] Even though the polling was by and large peaceful in this State on April 6, 2021, it must be observed that the Election Commission could not ensure that political parties adhered to the Covid protocol at the time of election campaigns and rallies. Despite repeated orders of this Court, going on like a broken record at the foot of almost every order on an election petition, that Covid protocol ought to be maintained during the campaign time, the significance of adhering to such protocol may have been lost on the Election Commission, going by the silence on the part of the Election Commission as campaigning and rallies were conducted without distancing norms being maintained and in wanton disregard of the other requirements of the protocol.
>
> 5. In view of the rapid surge in the number of cases on a daily basis, albeit this State not yet being as badly affected as some other States, the measures to be adopted at the time of the counting of votes on May 2, 2021, which is about a week away, should already have been planned in the light

> of the grim situation now prevailing. At no cost should the counting result in being a catalyst for a further surge, politics or no politics, and whether the counting takes place in a staggered manner or is deferred. Public health is of paramount importance and it is distressing that Constitutional authorities have to be reminded in such regard. It is only when the citizen survives that he enjoys the other rights that this democratic republic guarantees unto him. The situation is now one of survival and protection and, everything else comes thereafter.
>
> 6. As far as the Karur constituency is concerned, it is submitted on behalf of the Election Commission that two halls, one measuring about 3500 sq.ft and the other measuring in excess of 4000 sq.ft, have been arranged. Upon the Court's query whether such spaces would be adequate if most of the 77 candidates were to engage agents at the time of counting, the Election Commission claims that all but two of the independent candidates have indicated that they would not engage any agents at the time of counting and only seven out of nine major political parties have confirmed in writing that they would be appointing agents.
>
> 7. In such a scenario, the Election Commission does not expect that Covid protocol and appropriate measures cannot be taken if counting is conducted at the two designated halls. The Election Commission says that six additional counting tables have been organized so that distancing norms can be maintained.
>
> 8. Similar appropriate measures have to be adopted at every counting centre and it is only upon maintaining regular sanitization, proper hygienic conditions, mandatory wearing of mask and adherence to the distance norms, should any counting begin or be continued. The State Health Secretary and the Director of Public Health should be consulted by the Election Commission and the Chief Electoral Officer responsible in the State, to put appropriate measures in place immediately.
>
> 9. The matter will appear on April 30, 2021 to review the situation when a complete picture as to adequate steps having been taken at all counting centres should be indicated by the Election Commission. […]"

7 During the course of the hearing, it is alleged that the High Court orally observed that the EC is *"the institution that is singularly responsible for the*

second wave of COVID-19" and that the EC *"should be put up for murder charges".* These remarks, though not part of the order of the High Court, were reported in the print, electronic and tele media.

8 On 27 April 2021, an individual filed a complaint, against Mr Sudip Jain, Deputy Election Commissioner and other officials of the EC under Sections 269, 270 and 304 read with Section 120-B of the Indian Penal Code, 1860 in Khardah Police Station, Kolkata. The complaint makes no reference to the order dated 26 April 2021 of the Madras High Court.

9 Before the Madras High Court, the EC filed a counter-affidavit detailing the orders issued and the steps taken for management of poll processes in view of the pandemic. The EC also filed a miscellaneous application[9] for the following reliefs:

> "[…]
> 29. …this Hon'ble Court may be pleased to pass an order of interim direction directing that **only what forms part of the record in the present proceedings W.P. No. 10441/2021 is to be reported by the press and electronic media and further directions may be issued to the media houses to issue necessary clarification in this regard and thus render Justice**.
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> 30. In the circumstances, **it is prayed that this Hon'ble Court may be pleased to pass on order of interim direction directing that the police authorities shall not register any FIR/complaint for offence of Murder on the basis of the media reports of the oral observations attributed to this Hon'ble Court in relation to W.P. No. 10441/2021 and thus render Justice**."
>
> (**emphasis supplied**)

[9] WMP No. 12062 & 12065 of 2020

10 The matter was heard again by the Madras High Court on 30 April 2021 when the High Court disposed of the petition, in view of the measures taken by the EC for observance of COVID-19 protocols at the time of the counting of votes on 2 May 2021, particularly in the 135- Karur Constituency. The miscellaneous application was also closed in light of this order.

11 Aggrieved by the order of 30 April 2021, the EC has approached this Court. The grievance is that its miscellaneous application has not been evaluated on merits and its grievance in regard to the oral observations made during the previous hearing have not been addressed.

