

## Free Speech and Criminal Defamation: A New Approach

*Mukul Kumar Choudhary<sup>1</sup> And Varsha Singh<sup>2</sup>*

### Abstract

From the beginning of Indian democracy, extent of free speech and limitation imposed upon it always remained pertinent questions. Many laws incorporated in colonial era were questioned for restricting free speech in this modern democracy. Provision on Criminal defamation also falls within similar category. Validity of this law has been questioned on many occasions on ground of restricting free speech. Which failed. But recently Madras High court gave a very transformative judgment on this provision. In this judgment the court tried to restrict the use of criminal defamation as a weapon against free speech. The court pointed towards the need of freedom of press. The court has also clarified upon the role of higher judiciary as protector of right. All these aspects of the judgment have made it very transformative. Which hold great implication for future courts and future judgments. Therefore, in this paper we have tried to understand and analyse this judgment and its transformative character. we have also tried to understand future implication of the judgment. We have also pointed out that how this judgment will ensure greater press freedom and a new free speech jurisprudence.

### I. Introduction

“Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?”<sup>3</sup>

When John Mill argued that free exchange of ideas and expression was the only way to arrive at truth<sup>4</sup>. what he meant was that, truth will always come out in public domain even though infinite attempts were made by the society to suppress it. Therefore, as a society our goal should always be to provide free speech to people. Then only they can express themselves and bring the truth in public domain. Therefore, any laws or regulation which restrict the freedom of speech and expression must be reasonable in nature. It must not restrict the truth and tolerate free mobility of idea. This principle of universality of truth is also the foundation of Indian legal system’s free speech jurisprudence.

Based on this principle only on 5<sup>th</sup> of May, a single judge bench of Madras High court gave a transformative judgment<sup>5</sup> on criminal defamation and free speech. This judgment has interpreted provision of criminal defamation<sup>6</sup> in a method so artistic which has ensured the development of free speech jurisprudence. Furthermore, it has also protected freedom of press in this great democracy.

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<sup>1</sup> Mukul Kumar Choudhary, Year IV, Chanakya National Law University, Patna.

<sup>2</sup> Varsha Singh, Year IV, Amity Law School, Delhi.

<sup>3</sup> *Bennett Coleman v. Union of India*, (1972) 2 S.C.C. 788, ¶ 157 (quote by John Milton, *Areopagitica*)

<sup>4</sup> J.S Mill, *On Liberty* (Longman London, 1869).

<sup>5</sup> *Grievances Redressal Officer, Economic Times v. V.V. Minerals Pvt. Ltd.*, 2020 (3) M.L.J. (CrI.) 241.

<sup>6</sup> Defamation. —Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.

Indian Penal Code 1860, No.45, Acts of Parliament, 1860, § 499.

## II. Facts Of The Case And Arguments

In the present matter respondents V.V Minerals instituted a criminal defamation complaint against Sandhya Ravishankar and others before judicial magistrate. This defamation complaint was made for an article published in The Economic times<sup>7</sup> in 2015. This article raised some essential questions on validity of mining operations. Specially of beach sand mining in Tamil Nadu. In that article the author has contended that in fishing hamlet called Periyasampuram in Tuticorin district, Tamil Nadu various illegal mining projects are going on. A P.I.L has also been filed to restrict the sand mining in the area the value of which is up to 1 lac crore<sup>8</sup>. But “The most curious documents which are part of the PIL, however, are a set of mining licences issued by the Tamil Nadu Geology and Mining Department to a private company VV Minerals based in Tirunelveli, Tamil Nadu. These licences are run of the mill except for one fact — they authorise the private company to mine and export monazite.”<sup>9</sup> According to the regulation of the Union Government export of monazite is not permissible. Furthermore, licences were also only given to the V.V Minerals. This according to the author shows the foul play in the whole matter. But V.V Minerals found these allegations to be untrue and defamatory in the nature. Initially the corporation gave a notice to the publishers to take the article down. When the publishers did not agree then V.V Minerals filed the suit of defamation before appropriate authorities<sup>10</sup>.

Thereafter summons were issued against petitioners by judicial magistrate for the act of criminal defamation<sup>11</sup>. Hence, to quash those summons and preceding petitioner made the present petition before the High Court. The petitioners in this matter contended that, the case falls within the exception of section 499 of I.P.C. Hence, proceeding must be set aside. The respondent in the present matter contended that the High court do not have power to quash the proceedings. According to them even though the article of petitioner falls within the exception of criminal defamation it is a subjective matter and has to be decided by way of trial<sup>12</sup>.

## III. Judgment Of The Court

Now, the question before the High court was, is it within the power of High court to quash the proceeding. Since section 499<sup>13</sup> of I.P.C has a very low threshold for acceptance of complaint, i.e. existence of a defamatory imputation, which has been made with the intention or knowledge that it will cause harm<sup>14</sup>. Furthermore, although the matter falls within the exception of section 499 it

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<sup>7</sup>Sandhya Ravishankar, Illegal beach sand mining of minerals in Tamil Nadu may be a scam worth Rs 1 lakh crore, The Economic Times (May 23, 2015, 17:30 I.S.T.), <https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/illegal-beach-sand-mining-of-minerals-in-tamil-nadu-may-be-a-scam-worth-rs-1-lakh-crore/articleshow/46079527.cms?from=mdr>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Grievances Redressal Officer, Economic Times v. V.V. Minerals Pvt. Ltd., 2020 (3) M.L.J. (Cr.) 241, ¶ 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Indian Penal Code 1860, No.45, Acts of Parliament, 1860, § 499.

