

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 5434 OF 2017**

1. Sunil Baghel s/o C.B. Singh Baghel,
Age : 42 years, Occupation: Journalist,
Address : A-45/202, Sector 3,
Shanti Nagar, Mira Road (East).
2. Neeta Kolhatkar,
Age 50 years, Occupation Journalist,
Address : Jagannath Niwas, 2nd floor,
Awantikabai Gokhale Cross Lane,
Mumbai.
3. Vidya Kumar,
Age : 40 years, Occupation Journalist,
Address : 604, 23D, Sneh CHS,
Bimbisar Nagar, Goregaon (East),
Mumbai.
4. Sharmeen Hakim Indorewala,
Age: 26 years, Occupation : Journalist,
Address : 36/37, 4th Floor,
Lucky Building, 16, Pakmodia Street,
Mumbai.
5. Sadaf Modak,
Age : 28 years, Occupation : Journalist,
Address : 103, Mudit Gardens,
Sector 12/A, Plot : 17/1,
Koparkhairane, Navi Mumbai.
6. Sidharth Bhatia,
Age : 61 years, Occupation : Journalist,
Address : 21, Prem Court, J. Tata Road,
Churchgate Reclamation, Mumbai.
7. Naresh Joseph Fernandes,
Age : 48 years, Occupation : Journalist,

Address : Chez Nous, 125, St. Cyril Road,
Bandra (West), Mumbai.

8. Sunilkumar M. Singh,
Age : 48 years, Occupation : Journalist,
Address : Flat No. 14, 5th Floor,
Janardan Apartment, Somwar Bazar,
Malad (West), Mumbai.

9. Rebecca Samervel,
Age : 34 years, Occupation : Journalist,
Address : A 504, Vastu Park,
Evershine Nagar, Malad (W),
Mumbai.

...Petitioners

Versus

1. The State of Maharashtra
2. Central Bureau of Investigation,
Special Crime Branch,
Mumbai.
3. Mukesh Kumar Parmar (Original accused no.4)
S/o Laljibhai Parmar,
Occupation : Then Dy. Superintendent of Police,
ATS, Ahmedabad, Gujarat
Address : D-1/5, Officer's Quarters,
Opp. Police Head Quarters,
Shahi Baug, Ahmedabad, Gujarat
Village: Anawada, Tehsil-Pattan,
District Patan, Gujarat
4. Narsinh Dabhi (Original accused no.5)
S/o Harisinh Dabhi,
Occupation : Then Police Inspector,
ATS, Ahmedabad, Gujarat
Address : 2/3, Police Officer's Flats,
Hira Baug, Ellis Bridge, Ahmedabad
Gujarat, Village Nagnesh, Tehsil Chuda,
District Surendra Nagar, Gujarat

5. Balkrishan Chaubey (Original accused no.6)
s/o Rajendraprasad Chaubey
Occupation : The then Police Sub-Inspector,
ATS, Ahmedabad, Gujarat
Address : House No. 126/1,
“CH” Type, Sector-20, Govt. Quarters,
Gandhinagar, Village Gram/Post,
Lassipur, Taluka Jahanaguni,
District Azamgarh, UP
6. Rehman Abdul (Original accused no 7)
S/o Rasheed Khan
Occupation : The then Police Sub-Inspector/SHO
P.S. Pratapnagar, Udaipur,
Address : Government Quarters,
Pratap Nagar, Udaipur,
345, Jalpura, Jaipur Rajasthan
7. Himanshu Singh Rawat (Original Accused no 8)
S/o Mohan Singhji Rao,
Occupation : The then Police Sub-Inspector/SHO,
Khanoda P.S., Udaipur,
Address : 10-B, Adarsh Nagar, University Road,
Udaipur, Rajasthan,
Village 5, Anand Bhavan,
Temple Road, Bhitwari, Dist: Pali, Rajasthan
8. Shyam Singh Charan (Original Accused no. 9)
S/o Late Jai Singh
Occupation : The then Police Sub-Inspector,
Jawar Mines P. S. Udaipur Rajasthan
Address : Residing at P.S.: Sahira,
District Jodhpur, Rajasthan.
9. Ajay Kumar Parmar (Original Accused no 10)
S/o Bagwan Das, Occupation : The then Police Constable,
ATS, Ahmedabad, Gujarat,
Address : 3-Anand Vihar Society,
Opp. Rohit Park, Danilinada,
Ahmedabad, Gujarat

Village Sollaiya, Taluka – Mansa,
District Gandhinagar, Gujarat

10. Santram Sharma (Original Accused no 11)
S/o Chandrabhan Sharma
Occupation: The then Police Constable,
ATS, Ahmedabad, Gujarat,
Address : Quarter No. 10/4,
Type-VI, Sector 28,
Gandhinagar, Gujarat
Village/Post-Naraina, Taluka-Samalka Mandi,
District Panipat, Haryana
11. Naresh Chauhan (Original Accused no 9)
S/o Vishnubhai Chauhan
Occupation: The then Sub-Inspector of Police,
ATS, Ahmedabad, Gujarat,
Address : C-27, Kamdhenu Society,
Ranip, Ahmedabad Gujarat
12. Vijay Kumar Rathod (Original Accused no 14)
s/o Arjunbhai Rathod
Occupation: The then Police Inspector,
ATS, Ahmedabad, Gujarat,
Address : Udit Apartments,
Tulip Bungalows, Opp. TV Tower,
Thaltej, Ahmedabad, Gujarat
13. Rajendra Kumar Jirawala (Original Accused no 19)
S/o Laxmandas Jirawala
Occupation: Property Developer and Real Estate Agent
O/Address : Jirawala Construction,
10 New Cloth Market, Raipur,
Ahmedabad
Address : 20-B, Sthanak Wasi,
Jain Society, Near Naranpura Crossing,
Ahmedabad
14. Ghattamaneni Srinivasa Rao (Original Accused no 23)
S/o Murali Krishna