B Proceedings before the Supreme Court

12 Before this Court, the EC has challenged the order dated 30 April 2021. An IA for amendment has been filed to challenge the earlier order, which has now merged in the final order. By way of interim relief, a stay has been sought on the order dated 30 April 2021, besides which the following relief has been sought in terms of an interlocutory direction :

> "b) **direct that no coercive action be taken against the officials of the Election Commission of India in connection with the Complaint dated 27.04.2021 filed by Smt. Nandita Sinha before the Officer- in-Charge, Khardah Police Station, Kolkata (Annexure-P/19 herein)**"
>
> (**emphasis supplied**)

13 Mr Rakesh Dwivedi, learned Senior Counsel who appeared with Mr Amit Sharma, on behalf of the EC urged the following submissions:

(i) The High Court ought not to have made disparaging oral observations that the EC is the *"the institution that is singularly responsible for the second wave of COVID-19"* and that the EC *"should be put up for murder charges":*

(a) These observations bear no relevance to the nature of the controversy before the High Court, which related to the need to make arrangements for safe counting of votes consistent with COVID-19 protocols at the 135- Karur Legislative Assembly Constituency;

(b) The polling had already been completed and only the counting of votes remained on 2 May 2021;

(c) These observations were made without giving the EC an opportunity to explain the steps it had taken for maintenance of COVID-19 protocols and it had no notice that its conduct of the elections during the campaign would engage attention during the hearing;

(d) The High Court has made disparaging oral observations without proof or material; and

(e) The High Court disposed of the writ petition without addressing the miscellaneous application filed by the EC;

(ii) The remarks made by the High Court were widely reported in the media and have tarnished the image of the EC as an independent constitutional authority. These remarks have reduced the faith of the people in the EC and undermined the sanctity of its constitutional authority;

(iii) The scope of judicial review over the EC in matters pertaining to the conduct of elections is limited and courts should exercise restraint while

making observations about the EC or the electoral process, as it falls within the domain of another expert constitutional authority;

(iv) The EC had conducted various State elections during the pandemic and had taken adequate measures to enforce protocols relating to COVID-19. The actual enforcement of protocols and safety measures on the ground is in the hands of the State machinery. The EC does not take over governance by the States even during elections and has a limited number of personnel at its disposal;

(v) When the decision to conduct elections in Tamil Nadu was taken in February 2021 and during campaigning (which ended on 4 April 2021), the number of cases of COVID-19 was under control and an analysis of the data would indicate that the elections were not a significant factor in the surge of cases. States where no elections were held such as Maharashtra, Delhi and Karnataka have witnessed a severe surge in cases;

(vi) The EC had formulated adequate guidelines for campaigning during the pandemic and had restricted the scope of electioneering;

(vii) The observations of the High Court during the oral hearings, which are not part of the written judicial record, have caused undue prejudice to the EC;

(viii) The media must ensure there is accurate reporting of court proceedings and proceedings must not be sensationalized, leading to a loss of public confidence. Directions and guidelines must be framed on the manner of reporting court proceedings;

(ix) A balance must be maintained between the conduct of court proceedings and the freedom of the media. Media reporting which suggests that a court has cast aspersions on any person or functionary is incorrect; and

(x) Though the views of a court are reflected through its judgments, oral comments of judges are quoted in the mainstream media which may give an impression of an institutional opinion. This exceeds the boundaries of judicial propriety.

14 Opposing the submissions, Mr Pradeep Kumar Yadav, appearing on behalf of respondent on caveat, stressed on the fact that the EC enjoys wide ranging powers in a State during the time of an election, including powers to deploy para military forces, suspend or replace officers such as District magistrates, police officers and even the Director General of Police, to ensure that their directives are followed. Thus, the EC was responsible for the implementation of safety measures and protocols related to COVID-19 during the elections.

15 We shall now consider the submissions of the counsel from the perspective of the issues this case has raised.

C Legal Position & Analysis

16 Before this Court, the EC is aggrieved by the oral observations of the High Court during the course of the hearing and by it not having addressed the merits of its miscellaneous application. In its miscellaneous application, the EC sought (i) media reporting of *only* what forms a part of the judicial record before the Madras High Court and not the oral observations of the judges; and (ii) a direction that no

coercive action be taken against the officials of the EC on the complaint filed before the Khardah Police Station, Kolkata.

