IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

CONTEMPT PETITION (CIVIL) NO. 411 OF 2020

IN THE MATTER OF:

Foundation for Media Professionals … Petitioner

versus

Ajay Kumar Bhalla & Ors … Respondents

REJOINDER ON BEHALF OF THE PETITIONER IN RESPONSE TO THE SHORT AFFIDAVIT DATED 21.07.2020 FILED BY RESPONDENT NO.3, UNION OF INDIA WITH AFFIDAVIT

MOST RESPECTFULLY SHOWETH:

1. The present Petition has been filed by the Petitioner under Sections 12 of the Contempt of Courts Act, 1971, ["**Contempt Act**"] read with Article 129 of the Constitution of India, against the wilful disobedience by the Respondents/Contemnors of this Hon'ble Court's judgment and order dated 11.05.2020 in ***Foundation for Media Professionals v. U.T. of Jammu & Kashmir &Anr,*** **Diary No. 10817/2020 (2020 SCC Online SC 453)** ["***FMP***"] in failing to notify and facilitate the functioning of the "Special Committee" as directed by this Hon'ble Court.

2. That vide order dated 16.07.2020, this Hon'ble Court was pleased to record Respondent No. 3's undertaking to file a reply affidavit to the captioned contempt petition.

3. On 22.07.2020, the Petitioner was served with a copy of a "Short Affidavit" dated 21.07.2020 filed on behalf of Respondent No. 3, Union of India.

4. All the objections and averments taken by Respondent No. 3 in its counter affidavit are denied, except where expressly admitted by the Petitioner herein. It is prayed that no averment contained in the said counter affidavit may be deemed to be admitted, merely by reason of specific non-traverse. The Petitioner further seeks the leave of this Hon'ble Court to rely on the averments in the captioned Petition, which may be read as part and parcel of the present Rejoinder, and the contents of the same are not being repeated herein for the sake of brevity

5. The preliminary submissions set out hereunder are taken without prejudice to each other, and/or the ensuing para-wise reply on merits.

Preliminary Submissions

6. Respondent No. 3 has stated that "all directions" issued by this Hon'ble Court in its judgment, *FMP (supra)* dated 11.05.2020 have been "fully and faithfully" carried out. This assertion is vehemently denied, especially considering that even in its "Short Affidavit", Respondent No. 3 has failed to provide any details regarding compliance with paragraphs 23 and 24 of this Hon'ble Court's judgment in *FMP (supra)*, which specifically required it to:

   a) Immediately determine the "necessity" of the continuation of the restrictions in the Union Territory of Jammu and Kashmir;

b) To examine the contentions of, and the materials placed by, the Petitioner as well as the Respondents;

c) The appropriateness of the alternatives suggested by the Petitioners, regarding limiting the restrictions to those areas where it is necessary and the allowing of faster internet (3G or 4G) on a "trial basis over certain geographical areas"; and

d) Advice Respondent No. 4 in regard to the restrictions on internet services in Jammu & Kashmir.

Failure to publish any details regarding the functioning of the Special Committee

7. At the outset, it is submitted that while the "Short Affidavit" filed by Respondent No. 3 mentions the alleged dates of the Special Committee's meetings (15.05.2020 and 10.06.2020), this information has so far, not been available in the public domain. The failure to publish the (a) dates of the meeting of the Special Committee; (b) the minutes of these meetings; and (c) the decision taken by the Committee is directly contrary to the letter and spirit of this Hon'ble Court's judgment in ***Anuradha Bhasin v Union of India,*** **(2020) 3 SCC 637**, paragraphs 24, 104, 105, 114, which directed the Respondents herein to publish all orders passed under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 ["**Telecom Suspension Rules**"], in compliance with principles of natural justice, and to enable an aggrieved person to make a representation to the

government and to challenge the order before a court of law. The relevant portions of the judgment in ***Anuradha Bhasin (supra)***are extracted below:

> "....*It must be noted that although the Suspension Rules do not provide for publication or notification of the orders, a settled principle of law, and of natural justice, is that an order, particularly one that affects lives, liberty and property of people, must be made available. Any law which demands compliance of the people requires to be notified directly and reliably. This is the case regardless of whether the parent statute or rule prescribes the same or not. We are therefore required to read in the requirement of ensuring that all the orders passed under the Suspension Rules are made freely available, through some suitable mechanism....*
>
> *105. The above requirement would further the rights of an affected party to challenge the orders, if aggrieved. Judicial review of the orders issued under the Suspension Rules is always available, although no appellate mechanism has been provided, and the same cannot be taken away or made ineffective. An aggrieved person has the constitutional right to challenge the orders made under the Suspension Rules, before the High Court*