Occupation : The Then Police Sub-Inspector,
Singaraykonda PS., Singaraykonda,
Dist – Prakasam, Andhra Pradesh,
Now Police Inspector, Addanki Circle,
Dist – Prakasam, Andhra Pradesh

15. Vipul Aggarwal (Original accused no. 24)
S/o Shital Aggarwal,
Occupation : The Then Superintendent of Police,
Banaskantha, Gujarat
Address : DE-03, Dy. SP bungalow,
Police Head Quarters, Palanpur, Gujarat
&
C-21, Ashok Vihar, Phase-I, New Delhi
16. Aashish Pandya (Original accused no 25)
S/o Arunkumar Pandya
Occupation : The then Police Sub-Inspector,
SOG, Palanpur, Gujarat
Address : Quarter No.D2, Police Head Quarter,
Palanpur, Gujarat
&
Village: Meghpar, Taluka-Bhuj ,
Dist. Kutch, Gujarat
17. Narayan Singh (Original accused no 26)
S/o Fateh Singh Chauhan
Occupation : The then Assistant Sub-Inspector,
Dist. Police Udaipur, Rajasthan.
Address : Village - Utharda,
Tehsil – Nathdwara, Dist. Rajsamand,
Rajasthan
18. Yuvdhvir Singh (Original accused no 27)
S/o Nathu Singh Chauhan
Occupation : The then Police Constable,
Dist. Police, Udaipur, Rajasthan.
Address : Hiran Magri, Police Station,
Udaipur, Rajasthan, Village – Jalalpur,
Tehsil – Bawal, Dist. Rewari, Haryana

19. Kartar Singh (Original accused no 29)
S/o Yadram Jat
Occupation : The then Police Constable,
Dist. Police, Udaipur, Rajasthan.
Address : Hiran Magri Police Station,
Udaipur, Rajasthan, Village-Majrakath,
Tehsil – Bharor, Dist. Alwar, Rajasthan
20. Jethusinh Solanki (Original accused no 30)
S/o Mohansinh Solanki
Occupation : The then Assistant Sub-Inspector of Police,
SOG, Palanpur, Gujarat,
Address : Village Mota, Taluka Palanpur,
Dist – Banaskantha, Gujarat
21. Kanjibhai Kutchi (Original accused no 31)
S/o Naranbai Kutchi
Occupation : The then Police Constable,
SOG, Palanpur, Gujarat
Address : Quarter No. 332,
Block No. B-28, Police Headquarter,
Palanpur, Gujarat,
At & Post – Village Vasi, Taluka-Santa,
Dist – Banaskantha, Gujarat
22. Vinod Kumar Limbachiya (Original accused no 32)
S/o Amrutlal Limbachiya
Occupation : The then Police Constable,
SOG, Palanpur, Gujarat
Address : Quarter No. 283, Block No. B-24,
Police Headquarters, Palanpur, Gujarat,
& At & Post : Village Dangiya,
Taluka-Dantivada, Dist – Banaskantha,
Gujarat
23. Kiransinh Chauhan (Original accused no 33)
S/o Halaji Chauhan
Occupation : The then Constable,
SOG, Palanpur, Gujarat
Address : Chamunda Society,

Behind Police Headquarters, Madhupur Road,
Palanpur, Gujarat,
& Village – Madna (Dangia),
Taluka-Palanpur, Dist – Banaskantha,
Gujarat

24. Karan Sinh Sisodia (Original accused no 34)
S/o Arjunsinh Sisodia
Occupation : The then Police Head Constable Driver,
SOG, Palanpur, Gujarat
Address : Village – Hadad, Taluka – Danta

25. Ramanbhai Patel (Original accused no 38)
S/o Kodarbhai Patel
Occupation : The then Dy. Superintendent of Police,
CID Crime, Ahmedabad
(presently posted as Dy S.P, Sarkhej Division,
Ahmedabad Rural, Ahmedabad)
Address : 6-Raghukul Bungalows,
Opp. Gulab Tower, Sola, Ahmedabad
- ...Respondents

WITH

CRIMINAL WRIT PETITION NO. 132 OF 2018

Brihanmumbai Union of Journalists
through its Executive Committee Member
23-25, Prospect Chambers Annexe,
2nd Floor, Dr. D. N. Rd, Mumbai – 01

...Petitioners

Versus

1. Central Bureau of Investigation
through Joint Director, Zone-I, CBI,
13th Floor, Plot No. C-35A, 'G' Block,
Bandra Kurla Complex (BKC),
Near MTNL Exchange, Bandra (East),
Mumbai 400 098
2. Rehman Abdul (Original accused no. 7)
Government Quarters,