<sup>14</sup> Gautam Bhatia, A Sullivan for the Times: The Madras High Court on the Freedom of Speech and Criminal Defamation, Indian Constitutional Law and Philosophy, (May 16, 2020), <https://indconlawphil.wordpress.com/2020/05/16/a-sullivan-for-the-times-the-madras-high-court-on-the-freedom-of-speech-and-criminal-defamation/>.

has to be proved in the trial court. This restricts the High court from interfering in such proceedings at the trial stage<sup>15</sup>. But in this judgment the approach of the court must be appreciated. The court in this matter without showing much judicial activism used accepted principle and precedents to quash the proceeding. The method used by the court has ensured a new beginning in Indian free speech and criminal defamation jurisprudence.

The court while deciding the petition has applied a two-step approach and then concluded that proceedings must be quashed. Firstly, the court relied upon the recent precedents of courts of India and abroad to determine current scenario and status of defamation laws and media. By this approach the court articulated the principle deduced and laid down by those judgments. Furthermore, the court applied the same in the present case with proper logical application. Firstly, the court pointed out towards *New York Times v Sullivan*<sup>16</sup> where principle of actual malice was recognised. In this judgment the U.S Supreme court further held, merely because there is some error in the statement does not make it defamatory unless it is made in malicious or reckless manner. The court further observed that free speech also needs a breathing space that is, space to make error and mistakes. It is essential for proper working of any democracy.

Then the court further pointed out, the principle of *New York Times*<sup>17</sup> case is also recognised by the Indian Supreme court in *R. Rajagopal vs. State of Tamil Nadu*.<sup>18</sup> It has now become an essential part of Indian free speech jurisprudence. The court in this case also relied upon the judgment of Madras<sup>19</sup> and Delhi<sup>20</sup> High court. The court held it is now an accepted law in India that mere inaccuracies in statement would not make writer liable for defamation. It has to be proved that either writer knew that statements were false or they were made by the writer in a reckless manner. The court further found the principle of *New York Times* case laid down in exception 3<sup>21</sup> of section 499 in following words:

“What must be seen is whether the subject matter is a public question or not. Exception No.3 to Section 499 IPC refers to public question. Of course, the said expression has not been defined anywhere including the Law lexicons. But, one can safely understand it to mean an issue in which the public or the community at large has a stake or interest. Media ought to be relieved from any criminal prosecution once it is noted that its case falls within the Exception as delineated above<sup>22</sup>.”

This observation has helped the court immensely in applying the principle of *Sullivan* in the present matter. Then the court held that, in given facts and circumstances the author for her article relied upon the writ petition filed by Victor Rajamanickam. He was later made to withdraw from

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<sup>15</sup> *Id.*

<sup>16</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270.

<sup>17</sup> *Id.*

<sup>18</sup> *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 S.C.C. 632, ¶ 28.

<sup>19</sup> *R. Rajagopal v. J. Jayalalitha*, A.I.R. 2006 Mad 312.

<sup>20</sup> *Petronet Lng Ltd. v. Indian Petro Group*, (2009) 158 D.L.T. 759.

<sup>21</sup> “Conduct of any person touching any public question. - It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.” Indian Penal Code 1860, No. 45, Acts of Parliament, 1860, § 499, Exception 3.

<sup>22</sup> *Grievances Redressal Officer, Economic Times v. V.V. Minerals Pvt. Ltd.*, 2020 (3) M.L.J. (CrI.) 241, ¶ 15.

the proceedings due to malice but the petition still continued. This clearly shows that the article written by the author has not been written in a malicious or reckless manner. Hence, this would not result in defamation<sup>23</sup>.

After deciding the status of law with regard to criminal defamation, the court had to decide whether it has power to quash the petition under section 482<sup>24</sup> of CR.P.C. To determine this the court tried to find out whether this complaint would violate any fundamental right of the petitioner. If it violates the right then the court can take cognizance of the matter. It is the responsibility of the court to protect fundamental right of each and every citizen. This could be understood from following words of the court:

“The sentinel must ever be alert to danger and charge forth when required. The Court can never desert its duty when it comes to protection of fundamental rights. Those observations will apply to the entire higher judiciary.<sup>25</sup>”

The court then held that, criminal defamation affects the freedom of media. It has become a tool in the hands of corporate houses and influential person to intimate and restrict press from freedom to express itself<sup>26</sup>. Therefore, the court further held,

“When freedom of press which is a fundamental right is at stake, higher judiciary is obliged to exercise not only its inherent power but also exert itself a bit. An unused power is a useless tinsel. There is no point in merely saying that press is the foundation of democracy.<sup>27</sup>”

Then the court further held, to protect free speech as fundamental right the court may not need to rely upon trials of lower court. It can do summary trial itself under inherent power of the court to see whether the matter falls within the exception of section 499 or not. If yes, then it can quash the petition, if not, then to determine liability trial must occur. By this approach the right of complainant never gets affected. This also ensures protection of fundamental right of the citizens and media. By this approach they could not be intimidated under the fear of long run trials. This can restrict imposition of chilling effect on proper working and freedom of press<sup>28</sup>.