> *under Article 226 of the Constitution or other appropriate forum.*
>
> *144. One of the important criteria to test the reasonableness of such a measure is to see if the aggrieved person has the right to make a representation against such a restriction. It is a fundamental principle of law that no party can be deprived of his liberty without being afforded a fair, adequate and reasonable opportunity of hearing. Therefore, in a situation where the order is silent on the material facts, the person aggrieved cannot effectively challenge the same. Resultantly, there exists no effective mechanism to judicially review the same. ... In light of the same, it is imperative for the State to make such orders public so as to make the right available under Section 144(5) CrPC a practical reality. (Emphasis supplied)*

A true copy of the judgement of this Hon'ble Court in *Anuradha Bhasin v Union of India*, (2020) 3 SCC 637 is annexed herewith as **Annexure A-1 (pgs. 23 to 87).**

8. A similar interpretation was provided by this Hon'ble Court in its judgment in ***Shreya Singhal v Union of India*, (2015) 5 SCC 1**, while upholding the constitutionality of Section 69A of the Information Technology Act and the Blocking Rules notified thereunder on the ground that

blocking orders have to be reasoned so as to make them amenable to challenge in a writ petition:

> *"114. It will be noticed that Section 69-A unlike Section 66-A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution." (Emphasis supplied)*

Applying this principle to the present case, it is evident that the Report submitted by the Special Committee must be disclosed to the Petitioner as it is responsible for continuation of internet restrictions in Jammu & Kashmir, and since the Petitioner cannot challenge the Report before judicial authorities without having access to the same.

9. Since the passage of this Hon'ble Court's judgment dated 11.05.2020, the Special Committee has reportedly met twice – on 15.05.2020 and 10.06.2020 – with the next (third) meeting scheduled for August 2020. This has been justified on the ground that "*the situation would be reviewed regularly by the other competent authorities, and if there is an improvement in the security situation, appropriate action would accordingly be taken.*" However,

it is submitted that the aforesaid averment made by Respondent No. 3 in its counter affidavit is clearly contrary to, and in wilful disobedience of, the judgment of this Hon'ble Court dated 11.05.2020 in *FMP (supra)*, which had constituted the Special Committee as an alternative to the Review Committee established under the Telecom Suspension Rules, in view of the special circumstances in Jammu & Kashmir, to provide "*adequate procedural and substantive safeguards to ensure that the imposed restrictions are narrowly tailored*" **[*FMP (supra)*, para 23]**.

10. It is submitted that this Hon'ble Court's direction to constitute the Special Committee in *FMP (supra)* was intended to replace the Review Committee with the Special Committee, while keeping the checks and balances provided by the Review Committee intact. Pursuant to Rule 2(2) read with Rules 2(5) and 2(6) of the Telecom Suspension Rules, the order of the competent authority (Respondent No. 4 in the present case) has to be forwarded to the Review Committee within one working day. The Review Committee provides the "final internal check" [see ***Anuradha Bhasin (supra)*, para 96]**over the orders issued by the competent authority, since it has to meet within five working days of the order restricting internet services and record its findings regarding compliance with the substantive provisions of Section 5(2) of the Telegraph Act (such as the occurrence of public emergency/or in the interest of public safety). The relevant extract from ***Anuradha Bhasin (supra)*** states:

"***96.*** *The second requirement under Rule 2(2) is the forwarding of the reasoned order of the competent authority to a Review Committee which has been set up under the Suspension Rules, within one working day. .... Rule 2(6) is the final internal check under the Suspension Rules with respect to the orders issued thereunder. ....*

108. One of the gaps which must be highlighted relates to the usage of the word "temporary" in the title of the Suspension Rules. Despite the above, there is no indication of the maximum duration for which a suspension order can be in operation. Keeping in mind the requirements of proportionality expounded in the earlier section of the judgment, we are of the opinion that an order suspending the aforesaid services indefinitely is impermissible. In this context, it is necessary to lay down some procedural safeguard till the aforesaid deficiency is cured by the legislature to ensure that the exercise of power under the Suspension Rules is not disproportionate. We, therefore, direct that the Review Committee constituted under Rule 2(5) of the Suspension Rules must conduct a periodic review within seven working days of the previous review, in terms of the requirements under Rule 2(6).