Pratap Nagar, Udaipur,
345, Jalpura, Jaipur Rajasthan

3. Home Department, State of Maharashtra,
Through its Principal Secretary,
Mantralaya Annex,
Mumbai

...Respondents

Mr. Aabad H. H. Ponda a/w Mr. Abhinav Chandrachud i/b Ms. Varsha Bhogle Deshmukh and Mr. Shailendra Singh for the Petitioners in WP/5434/2017

Mr. Mihir Desai, Sr. Advocate i/b Mr. Chetan Mali for the Petitioners in WP/132/18

Mr. H. J. Dedhia, A.P.P for the Respondent No.1-State in WP/5434/17

Mr. Vinod Chate, A.P.P for the Respondent No.3-State in WP/132/18

Mr. Sandesh Patil for the Respondent-CBI (No.2 in WP/5434/17 & No.1 in WP/132/18)

Mr. Abdul Hafeez i/b Mr. Khan Abdul Wahab for the Respondent No.6 in WP/5434/17 and for the Respondent No. 2 in WP/132/18

Mr. Shailesh Kantharia for the Respondent No. 12 in WP/5434/17

Mr. Rajesh D. Bindra for the Respondent No. 16 in WP/5434/17

Mr. Sachin Pawar for the Respondent Nos. 20 to 24 in WP/5434/17

CORAM : REVATI MOHITE DERE, J.
TUESDAY, 23rd JANUARY, 2018 &
WEDNESDAY, 24th JANUARY, 2018

ORAL ORDER :

1 Heard learned counsel for the parties.

2 Rule. Respondents waive notice through their respective counsel.

3 Rule is made returnable forthwith, with the consent of the parties and is taken up for final disposal.

4 By these petitions, the petitioners have impugned the order dated 29th November, 2017 passed by the learned Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai, below Exhibit 1502 in Sessions Case Nos. 177 of 2013, 178 of 2014, 577 of 2013 and 312 of 2014, by which, the learned Sessions Judge banned the print, electronic and social media from publishing/posting and/or reporting the court proceedings, until further orders.

5 The short question that arises for consideration in both the aforesaid petitions essentially is, whether the learned Judge had the power to pass the impugned order i.e. to ban the media from publishing and reporting the court proceedings, in the absence of any provision under the Code of Criminal Procedure (hereinafter referred to as 'the Code').

6 Mr. Ponda and Mr. Chandrachud, learned counsel for the petitioners appearing in Writ Petition No. 5434 of 2017 submitted that the learned Judge had no power under the Code, to gag the media/Press and as such, the impugned order dated 29th November, 2017 was clearly illegal and unsustainable in law. They submitted that the powers, if any, to pass postponement orders vests only with the High Courts and the Supreme Court and that the subordinate criminal courts have no such inherent powers to pass such orders. Learned counsel relied on the Judgments of the Apex Court in the case of ***Sahara India Real Estate Corp. Ltd. vs. SEBI & Ors.***¹ and in the case of ***Naresh Mirajkar & Ors. vs. State of Maharashtra & Anr.***² in support of their submission. They submitted that by the impugned order, the learned Judge has taken away the fundamental right of

1 (2012) 10 SCC 603

2 (1966) 3 SCR 744

the Press to report the court proceedings. Mr. Ponda further submitted that Section 327(2) of the Code and Section 2 of Order XXXIIA of the Code of Civil Procedure, contemplate for in-camera proceedings; that under Sections 133, 142, 143, 145, 146 and 147 of the Code, Courts even have injunctory powers; that there are also provisions in some Special Statutes which ban the media from reporting e.g. Section 16 of Terrorist and Disruptive Activities (Prevention) Act ('TADA'); Section 17 of the National Investigation Act ('NIA'); Section 30 of the Prevention of Terrorism Act ('POTA'); Section 18 of the Maharashtra Control of Organised Crime Act ('MCOCA'); etc. According to the learned counsel, the trial in question is an 'open trial', and therefore, the learned Judge, in the absence of any provision, had no power to ban the media/Press from reporting.

7 Mr. Mihir Desai, learned senior counsel appearing for the petitioners in Writ Petition No. 132 of 2018, also submitted that the learned Judge had no power/jurisdiction to pass the impugned order, and that the

said order was also in contravention of the provision of Section 327 of the Code. He submitted that there are only 3 or 4 contingencies in which a Court i.e. the High Court and the Supreme Court can restrain the media from publication and that too, for a short duration, i.e. when there is a real and imminent danger to a fair trial; that there is real and substantial risk of prejudice to the administration of justice or to the fairness of trial; and where reporting by the Press would shift the burden of innocence.

8 He further submitted that the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution, includes freedom of the Press and that the same has been recognized as a fundamental right. Learned counsel has tendered a compilation of the following judgments, *Brij Bhushan vs. State of Delhi*³; *Sakal Papers (P) Ltd. vs. Union of India*⁴; *Benett Coleman & Co. vs. Union of India*⁵; *Indian Express Newspapers & Ors. vs. Union of India*⁶; *S. Ranjarajan vs. P. Jagjivan Ram & Ors.*⁷; *Bindeshwari Prasad Singh vs. Kali Singh*⁸; *Kehar Singh &*

3 1950 SCR 605

4 1962 (3) SCR 842

5 1972(2) SCC 788

6 (1985) 1 SCC 641

7 (1989) 2 SCC 574

8 (1977) 1 SCC 57

***Ors. vs. Delhi (State Administration)*⁹; *Naresh Mirajkar (supra)*; *Reliance Petrochemical Ltd. vs. Proprietors of Indian Express Newspapers Ltd. & Ors.*¹⁰; *Sahara India Real Estate Corp. Ltd. (supra)*; *Chhattisgarh Mukti Morcha vs. State of Madhya Pradesh & Ors.*¹¹; *Vijay Singhal & Ors. vs. Govt. of NCT of Delhi & Anr.*¹²; and *Asharam Bapu vs. Union of India & Ors.*¹³ in support of his submissions.**

9 Mr. Patil, learned counsel for the CBI submitted that the CBI had no stand in the matter and would subject to the orders of the Court.