17 At the outset, it must be noted that the second prayer noted above was thoroughly misconceived. If an FIR has been registered in Kolkata, the person aggrieved has recourse to remedies under the Code of Criminal Procedure, 1973. There are remedies under the law, including but not limited to quashing under Section 482 of the Code of Criminal Procedure, 1973. The EC cannot have a grievance if it opted for a misconceived course of action, which the High Court could not possibly have entertained.

18 We must now deal with the heart of the matter, which is the first prayer that the EC has raised - that of seeking a restraint on the media on reporting court proceedings. The basis of its application was that nothing apart from what forms a part of the official judicial record should be reported. This prayer of the EC strikes at two fundamental principles guaranteed under the Constitution – open court proceedings; and the fundamental right to the freedom of speech and expression.

C.1 Open Courts and the Indian Judiciary

19 Courts must be open both in the physical and metaphorical sense. Save and except for in-camera proceedings in an exceptional category of cases, such as cases involving child sexual abuse or matrimonial proceedings bearing on matters of marital privacy, our legal system is founded on the principle that open access to courts is essential to safeguard valuable constitutional freedoms. The concept of an open court requires that information relating to a court proceeding must be available in the public domain. Citizens have a right to know about what

transpires in the course of judicial proceedings. The dialogue in a court indicates the manner in which a judicial proceeding is structured. Oral arguments are postulated on an open exchange of ideas. It is through such an exchange that legal arguments are tested and analyzed. Arguments addressed before the court, the response of opposing counsel and issues raised by the court are matters on which citizens have a legitimate right to be informed. An open court proceeding ensures that the judicial process is subject to public scrutiny. Public scrutiny is crucial to maintaining transparency and accountability. Transparency in the functioning of democratic institutions is crucial to establish the public's faith in them. In **Mohammed Shahabuddin** vs **State of Bihar**[10], the concurring opinion noted:

> "… even if the press is present, if individual members of the public are refused admission, the proceedings cannot be considered to go on in open courts…an "open court" is a court to which general public has a right to be admitted and access to the court is granted to all the persons desirous of entering the court to observe the conduct of the judicial proceedings."

20 There are multiple ways in which an open court system contributes to the working of democracy. An open court system ensures that judges act in accordance with law and with probity. Lord Widgery's remarks in **R** vs **Socialist Workers Printers, ex p Attorney General**[11] sum up the role public hearings play on the conduct of the judge in the following terms:

> "The great virtue of having the public in court courts is that discipline which the presence of the public imposes upon the court itself. When the court is full of interested members of

[10] (2010) 4 SCC 653
[11] [1974] 3 WLR 801

> the public…it is bound to have the effect that everybody is more careful about what they do, everyone tries just that little bit harder and there is disciplinary effect on the court which would be totally lacking if there were no critical members of the public or press present. When one has an order for trial in camera, all the public and press are evicted at one fell swoop and the entire supervision by the public is gone."

21 Public scrutiny fosters confidence in the process. Public discussion and criticism may work as a restraint on the conduct of a judge. In his dissenting opinion in **Naresh Shridhar Mirajkar** vs **State of Maharashtra**[12], Justice M Hidayatullah (as the learned Chief Justice was then), observed how an open court paves the way for public evaluation of judicial conduct:

> "129. […] Hearing in open court of causes is of the utmost importance for maintaining confidence of the public in the impartial administration of justice: it operates as a wholesome check upon judicial behaviour as well as upon the conduct of the contending parties and their witnesses."

22 Cases before the courts are vital sources of public information about the activities of the legislature and the executive[13]. An open court serves an educational purpose as well. The court becomes a platform for citizens to know how the practical application of the law impacts upon their rights. In **Swapnil Tripathi** vs **Supreme Court of India**[14], a three Judge Bench stressed upon the importance of live streaming judicial proceedings. One of us (DY Chandrachud J) analyzed the precedent from a comparative perspective :

> "82. […] Through these judicial decisions, this Court has recognised the importance of open courtrooms as a means of allowing the public to view the process of rendering of justice. First-hand access to court hearings enables the

[12] (1966) 3 SCR 744, hereinafter referred to as "**Mirajkar**"
[13] Cunliffe Emma, "Open Justice: Concepts and Judicial Approaches" (2012) 40 Fed L Rev 385.
[14] (2018) 10 SCC 639, hereinafter referred to as "**Swapnil Tripathi**"