> *The Review Committee must therefore not only look into the question of whether the restrictions are still in compliance with the requirements of Section 5(2) of the Telegraph Act, but must also look into the question of whether the orders are still proportionate, keeping in mind the constitutional consequences of the same. We clarify that looking to the fact that the restrictions contemplated under the Suspension Rules are temporary in nature, the same must not be allowed to extend beyond that time period which is necessary.*" (*Emphasis supplied*)

11. Thus, the aforesaid observations passed by this Hon'ble Bench of this Hon'ble Court make it clear that the Review Committee has to primarily perform three tasks:

    a) Ensure compliance with the substantive requirements of Section 5(2) of the Telegraph Act.

    b) Meet every seven days of the previous review order to ensure continued compliance with Section 5(2) of the Telegraph Act.

    c) Assess whether the orders continuing the restriction on internet services are still proportionate, and the internet restrictions are not being carried out "indefinitely".

12. Respondent No. 3' continued non-compliance and willful disobedience of this Hon'ble Court's judgment in ***FMP (supra)***is evident from the following factors:

a) The Special Committee has reportedly only met twice, on 15.05.2020 and 10.06.2020 – presumably to assess the "appropriateness" and proportionality of the orders passed by Respondent No. 4. However, these meetings have no correlation with the orders passed by Respondent No. 4 dated 11.05.2020, 17.06.2020, and 08.07.2020, continuing the restriction of internet services to 2G speeds only. Notably, the last two orders restricting internet services have been passed by Respondent No. 4, *after* the meeting of the Special Committee; and have till date, not been reviewed by any Committee (whether the Review Committee under the Telecom Suspension Rules, or the Special Committee). Thus, internet services of the *entire* Union Territory of Jammu & Kashmir continue to be unilaterally restricted to 2G speeds without even a façade of review or oversight provided by the Executive Branch of government.

b) Order No. Home-82 (TSTS) of 2020 dated 08.07.2020 passed by Respondent No. 4 is valid till 29.07.2020, whereas the next scheduled meeting of the Special Committee as per the counter affidavit filed by Respondent No. 3 is in August 2020. Thus, once again, there is a complete absence of review or oversight of Respondent No. 4's orders, by the Special Committee, even though it was constituted for this very purpose.

c) The Special Committee's meetings every month, or every two months, is in direct violation of this Hon'ble Court's directions in *Anuradha Bhasin* to periodically review orders every seven days.

d) Finally, the Special Committee's failure to apply the proportionality standard; or determine the appropriateness of the Petitioner's alternatives; or restore faster (3G/4G) internet speeds on a "trial basis" is evident from the fact that nearly one year has elapsed since Indian citizens living in Jammu &Kashmir, who are entirely innocent of any wrongdoing and for no fault of their own, have been deprived of proper internet services, which has become even more important during the time of the COVID-19 pandemic.

In view of these circumstances, the Petitioner prays for the issuance of contempt orders against the Respondents herein.

13. Notably, Sh. G.C. Murmu, the Lieutenant Governor of the Union Territory of Jammu & Kashmir gave an interview, published in the Indian Express on 21.07.2020, where he expressed his hope and desire that the Special Committee will restore 4G mobile internet services in Jammu & Kashmir, given that 90% of people in Kashmir are ordinary citizens who want development, growth and employment. The Petitioner sent a representation to the Special Committee on 23.07.2020 bringing on record the Order No. Home-82 (TSTS) of 2020 dated 08.07.2020

passed by Respondent No. 4; the financial loss suffered by the Union Territory due to the shutdown; as well the interview dated 21.07.2020 of Sh. G.C. Murmu, and requested for restoration of 4G internet in Jammu & Kashmir. However, the Petitioner has yet to receive any response or acknowledgement from the Special Committee.

A true copy of the representation sent by the Petitioner to the Special Committee dated 23.07.2020, along with the enclosures, is annexed herewith as **Annexure A-2 (pgs. 88 to 103).**

14. That on 26.07.2020, Respondent No. 4 (the Union Territory of Jammu and Kashmir) reportedly informed Respondent No. 3 (the Union Ministry of Home Affairs) that it did not have any objection in restoring 4G internet services, and that high-speed net connectivity would not pose any problem. It is submitted that this change in position by Respondent No. 4 should also be considered by the Special Committee and by this Hon'ble Court to direct the restoration of 4G internet in Jammu & Kashmir.