10 Mr. Abdul Hafeez, learned counsel for Rehman Abdul (original accused No. 7)-the respondent No. 2 in Writ Petition No. 132 of 2018 and respondent No. 6 in Writ Petition No. 5434 of 2017 opposed the petitions. He submitted that no interference was warranted in the impugned order. He submitted that since the case has a chequered history, there is an apprehension to the lives and safety of witnesses, the prosecuting advocates and the defence advocates. He submitted that an accused has a right to a

9 (1988) 3 SCC 609

10 (1988) 4 SCC 592

11 (1995) (O) MP LJ 995

12 (2013) 136 DRJ 223

13 (2013) 10 SCC 37

free and fair trial and considering the sensitivity of the said case, the learned Judge has rightly restrained the media from reporting the case.

11 Mr. Rajesh Bindra appearing for respondent No. 16 in Writ Petition No. 5434 of 2017 also opposed the petitions. He submitted that this is one of the most sensitive case, as top politicians and IPS Officers are involved in the case. He further submitted that the accused are the victims of political parties, as a result of which, great prejudice is being caused to the accused. He further submitted that not only the accused but also the defence advocates apprehend danger to their lives, if the media is allowed to publish and report the trial. According to the learned counsel, reporting will also affect the national security.

12 Mr. Shailesh Kantharia appearing for respondent No. 12 and Mr. Sachin Pawar appearing for respondent Nos. 20 to 24 in Writ Petition No. 5434 of 2017 supported Mr. Abdul Hafeez and Mr. Bindra. Though, private notices in Writ Petition No. 5434 of 2017 were served on all other

accused/their Advocates in trial Court, none appeared on their behalf. Service affidavits have been tendered in Writ Petition No. 5434 of 2017. Same are taken on record.

13 Before I proceed to decide the issues/questions raised in these petitions, it would be necessary to advert to a few facts, which have a bearing in the said case. The case relates to the killing of Sohrabuddin, his wife-Kausar Bi and their close associate-Tulsiram Prajapati, allegedly in a fake encounter. Considering the involvement of high ranking officials of the State of Gujarat, including senior police officers, the Apex Court handed over the investigation of the said case to CBI in January, 2010. In 2012, the Apex Court transferred the 'Sohrabuddin case' from Gujarat to Mumbai, on a transfer petition preferred by the CBI (Transfer Petition (Cri.) No. 44 of 2011). The Apex Court in para 37 of its judgment in the transfer petition reported in **(2012) 10 SCC 545-CBI vs. Amitbhai Anil Chandra Shah**, observed as under :

“37. On hearing Mr Tankha, appearing for the CBI, Mr Ahmadi representing the writ petitioner, Mr Tushar Mehta appearing on behalf of the State of Gujarat, and the counsel appearing for the different accused and Mr Subramaniam, the learned amicus curiae, and on a careful consideration of all the material facts and circumstances as also having regard to the

past experience in the Sohrabuddin matter, we are convinced that in order to preserve the integrity of the trial it is necessary to shift it outside the State. The decision to transfer the case is not a reflection on the State judiciary and it is made clear that this Court reposes full trust in the judiciary of the State. As a matter of fact, the decision to transfer the case outside the State is intended to save the trial court in the State from undue stress and to avoid any possible misgivings in the minds of the ordinary people about the case getting a fair trial in the State.”

(emphasis supplied)

14 After the case was transferred to Mumbai, several accused filed applications seeking their discharge from the said case. It is informed that out of 38 accused, 15 accused have been discharged and 22 accused are facing trial, in the said case. The learned Sessions Judge framed charges as against the said 22 accused. Before the recording of evidence of the first prosecution witness commenced, the respondent-Rehman Abdul (original accused No. 7) filed an application (Exhibit 1502) seeking a ban on the print, electronic and social media from publishing, posting and/or reporting the proceedings till the judgment. All accused in the said case supported the said application. Pursuant thereto, the learned Additional Sessions Judge, after hearing the parties, including the Reporters present in the Court, passed the impugned order dated 29th October, 2017. Vide the said order, the learned Judge gagged the media from reporting/publishing any of the proceedings during the trial in the matter, until further orders.

15 The broad questions raised in the present petitions are; whether the learned Judge had the power/jurisdiction to gag the media; whether the impugned order is contrary to the very principle of an open trial as mandated by Section 327 of the Code; and whether the gag order violated the petitioners' fundamental rights guaranteed to them under Article 19(1) (a) of the Constitution.

16 Before I proceed to deal with the said questions, it would be apposite to consider Section 327 of the Code and the law in regard to the same. Section 327 of the Code reads thus :

“327. COURT TO BE OPEN. - (1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D or section 376E of the Indian Penal Code shall be conducted in camera:

Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court:

Provided further that in camera trial shall be conducted as far as practicable by a woman Judge or Magistrate.