> public and litigants to witness the dialogue between the Judges and the advocates and to form an informed opinion about the judicial process.
> 83. The impact of open courts in our country is diminished by the fact that a large segment of the society rarely has an opportunity to attend court proceedings. This is due to constraints like poverty, illiteracy, distance, cost and lack of awareness about court proceedings. Litigants depend on information provided by lawyers about what has transpired during the course of hearings. **Others, who may not be personally involved in a litigation, depend on the information provided about judicial decisions in newspapers and in the electronic media. When the description of cases is accurate and comprehensive, it serves the cause of open justice. However, if a report on a judicial hearing is inaccurate, it impedes the public's right to know. Courts, though open in law and in fact, become far removed from the lives of individual citizens**. This is anomalous because courts exist primarily to provide justice to them."
>
> (**emphasis supplied**)

23 However, there are certain exceptions to the rule of open courts in India. In **Mirajkar** (supra), Chief Justice PB Gajendragadkar observed:

> "21. … While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a

> doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera."

Hence, while *in camera* proceedings may be necessary in certain exceptional circumstances to preserve countervailing interests such as the rights to privacy and fair trial, for instance, in a sexual assault case, public scrutiny of the court process remains a vital principle for the functioning of democracy.

C.2 Freedom of Expression of the Media

24 Article 19(1)(a) of the Constitution guarantees every citizen the right to freedom of speech and expression. Over six decades ago, in 1958, a Constitution Bench of this Court, in **Express Newspaper (P) Limited** vs **Union of India**[15], explained that Article 19(1)(a) would carry within it, implicitly, the right to freedom of the press. The Court held:

> "**As with all freedoms, press freedom means freedom from and freedom for. A free press is free from compulsions from whatever source, governmental or social, external or internal. From compulsions, not from pressures; for no press can be free from pressures except in a moribund society empty of contending forces and beliefs.** These pressures, however, if they are persistent and distorting — as financial, clerical, popular, institutional pressures may become — approach compulsion; and something is then lost from effective freedom which the press and its public must unite to restore.
> A free press is free for the expression of opinion in all its phases. It is free for the achievement of those goals of press service on which its own ideals and the requirements of the community combine and which existing techniques make possible. For these ends, it must have full command of technical resources, financial strength, reasonable access to sources of information at home and abroad, and the necessary facilities for bringing information to the national

[15] 1959 SCR 12

> market. The press must grow to the measure of this market.""
>
> **(emphasis supplied)**

25 The Constitution guarantees the media the freedom to inform, to distill and convey information and to express ideas and opinions on all matters of interest. Free speech and expression is subject to the regulatory provisions of Article 19(2). The decision in **LIC** vs **Manubhai D. Shah (Prof.)**[16] develops these ideas :

> "…The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy. Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. It cannot be gainsaid that modern communication mediums advance public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. **Therefore, in any set-up, more so in a democratic set-up like ours, dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2) of the Constitution. It follows that a citizen for propagation of his or her ideas has a right to publish for circulation his views in periodicals, magazines and journals or through the electronic media since it is well known that these communication channels are great purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on vital issues of national importance**…"
>
> **(emphasis supplied)**

26 Freedom of speech and expression extends to reporting the proceedings of judicial institutions as well. Courts are entrusted to perform crucial functions under the law. Their work has a direct impact, not only on the rights of citizens, but also the extent to which the citizens can exact accountability from the executive whose

[16] (1992) 3 SCC 637

duty it is to enforce the law. Citizens are entitled to ensure that courts remain true to their remit to be a check on arbitrary exercises of power. The ability of citizens to do so bears a direct correlation to the seamless availability of information about what happens in a court during the course of proceedings. Therein lies the importance of freedom of the media to comment on and write about proceedings. This principle was recognized in the *Madrid Principles on the Relationship between the Media and Judicial Independence*[17]. The first principle is formulated thus:

> "1. Freedom of expression (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. 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."

This principle is recognized within Indian jurisprudence, where the media has full freedom to report on ongoing litigation before the Courts, within certain limitations, bearing on the need to ensure that justice between parties is not derailed.