After determining both the question of law i.e. under inherent jurisdiction the court can quash criminal defamation proceedings. Furthermore, some error in the statement would not make it defamatory unless made recklessly. The court held that, criminal defamation complaint can be quashed against the petitioner. The case of petitioner has fulfilled the good faith requirement and statements are not made recklessly<sup>29</sup>.

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<sup>23</sup> *Id.*, at 22.

<sup>24</sup> Saving of inherent powers of High Court- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Code of Criminal Procedure 1973, No. 2, Acts of Parliament, 1974, § 482.

<sup>25</sup> *Grievances Redressal Officer, Economic Times v. V.V. Minerals Pvt. Ltd.*, 2020 (3) M.L.J. (Cri.) 241, ¶ 18.

<sup>26</sup> *Id.* at ¶ 20.

<sup>27</sup> *Id.* at ¶ 19.

<sup>28</sup> *Id.* at ¶ 20.

<sup>29</sup> *Id.* at ¶ 24.

#### IV. Analysis Of The Judgment

This judgment of the Madras High court has developed a new transformative jurisprudence of free speech and criminal defamation. Firstly, this judgment has made Sullivan principle equally applicable in both civil and criminal law. Earlier post Rajagopal judgment, Sullivan principle only applied in civil defamation case. It has made situation quite unprecedented as in that scenario, you need more evidence to prove a civil wrong than a criminal wrong. Earlier there was no precedent available for applicability of *Sullivan* principle in cases of criminal defamation. But in this judgment the court understood the imperfection in precedents. Hence, recognised the applicability of Sullivan principle on criminal defamation. The court not only recognised the principle of great American case in criminal defamation but also provided it statutory backing under exception 3<sup>30</sup> of section 499<sup>31</sup> of I.P.C. Acceptance of Sullivan principle in cases of criminal defamation has gave many a hope that, this judgment will ensure and bring greater freedom of speech and expression. It will further ensure more freedom to the media. Furthermore, they will not be intimidated by the threat of criminal defamation by big corporate houses and influential people.

This judgment of Madras High court has another transformative aspect in it i.e. Increase in the inherent power of the High court. In this judgment the court held that, to protect the fundamental rights of the citizens the court can use its inherent power on any occasion in any aspect<sup>32</sup>. This includes conducting summary trials in matters where if such trials do not occur, it will restrict right of the citizens. It may affect proper implementation and working of the democracy. Acceptance of this view will have greater implication on future courts on matters related to inherent power. By application of this principle now High court can do anything to ensure complete justice. This can some time in future make High court an activist court. Therefore, this view has to be implemented in a contained manner in rarest of rare cases.

#### V. Conclusion

The judgment of the Madras High court has to be appreciated for the approach it has applied to ensure free flow of data and news in a budding democracy. In this judgment the court further tried to restrict unwanted restriction upon the free speech. It also restricted chilling effect upon the media house who may commit error in reporting even after taking proper care and caution. This judgment should be hailed further for restricting applicability of criminal defamation. It also recognised Sullivan principle in criminal defamation. The court further imposed greater responsibility upon higher judiciary to protect fundamental rights of the citizens. The Madras High Court by this judgment has developed a new hope for revival of free speech jurisprudence in India.

This judgment of the madras High court has furthermore raised questions on proper applicability of criminal defamation law. According to the court this provision is more likely to use as a gag on media instead of a protective measure. Use of criminal defamation as a gag on press has always been a concern in our democracy. Therefore, while deciding the validity of this provision the

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<sup>30</sup> *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 S.C.C. 632.

<sup>31</sup> Indian Penal Code 1860, No.45, Acts of Parliament, 1860, § 499.

<sup>32</sup> *Grievances Redressal Officer, Economic Times v. V.V. Minerals Pvt. Ltd.*, 2020 (3) M.L.J. (CrL.) 241, ¶ 20.

Supreme court gave various guidelines and held<sup>33</sup> that this provision should be used in exceptional cases only. Further on 21<sup>st</sup> of may, in another case Madras High court held<sup>34</sup> that while taking cognizance in cases of criminal defamation a high standard has to be maintained. Furthermore, only prima facie evidence is not sufficient to start the proceeding.

Therefore, all these developments have generated a new hope among many, of a democracy where there is no unnecessary chilling effect among press. Where everyone is free to express their idea in search of truth even though how so offensive their idea may be in the eyes of our society.

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<sup>33</sup> Subramanian Swamy v. Union of India, (2016) 7 S.C.C. 221.

<sup>34</sup> Thiru N. Ram v. Union of India, 2020 (3) M.L.J. (Crl) 289.