(3) Where any proceedings are held under sub- section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court:

Provided that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties.”
(emphasis supplied)

The language of Section 327 itself indicates that the place where the Criminal Court is held for the purpose of inquiry and trial of any offence shall be deemed to be an open court. An open trial is the rule and wherever exceptions are carved out, they are made only to secure the ends of justice. Section 327 declares that the place of inquiry and trial of any offence shall be deemed to be an “open court”. The words “open court” used in Section 327 of the Code are significant. Section 327 embodies the principle of public trial. The proviso to sub-section (1) of Section 327 gives the Presiding Judge or the Magistrate, if he thinks fit, to order at any stage of any inquiry or trial of any particular case, that the public generally,

or any particular person, shall not have access to, or be or remain in, the room or building used by the Court. Thus, the Presiding Officer has the power to remove any person or the public generally from the Court room/building, as a public trial is not a disorderly trial but an orderly trial. As far as sub-sections (2) and (3) of Section 327 are concerned, they do not apply to the facts of the case and as such, it is not necessary to deal with the same in detail. Suffice to state, that sub-section (2) of Section 327, only creates an exception to the general rule and states that cases relating to sexual offences i.e. Sections 376, 376A, 376B, 376C, 376D or 376E of the Indian Penal Code shall be conducted in-camera and under sub-section (3) of Section 327, where proceedings are held under sub-section (2), it is not lawful for any person to print/publish any matter relating to such proceedings, except with the previous permission of the Court. The said ban is not an absolute ban, inasmuch as, the proviso to sub-section (3) of Section 372 provides, that the ban on printing/publication may be lifted, subject to maintaining confidentiality of the name and address of the parties.

17 Coming back to Section 327 of the Code, and as noted earlier, an 'open trial' is the general rule. It is not in dispute that the trial in the present case is an open trial, inasmuch as, the Press/media and the public are permitted to attend the same. However, the learned Sessions Judge, by the impugned order, has gagged the media/Press from reporting/publishing the trial Court proceedings. Apart from the question of power of the learned Sessions Judge to pass the impugned order, it is also necessary to spell out the underlying principles behind an 'open trial'. It is one of the salutary principles of the administration of justice, that justice must not only be done but must also seem to be done and an 'open trial' reaffirms the said principle. The other fundamental principles justifying public access to criminal trials are; (i) that crime is a wrong done more to the society than to an individual; (ii) it involves a serious invasion of rights and liberties of other person(s), and as such, people are entitled to know whether the justice delivery system is adequate or inadequate; (iii) whether the State is misusing the State machinery like the police, prosecutors and other public servants; (iv) whether the accused is dealt with fairly and not unjustly condemned and so on. Thus, when the State representing the society, seeks to prosecute a person, it must do so, openly, fairly and fearlessly. In this

context, it would be apposite to reproduce the words of Lord Shaw in the case of **Scott vs. Scott**¹⁴, which reads thus:

“It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.'” (emphasis supplied)

18 In **Kehar Singh** (*supra*), the Apex Court in the context of public access to criminal trials, observed in para 196 as under :

“196. There are numerous benefits accruing from the public access to criminal trials. Beth Horn-buckle Fleming in his article, "First Amendment Right of Access to Pretrial Proceeding in Criminal Cases" (Emory Law Journal, V. 32(1983) P. 618 to 688) neatly recounts the benefits identified by the Supreme Court of the United States in some of the leading decisions. He categorizes the benefits as the "fairness" and "testimonial improvement" effects on the trial itself, and the "educative" and "sunshine" effects beyond the trial. He then proceeds to state;

“Public access to a criminal trial helps to ensure the fairness of the proceeding. The presence of public and press encourages all participants to perform their duties conscientiously and discourages misconduct and abuse of power by judges, prosecutors and other participants. Decisions based on partiality and bias are discouraged, thus protecting the integrity of the trial process. Public access helps to ensure that

14 1913 A.C. 417

procedural rights are respected and that justice is applied equally.

Closely related to the fairness function is the role of public access in assuring accurate fact-finding through the improvement of witness testimony. This occurs in three ways. First, witnesses are discouraged from committing perjury by the presence of members of the public who may be aware of the truth. Second, witnesses like other participants, may be encouraged to perform more conscientiously by the presence of the public, thus improving the overall quality of testimony. Third, unknown witnesses may be inducted to come forward and testify if they learn of the proceedings through publicity. Public access to trials also plays a significant role in educating the public about the criminal justice process. Public awareness of the functioning of judicial proceedings is essential to informed citizen debate and decision making about issues with significant effects beyond the outcome of the particular proceeding. Public debate about controversial topics, such as, exclusionary evidentiary rules, is enhanced by public observation of the effect of such rules on actual trials. Attendance at criminal trials is a key means by which the public can learn about the activities of police, prosecutors, attorneys and other public servants, and thus make educated decisions about how to remedy abuses within the criminal justice system.

Finally, public access to trials serves an important 'sunshine' function. Closed proceedings, especially when they are the only judicial proceedings in a particular case or when they determine the outcome of subsequent proceedings, may foster distrust of the judicial system. Open proceedings, enhance the appearance of justice and thus help to maintain public confidence in the judicial system."