27 The media has over the years, transitioned from the predominance of newspapers in the printed form, to radio broadcasts, television channels and now, to the internet for disseminating news, views and ideas to wide audiences extending beyond national boundaries. The internet, including social media, have refashioned and, in significant ways, revolutionized the means through which information is relayed. At every stage of this transition, new questions have been

[17] These principles were issued by a group of 40 distinguished legal experts and media representatives, who met in a meeting convened by the International Commission of Jurist's Centre for the Independence of Judges and Lawyers, and the Spanish Committee of UNICEF, *available at* <https://www.icj.org/wp-content/uploads/1994/01/madrid-principles-on-media-and-judicial-independence-publication-1994-eng.pdf>

raised about how court processes will adapt to the change, so that the rights of the parties before the courts and processes of justice are not affected[18]. However, while these are valid concerns, they should never be a good enough reason for Courts to not engage with evolving technology. Technology has shaped social, economic and political structures beyond description. The world is adapting to technology at a pace which is often difficult to catalogue, and many of our citizens are becoming digital natives from a young age. It is understandable that they will look towards modern forms of media, such as social media websites and applications, while consuming the news. This, understandably, would also include information reported about the functioning of courts. Hence, it would do us no good to prevent the new forms of media from reporting on our work. It was keeping this principle in mind that the Lord Chief Justice of England and Wales, in the context of the use of live text-based forms of communication (including Twitter) to report on court proceedings, noted thus[19]:

> "It is presumed that a representative of the media or a legal commentator using live, text-based communications from court does not pose a danger of interference to the proper administration of justice in the individual case. **This is because the most obvious purpose of permitting the use of live, text-based communications would be to enable the media to produce fair and accurate reports of the proceedings.** As such, a representative of the media or a legal commentator who wishes to use live, text-based communications from court may do so without making an application to the court."
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> **(emphasis supplied)**

[18] Daniel Stepniak, 'Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions' 12 William & Mary Bill of Rights Journal 791 (2004)

[19] 'Practice Guidance: The Use of Live Text-Based Forms of Communication (Including *Twitter*) from Court for the Purposes of Fair and Accurate Reporting' *available at* <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/ltbc-guidance-dec-2011.pdf >

28 Our Court has performed its modest part to acknowledge the rapid pace of the development of technology, and our need to keep up. In **Swapnil Tripathi** (supra), it noted:

> "C. Technology and Open Court
> 84. In the present age of technology, it is no longer sufficient to rely solely on the media to deliver information about the hearings of cases and their outcomes. Technology has become an inevitable facet of all aspects of life. Internet penetration and increase in the use of smart phones has revolutionized how we communicate. As on 31-3-2018, India had a total of 1,206.22 million telecom subscribers and 493.96 million internet users. [Telecom Regulatory Authority of India, the Indian Telecom Services Performance Indicators January-March, 2018. Available at: <https://trai.gov.in/sites/default/files/PIReport27062018_0.pdf>.] Technology can enhance public access, ensure transparency and pave the way for active citizen involvement in the functioning of State institutions. Courts must also take the aid of technology to enhance the principle of open courts by moving beyond physical accessibility to virtual accessibility."

Acceptance of a new reality is the surest way of adapting to it. Our public constitutional institutions must find better responses than to complain.

C.3 Public Discourse, Media Reporting and Judicial Accountability

29 As we understand the rights of the media to report and disseminate issues and events, including court proceedings that are a part of the public domain, it is important to contextualize that this is not merely an aspect of protecting the rights of individuals and entities on reporting, but also a part of the process of augmenting the integrity of the judiciary and the cause of justice as a whole.

30 With the exception of *in camera* proceedings, a courtroom is a public space. In **Attorney General** vs **Leveller Magazine**[20], Lord Diplock, held that "*The principle of open justice requires that the court should do nothing to discourage fair and accurate reports of proceedings*." An open court and transparent dispensation of justice in all its modalities, is an end in itself. As we have discussed above, technology is an accelerant in this endeavor, but not the harbinger of this thought. Media reporting has operated alongside formalized court processes for close to a century. Court proceedings in colonial India, especially sedition trials, were also sites of political contestation where colonial brutality and indignity were laid bare. The widespread reportage on *Lokmanya* Balgangadhar Tilak's first trial for sedition was seminal in highlighting the variance in procedural laws and rights denied to Indian undertrials, as he struggled to access legal aid and was convicted in spite of a non-unanimous verdict of the jury. The *Lokmanya*'s poignant words, while recorded by the order as a formalized process of sentencing, were circulated far and wide by anti-colonial publications which fueled India's struggle for freedom. These words incidentally also adorn the plaque outside that very courtroom in the Bombay High Court to this day[21]:

> "In spite of the verdict of the Jury I maintain that I am innocent. There are higher Powers that rule the destiny of men and nations and it may be the will of Providence that the cause which I represent may prosper more by my suffering than by my remaining free."

[20] [1979] A.C. 440
[21] **Emperor** vs **Balgangadhar Tilak,** (1908) 10 BOMLR 848 (Bombay High Court)

31 Post-independence, matters of seminal constitutional importance have witnessed widespread reportage in newspapers and magazines - which did not merely report on the pronouncement of verdicts, but also the quirks of the counsel and judges. These tales have now passed down as the legacy of our profession and also provide useful context for our study of the law.

32 Albeit in the context of the value of open courts, Justice Bachawat, speaking for this Court in **Mirajkar** (supra), had placed emphasis on the publicity of court proceedings in the following terms:

> "A court of justice is a public forum. It is through publicity that the citizens are convinced that the court renders even handed justice, and it is, therefore, necessary that the trial should be open to the public and there should be no restraint on the publication of the report of the court proceedings. The publicity generates public confidence in the administration of justice…….Hegel in his Philosophy of Right maintained that judicial proceedings must be public, since the aim of the Court is justice, which is universal belonging to all."

33 With the advent of technology, we are seeing reporting proliferate through social media forums which provide real-time updates to a much wider audience. As we have discussed in the previous section, this is an extension of the freedom of speech and expression that the media possesses. This constitutes a 'virtual' extension of the open court. This phenomenon is a not a cause of apprehension, but a celebration of our constitutional ethos which bolsters the integrity of the judiciary by focusing attention on its functions. Several courts across the world, including the US Supreme Court, the UK Supreme Court, the Court of Appeal of the UK and the International Criminal Court enable public viewership of proceedings through livestreaming or other suitable open access methodology.

The Gujarat High Court also recently introduced livestreaming of its proceedings, in a bid to enhance public participation in the dispensation of justice. In this backdrop, it would be retrograde for this Court to promote the rule of law and access to justice on one hand, and shield the daily operations of the High Courts and this Court from the media in all its forms, by gagging the reporting of proceedings, on the other.

C.4 Freedom and constraints of judicial conduct

34 The grievance of the EC does not arise as much from the impugned order of the Madras High Court, as it does from the oral remarks made by the judges of the High Court during the hearing on 26 April 2021. The High Court has not been impleaded before us and has not had an opportunity to respond. Thus, we have been unable to discover what truly transpired in the proceedings and the exact remarks that were made. Unless live-streaming and archival of court proceedings sees the light of the day (three years have elapsed since the decision in **Swapnil Tripathi** (supra)) the absence of records of oral proceedings would continue to bedevil the system. However, a constitutional authority such as the EC, has adverted to the oral remarks on oath in its affidavit. These have not been disputed by the respondent. The oral remarks have received widespread publicity in electronic and print media. We have, in deference to the independent constitutional status of the High Court, not required a confirmatory report from the Registrar General of the High Court.

35 The independence of the judiciary from the executive and the legislature is the cornerstone of our republic. Independence translates to being impartial, free

from bias and uninfluenced by the actions of those in power, but also recognizes the freedom to judges to conduct court proceedings within the contours of the well-established principles of natural justice. Judges in the performance of their duty must remain faithful to the oath of the office they hold, which requires them to bear allegiance to the Constitution. An independent judiciary must also be one which is accountable to the public in its actions (and omissions).

36 The manner in which judicial proceedings are conducted, especially in our superior courts, is unique to each judge and holds great weight in the dispensation of justice. The issues raised or comments made by the Bench during an oral hearing provide clarity not just to the judges who adjudicate upon the matter, but also allow the lawyers to develop their arguments with a sense of creativity founded on a spontaneity of thought. Many a times, judges play the role of a devil's advocate with the counsel to solicit responses which aid in a holistic understanding of the case and test the strength of the arguments advanced before them. That is where the real art of advocacy comes to play. The order or judgment of the court must indicate a process of reflection and of the application of mind of the judge to the submissions of opposing parties.