(emphasis supplied)

19 In *Mohd. Shahabuddin vs. State of Bihar & Ors.*¹⁵, the Apex Court observed, that in all civilized countries governed by the rule of law, all criminal trials have to be public trials, where public and press have complete access. Public access is essential if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. It was further observed that publicity is the authentic hallmark of judicial functioning distinct from administrative functioning; that open trials serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion; that public trial restores the balance in cases when shocking crime occurs in the society; that people have inherent distrust for the secret trials and one of the demands of the democratic society is that public should know what goes on in court while being told by the press or what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. It was further observed that criminal trial is a public event and what transpires is a public property and that open trial is the universal rule and must be scrupulously adhered to, except in exceptional and extraordinary circumstances.

15 (2010) 4 SCC 653

Thus, an 'open trial' subserves the ends of justice. It acts as a safeguard for protection of the rights of all i.e. witnesses, accused, etc. and as such ensures fairness of the proceedings. Open trial is the rule and must be scrupulously adhered to, except under exceptional and extraordinary circumstances. Section 327 recognizes the right to public trial. Closed proceedings foster distrust in the judicial system and hence, proceedings must be open proceedings, as it helps maintain public confidence in the judicial system. Needless to state, that there are statutory exceptions to the publicity rule. A number of Statutes restrict, empower or require the court to restrict admission to certain court proceedings and the publication of such proceedings, e.g. 228-A of the Indian Penal Code, Section 33 of the Special Marriage Act, Section 22 of the Hindu Marriage Act, Section 14 of the Official Secrets Act, Section 18 of MCOCA, Section 30 of POTA, Section 16 of TADA, Section 17 of NIA Act, etc. Apart from this statutory exceptions, publicity of proceedings can be restricted 'in the interest of justice; where the Court is satisfied beyond doubt that the ends of justice would be defeated if the case would be tried in open Court.

20 Coming to the question of the powers of the subordinate criminal courts, it is pertinent to note that the subordinate criminal courts do not have any inherent powers vested in them under the Code. It is only the 'courts of record' i.e. the High Courts and the Supreme Court, that are vested with such powers i.e. inherent jurisdiction to pass postponement orders. A perusal of the judgments mentioned hereinafter, show that subordinate criminal courts have no inherent powers under the Code. The Apex Court in ***Bindeshwari Prasad Singh (supra)*** in para 4 has observed as under :

“4. We might mention that the order dated November 23, 1968 was a judicial order by which the Magistrate had given full reasons for dismissing the complaint. Even if the Magistrate had any jurisdiction to recall this order, it could have been done by another judicial order after giving reasons that he was satisfied that a case was made out for recalling the order. We, however, need not dilate on this point because there is absolutely no provision in the Code of Criminal Procedure of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. Code of Criminal Procedure does contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of Civil Procedure Code, the subordinate criminal courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision.”

(emphasis supplied)

The same was reiterated by the Apex Court in the case of ***Ritesh Sinha vs. State of Uttar Pradesh & Anr.***¹⁶ and in the case of ***Super Cassettes Industries Ltd. vs. Music Broadcast Pvt. Ltd.***¹⁷. In ***Super Cassettes Industries Ltd. (supra)***, the Apex Court in para 25 observed as under :

“25. Referring to the decision of this Court in *Bindeshwari Prasad Singh v. Kali Singh* (1977) 1 SCC 57, Mr. Sibal urged that in the said decision, this Court was called upon to decide as to whether a Magistrate had the authority to review or recall his order. It was held that unlike Section 151 of the Civil Procedure Code, which vests the civil courts and certain tribunals with inherent powers, the subordinate criminal courts had no such inherent power, since there was absolutely no provision in the Code of Criminal Procedure empowering a magistrate to exercise such powers.”

Similarly in the case of ***Sahara India Real Estate Corp. Ltd. (supra)***, the Apex Court observed in para 50 as under :

“50. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending

16 (2013) 2 SCC 357

17 (2012) 5 SCC 488

publication/broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.”

(emphasis supplied)

In ***Naresh Mirajkar & Ors. (supra)***, the nine Judges

Constitution Bench, in para 30, observed as under :

“30. If the High Court thus had inherent power to hold the trial of a case in camera, provided, of course, it was satisfied that the ends of justice required such a course to be adopted, it would not be difficult to accept the argument urged by the learned Attorney General that the power to hold a trial in camera must include the power to hold a part of the trial in camera, or to prohibit excessive publication of a part of the proceedings at such trial. What would meet the ends of justice will always depend upon the facts of each case and the requirements of justice. In a certain case, the Court may feel that the trial may continue to be a public trial, but that the evidence of a particular witness need not receive excessive publicity, because fear of such excessive publicity may prevent the witness from speaking the truth. That being so, we are unable to hold that the High Court did not possess inherent jurisdiction to pass the impugned order. We have already indicated that the impugned order, in our opinion, prevented the publication of Mr. Goda's evidence during the course of the trial and not thereafter.”

21 With regard to the powers of the Court to pass postponement orders, it would be useful to place reliance on the judgment of the Apex Court in the case of ***Sahara India Real Estate Corp. Ltd. (supra)***. The Apex Court in the said judgment observed in para 42 as under :

“42. At the outset, we must understand the nature of such orders of postponement. Publicity postponement orders should be seen in the context of Article 19(1)(a) not being an absolute right. The US clash model based on collision between freedom of expression (including free press) and the right to a fair trial will not apply to the Indian Constitution. In certain cases, even the accused seeks publicity (not in the pejorative sense) as openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a litigation including the judges are under scrutiny and at the same time people get to know what is going on inside the court rooms. These aspects come within the scope of Article 19(1) and Article 21. When rights of equal weight clash, the Courts have to evolve balancing techniques or measures based on re-calibration under which both the rights are given equal space in the Constitutional Scheme and this is what the "postponement order" does, subject to the parameters, mentioned hereinafter. But, what happens when the courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognized as a human right. These presumptions existed at the time when the Constitution was framed [existing law under Article 19(2)] and they continue till date not only as part of rule of law under Article 14 but also as an Article 21 right. The constitutional protection in Article 21 which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the right to free speech under

Article 19(1)(a), by virtue of force of it being a constitutional provision. Given that the postponement orders curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is "the end and purpose of all laws". However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. It is not possible for this Court to enumerate categories of publications amounting to contempt. It would require the courts in each case to see the content and the context of the offending publication. There cannot be any straightjacket formula enumerating such categories. **In our view, keeping the above parameters, if the High Court/ Supreme Court (being Courts of Record) pass postponement orders under their inherent jurisdictions, such orders would fall within "reasonable restrictions" under Article 19(2) and which would be in conformity with societal interests,** as held in *Ministry of Information and Broadcasting vs. Cricket Association of Bengal*-(1995) 2 SCC 161. In this connection, we must also keep in mind the language of Article 19(1) and Article 19(2). Freedom of press has been read into Article 19(1)(a). After the judgment of this Court in *Maneka Gandhi vs. Union of India*-(1978) 1 SCC 248, it is now well-settled that test of reasonableness applies not only to Article 19(1) but also to Article 14 and Article 21. For example, right to access courts under Articles 32, 226 or

136 seeking relief against infringement of say Article 21 rights has not been specifically mentioned in Article 14. Yet, this right has been deduced from the words "equality before the law" in Article 14. Thus, the test of reasonableness which applies in Article 14 context would equally apply to Article 19(1) rights. Similarly, while judging reasonableness of an enactment even the Directive Principles have been taken into consideration by this Court in several cases [see the recent judgment of this Court in Society for Un-aided Private Schools of Rajasthan v. U.O.I.- (2012) 6 SCC 1. Similarly, in Dharam Dutt v. Union of India-(2004) 1 SCC 712, it has been held that rights not included in Article 19(1)(c) expressly, but which are deduced from the express language of the Article are concomitant rights, the restrictions thereof would not merely be those in Article 19(4). Thus, balancing of such rights or equal public interest by order of postponement of publication or publicity in cases in which there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial and within the above enumerated parameters of necessity and proportionality would satisfy the test of reasonableness in Articles 14 and 19(2). One cannot say that what is reasonable in the context of Article 14 or Article 21 is not reasonable when it comes to Article 19(1)(a). Ultimately, such orders of postponement are only to balance conflicting public interests or rights in Part III of the Constitution. They also satisfy the requirements of justification under Article 14 and Article 21."

(emphasis supplied)

22 Having regard to the aforesaid judgments, it is thus clear that the learned Judge, had no power under the Code to pass the impugned order. Infact, even the learned counsel for the respondent-accused were

unable to point out the provision under which the learned Judge could have banned the media from publication/reporting of the trial court proceedings. It is thus abundantly clear, that it is only the High Courts and the Supreme Court that have the power to pass postponement orders, in exceptional circumstances for a brief period, and that subordinate criminal courts do not have any inherent powers under the Code. In the absence of any provision under the Code conferring power on the learned Judge to pass such an order, the impugned order gagging the media/Press from publishing/posting and/or reporting the trial court proceedings was clearly illegal, unsustainable and contrary to law.

23 The application for banning the media from publishing/posting and/or reporting the proceedings was filed by the respondent-Rehman Abdul and the same was supported by all the accused and their counsel. The said application preferred by the original accused No.7-Rehman Abdul reads thus :

“May It Please Your Honor,

This Hon'ble Court may graciously be pleased to ban the print, electronic and social media from publishing, posting, and/or reporting the proceeding of the present trial till its judgment, as

such act will prejudice the case of prosecution, defense. The same may create security problem for accused facing trial, prosecution witness, Ld. Prosecutor as well as Defense Team. The case is having chequered history and mis-reporting has already caused prejudice to both side.

Mumbai

Date 29th November 2017 Advocate for Accused no.7”

24 A perusal of the said application shows that the grounds for banning the media from publishing, posting and/or reporting the proceedings till its judgment, was on the premise - (i) that such an act would prejudice the case of the prosecution, defence; (ii) the same would create security problems for the accused facing trial, prosecution witnesses, learned Prosecutor as well as the defence Advocates; (iii) that the case having a chequered history and misreporting of the same has already caused prejudice to both the sides.