37 The diversity of judicial backgrounds brings polyvocality in judgments and has enriched our jurisprudence for over seven decades since Independence. The humanity intrinsic to each judge allows them to transcend the language of the law to do complete justice. In the pursuit of doing justice and in the course of an open deliberation in court, propositions may be put forth and observations are made in order to facilitate the process of arriving at an acceptable outcome based on the law but which is in accord with justice. Observations during the course of a

hearing do not constitute a judgment or binding decision. They are at best tentative points of view, on which rival perspectives of parties in conflict enable the judge to decide on an ultimate outcome. This exchange of views, perspectives and formulations is but a part of evolving towards a solution which accords with justice according to law. An exchange of views from the Bench is intrinsic to a process of open and transparent judging. The revealing of a judges' mind enables opposing parties to persuade her to their points of view. If this expression were to be discouraged the process of judging would be closed. As Lord Denning MR observed in **Sirros** vs **Moore**[22]:

> "Every Judge of the courts of this land — from the highest to the lowest — should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every Judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction — in fact or in law — but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief nothing else will make him liable. He is not to be plagued with allegations of malice or ill will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it to be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

[22] [1975] QB 118

This Court has also had the opportunity to deal with a matter concerning the expunging of adverse remarks from judicial records in **Kashi Nath Roy** vs **State of Bihar**[23]**.** The judgment of the two Judge bench noted:

> "7. It cannot be forgotten that in our system, like elsewhere, appellate and revisional courts have been set up on the presupposition that lower courts would in some measure of cases go wrong in decision-making, both on facts as also on law, and they have been knit-up to correct those orders**. The human element in justicing being an important element, computer-like functioning cannot be expected of the courts; however hard they may try and keep themselves precedent-trodden in the scope of discretions and in the manner of judging. Whenever any such intolerable error is detected by or pointed out to a superior court, it is functionally required to correct that error and may, here and there, in an appropriate case, and in a manner befitting, maintaining the dignity of the court and independence of judiciary, convey its message in its judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellow but clear, and result-orienting, but rarely as a rebuke. Sharp reaction of the kind exhibited in the afore-extraction is not in keeping with institutional functioning.** The premise that a Judge committed a mistake or an error beyond the limits of tolerance, is no ground to inflict condemnation on the Judge-Subordinate, unless there existed something else and for exceptional grounds."
>
> (**emphasis supplied**)

In **Dr Raghubir Saran** vs **State of Bihar and Another**[24], this Court particularly advised higher Courts to enable judges of the lower Courts to freely express their opinion. Chief Justice K Subba Rao, speaking for a three Judge bench observed:

> "6. […]
> I entirely agree with the remarks. I reiterate that every judicial officer must be free to express his mind in the matter of the appreciation of evidence before him. **The phraseology used by a particular Judge depends upon his inherent reaction to falsehood, his comparative command of the English language and his felicity of expression. There is nothing more deleterious to the discharge of judicial functions than**

[23] (1996) 4 SCC 539
[24] (1964) 2 SCR 336

> **to create in the mind of a Judge that he should conform to a particular pattern which may, or may not be, to the liking of the appellate court. Sometimes he may overstep the mark. When public interests conflict, the lesser should yield to the larger one. An unmerited and undeserved insult to a witness may have to be tolerated in the general interests of preserving the independence of the judiciary.** Even so, a duty is cast upon the judicial officer not to deflect himself from the even course of justice by making disparaging and undeserving remarks on persons that appear before him as witnesses or otherwise. Moderation in expression lends dignity to his office and imparts greater respect for judiciary. But occasions do arise when a particular Judge, without any justification, may cast aspersions on a witness or any other person not before him affecting the character of such witness or person. Such remarks may affect the reputation or even the career of such person. In my experience I find such cases are very rare. But if it happens, I agree with the Full Bench of the Bombay High Court that the appellate court in a suitable case may judicially correct the observations of the lower court by pointing out that the observations made by that court were not justified or were without any foundation or were wholly wrong or improper."
>
> (**emphasis supplied**)

38 The duty to preserve the independence of the judiciary and to allow freedom of expression of the judges in court is one end of the spectrum. The other end of the spectrum, which is equally important, is that the power of judges must not be unbridled and judicial restraint must be exercised, before using strong and scathing language to criticize any individual or institution. In **A.M Mathur** vs **Pramod Kumar Gupta**[25], a two Judge bench of this Court, speaking through Justice K Jagannatha Shetty held:

> "13. **Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be a constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary.** Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those

[25] (1990) 2 SCC 533

> who come before the court as well to other co-ordinate branches of the State, the executive and the legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process.
>
> 14. The Judge's Bench is a seat of power. Not only do judges have power to make binding decisions, their decisions legitimate the use of power by other officials. The judges have the absolute and unchallengeable control of the court domain. **But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses.** We concede that the court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct."
>
> (**emphasis supplied**)

39 In balancing these two ends, the role of superior courts is especially relevant. This Court must strike a balance between reproaching the High Courts or lower courts unnecessarily, so as to not hamper their independent functioning. This court must also intervene where judges have overstepped the mark and breached the norms of judicial propriety.