25 A perusal of the impugned order shows that the learned Judge was essentially swayed by the sensationalism of the said case. Sensationalism, by itself, cannot be the sole ground for banning the media from publishing, posting and/or reporting proceedings. Similarly, mere

allegation that there is an apprehension that justice will not be done in a given case or that there are general allegations of surcharged atmosphere alone would not suffice. The Court has to see whether the apprehension/doubt is reasonable or not and the basis for such an apprehension. Learned counsel for the respondent-accused have not been able to show any basis for such apprehensions. Although, some of the learned counsel for the respondents submitted that they feared for their lives and for the lives of the accused or apprehend some untoward incident, nothing has been brought on record to substantiate the same, except bare words made across the bar. Similarly, how national security would be affected, if media is permitted to report, the proceedings, is in the realm of speculation, without any basis. Thus, the apprehensions expressed are not such that they do not show real and substantial risk of prejudice being caused to the accused or a clear and present danger to a fair trial. In fact, the record shows that till date, almost 15 accused have been discharged from the said case and as such the apprehension is misplaced and unjustified.

26 The learned counsel for the respondent accused also submitted that the death of a former Judge dealing with the said case and the publicity attached to it would jeopardize their rights to a fair trial. Infact, before the argument commenced, Mr. Bindra, learned counsel for the respondent-Ashwin Pandya (accused No.25) urged that the matter be deferred, as the Apex Court was hearing Public Interest Litigations (PILs) in connection with the death of a former Judge dealing with the said case and that one of the reasons given for banning the media from publication was the manner in which the death of the said Judge was distorted. Learned counsel for the petitioners vehemently opposed the deferring of these petitions and submitted that the said petitions had no bearing with the PILs pending before the Apex Court. Perused the order of the Apex Court. Admittedly, the petitions before the Apex Court are with respect to the death of Judge Loya and therefore in that context, it was stated that no other High Court including the High Court of Bombay will entertain the petition with regard to the subject matter in issue. The present petitions are not even remotely connected with the PILs or the subject matter of the PILs, before the Apex Court and as such there is no question of deferring the hearing of these petitions.

27 The case in hand has a chequered history. As noted earlier, the investigation in the said case, having regard to the peculiar facts of the case, was handed over to the CBI by the Apex Court in 2010 and in 2012 the case was transferred from Gujarat to Mumbai for trial. Merely because a given case is sensational, does not warrant a ban on publication/publishing of the court proceedings. Certainly, the public has a right to know what is happening in the proceedings. The right to know flows from the rights of the Press under Article 19(1)(a) of the Constitution of India, i.e. to publish and circulate information. The Apex Court in the case of *Bennett Coleman & Co. & Ors. vs. Union of India & Ors.*¹⁸, in para 31 has observed that although Article 19(1)(a) does not mention the freedom of the Press, it is the settled law that freedom of speech and expression includes freedom of the Press and circulation. Similarly, in the case of *Express Newspapers(Private) Ltd. & Anr. vs. The Union of India & Ors.*¹⁹, it is said that there can be no doubt that liberty of the Press is an essential part of the freedom of speech and expression guaranteed by Article 19(1)(a). The Press has the right of free propagation and free

18 (1972) 2 SCC 788

19 AIR 1958 SC 578

circulation without any previous restraint on publication.

28 Similarly, in the case of *Sakal Papers (P) Ltd. (supra)*, it is said that the freedom of speech and expression guaranteed by Article 19(1) gives a citizen the right to propagate and publish his ideas, to disseminate them, and to circulate them either by words of mouth or by writing.

29 Needless to state, that in any democratic society, the open justice rule must be the norm and covertness, the exception. The right to open justice flows from the right to a fair trial. The importance of public trial in a democratic country governed by the rule of law can hardly be overemphasized, as the primary function of the judiciary is to do justice between the parties, which bring their causes before it. The right of the public to information flows from the right of the Press under Article 19(1) (a) of the Constitution. The media, by reporting court proceedings, is fulfilling the public's right to information about the working of the courts. Infact, the media not only exercises its own right to freedom of expression under Article 19(1)(a) but it also serves a larger public purpose by disseminating or being the carrier of information, which otherwise is not

easily available or accessible to the public, at large. In that sense, the Press are the eyes and ears of the public, who, by reporting fulfill the public's right to know, about the happenings in court proceedings. The Press is the most powerful watchdog of public interest, in a democracy. Infact, the presence of Press and public in criminal trials encourages all participants to perform their duties diligently and conscientiously. It discourages misconduct and abuse of power by the prosecuting agency, prosecutors, judges and all other participants. It discourages decisions based on partiality and bias. It discourages witnesses from committing perjury. In that sense, the presence of Press and public protects the integrity of the trial; and public awareness of court proceedings helps maintain public confidence in the judicial system. As observed in ***Scott vs. Scott (supra)***, “Publicity is the soul of justice. Where there is no publicity, there is no justice”. The interests of the society are not to be treated with disdain and as *persona non-grata*. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth, has to be fair to all concerned i.e. the accused, the victims and the society. A fair trial is one, where there is a balance of competing interests of the accused, the victim and the society.

30 As far as the witnesses are concerned, they must be protected at all costs as Bentham has rightly said “that the witnesses are the eyes and ears of justice”. If truth is to be ultimately arrived at, the eyes and ears of justice have to be protected, so that, justice does not get incapacitated. Needless to state, that it is always open for the prosecution, if necessary, to request the Court to conceal the identity of the witnesses, and to give protection to the witnesses, if the need so arises.

31 Accordingly, for the reasons set out hereinabove, the petitions are allowed. The impugned order dated 29th November, 2017 passed by the learned Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai below Exhibit 1502 filed in Sessions Case Nos. 177 of 2013, 178 of 2014, 577 of 2013 and 312 of 2014, is quashed and set-aside.

32 Rule is made absolute in the above terms.

33 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.