40 We are tasked with balancing the rights of two independent constitutional authorities. On one hand is the Madras High Court, which is a constitutional court and enjoys a high degree of deference in the judicial structure of this country. The High Courts perform an intrinsic role as appellate courts and as courts of first instance in entertaining writ petitions under Article 226 (and as courts of original civil and criminal jurisdiction in certain cases). They are often the first point of contact for citizens whose fundamental rights have been violated. High Courts are constantly in touch with ground realities in their jurisdictions. During the COVID-19

pandemic, the High Courts across the country have shown commendable foresight in managing the public health crisis which threatens to submerge humanity. Their anguish when they come face to face with reality must be understood in that sense. On the other hand is the EC, a constitutional authority tasked with the critical task of undertaking superintendence and control of elections under Article 324 of the Constitution. The EC has facilitated the operation of our constitutional democracy by conducting free and fair elections and regulating conduct around them for over seven decades. Its independence and integrity are essential for democracy to thrive. This responsibility covers powers, duties and myriad functions[26] which are essential for conducting the periodic exercise of breathing life into our democratic political spaces.

41 Today, the Court has not been called upon to determine the constitutionality or legality of the actions of the EC in its conduct of the Assembly elections in the five states. In restricting ourselves to the specific grievances that have been urged by the EC, regarding the remarks made by the judges of the Madras High Court, we find that the High Court was faced with a situation of rising cases of COVID-19 and, as a constitutional Court, was entrusted with protecting the life and liberty of citizens. The remarks of the High Court were harsh. The metaphor inappropriate. The High Court - if indeed it did make the oral observations which have been alluded to - did not seek to attribute culpability for the COVID-19 pandemic in the country to the EC. What instead it would have intended to do was to urge the EC to ensure stricter compliance of COVID-19 related protocols during elections.

[26] **Mohinder Singh Gill** vs **Chief Election Commr.,** (1978) 1 SCC 405

42 Having said that, we must emphasize the need for judges to exercise caution in off-the-cuff remarks in open court, which may be susceptible to misinterpretation. Language, both on the Bench and in judgments, must comport with judicial propriety. Language is an important instrument of a judicial process which is sensitive to constitutional values. Judicial language is a window to a conscience sensitive to constitutional ethos. Bereft of its understated balance, language risks losing its symbolism as a protector of human dignity. The power of judicial review is entrusted to the High Courts under the Constitution. So high is its pedestal that it constitutes a part of the basic features of the Constitution. Yet responsibility bears a direct co-relationship with the nature and dimensions of the entrustment of power. A degree of caution and circumspection by the High Court would have allayed a grievance of the nature that has been urged in the present case. All that needs to be clarified is that the oral observations during the course of the hearing have passed with the moment and do not constitute a part of the record. The EC has a track record of being an independent constitutional body which shoulders a significant burden in ensuring the sanctity of electoral democracy. We hope the matter can rest with a sense of balance which we have attempted to bring.

43 These oral remarks are not a part of the official judicial record, and therefore, the question of expunging them does not arise. It is trite to say that a formal opinion of a judicial institution is reflected through its judgments and orders, and not its oral observations during the hearing. Hence, in view of the above discussion, we find no substance in the prayer of the EC for restraining the media from reporting on court proceedings. This Court stands as a staunch

proponent of the freedom of the media to report court proceedings. This we believe is integral to the freedom of speech and expression of those who speak, of those who wish to hear and to be heard and above all, in holding the judiciary accountable to the values which justify its existence as a constitutional institution.

D Conclusion

44 For the reasons which we have indicated, we dispose of the appeal in the above terms.

45 Pending applications, if any, shall stand disposed.

…….....J.
[Dr Dhananjaya Y Chandrachud]

……..……..…….....J.
[M R Shah]

New Delhi;
May 6, 2021.