A true copy of the news report titled "Change in stand: 4G won't be a problem, J&K to Home Ministry" dated 26.07.2020 published in the Indian Express is annexed herewith as **Annexure A-3 (pgs. 104 to 106).**

Failure to supply the Petitioner with a copy of the Report of the Committee

15. Although Respondent No. 3's "Short Affidavit" continuously reiterates its compliance with this Hon'ble Court's judgment dated 11.05.2020 in ***FMP (supra),*** its deliberate and unjustified withholding of the Special Committee's Report from the Petitioner has left the Petitioner unable to assess, ascertain, and verify the actions of the Committee and its compliance with this Hon'ble Court's judgment. In fact, the short nature (six pages) of Respondent No. 3's "Short Affidavit" is testament to the fact that the Petitioner has not been provided any details regarding Respondent No. 3's counter to its contempt petition. This Hon'ble Court in ***Ram Jethmalani v. Union of India,*** **(2011) 8 SCC 1**has clearly held that it is the obligation of the State to provide all materials for Petitioners to allow Petitioners to effectively litigate before the Hon'ble Court:

> "75. *In order that the right guaranteed by clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State*."

16. At the outset, the Petitioner would like to point out that during the hearing of this contempt petition on 16.07.2020 the Respondents had sought the permission of this Hon'ble Court to file the Report in a sealed cover, but such permission was not granted.

17. It is submitted that in ***Anuradha Bhasin (supra)***, this Hon'ble Court unequivocally settled the issue clarifying that the State cannot restrict the access of Petitioners to any material, such as orders or any action taken, which results in curtailment of fundamental rights. Instead, the State must take a proactive approach in ensuring that these materials are made available to Petitioners. The Hon'ble Court also went on to caution that any restriction to access, if at all, can only be sought by claiming privilege through an affidavit and that in such situations a redaction of only the sensitive materials is permissible. The relevant portion of the judgment in ***Anuradha Bhasin (supra)*** is extracted below:

> "24. *As a general principle, on a challenge being made regarding the curtailment of fundamental rights as a result of any order passed or action taken by the State which is not easily available, the State should take a proactive approach in ensuring that all the relevant orders are placed before the Court, unless there is some specific ground of privilege or countervailing public interest to be balanced, which must be specifically claimed by the State on affidavit. In such*

cases, the Court could determine whether, in the facts and circumstances, the privilege or public interest claim of the State overrides the interests of the petitioner. Such portion of the order can be redacted or such material can be claimed as privileged, if the State justifies such redaction on the grounds, as allowed under the law."

18. In view of the aforesaid observations, the Respondents cannot withhold the Special Committee Report from the Petitioners in this wholesale manner, without filing file an affidavit claiming privilege *and* justifying to the Hon'ble Court which facts of the report, if revealed, will endanger national security, and in what manner would those facts be redacted as per the directions of the Hon'ble Court.

19. It is further submitted that the order and judgment dated 11.05.2020 passed by this Hon'ble Court in ***FMP (supra)*** did not authorise or permit the Respondents from keeping the details about the functioning and decisions of the Special Committee as secret, opaque, and hidden from the public domain.

20. A Constitution Bench of this Hon'ble Court in ***Subramanian Swamy v. Arun Shourie,*** **(2014) 12 SCC 344** (incidentally also arising out of a contempt petition)has also deprecated the practice of using sealed covers, and treating them as integral part of the Respondent's counter affidavit, in the following manner:

> *"6. Respondent Arun Shourie submitted his reply-affidavit on 13-10-1990. We shall refer to his defence and objections at an appropriate place a little later. Suffice, however, to note at this stage that in the counter-affidavit, the respondent prayed that, in view of the sensitive nature of the facts, he would choose to refrain from setting out those facts in the affidavit but would prefer to put them in the form of a signed statement in a sealed cover for the perusal of the Court which may be treated as an integral part of the counter-affidavit. The Court, however, on 4-3-1991 rejected his prayer and observed that the procedure suggested by the respondent was not an acceptable procedure and was inconsistent with recognised form of the pleadings. The respondent was granted liberty to withdraw the sealed cover from the Court. He was given an opportunity to file additional affidavit.*" (*Emphasis supplied*)

21. In the same vein, this Hon'ble Court in ***Anuradha Bhasin (supra)***has also recognised that the publication of orders and materials is itself a right under the right to know under Article 19, which cannot be arbitrarily denied:

> "23.1…. A *democracy, which is sworn to transparency and accountability, necessarily mandates the production of orders as it is the right of an individual to know. Moreover,*

fundamental rights itself connote a qualitative requirement wherein the State has to act in a responsible manner to uphold Part III of the Constitution and not to take away these rights in an implied fashion or in casual and cavalier manner.

23.2 Second, there is no dispute that democracy entails free flow of information. There is not only a normative expectation under the Constitution, but also a requirement under natural law, that no law should be passed in a clandestine manner."

Para-wise reply on merits

22. Without prejudice the preliminary submissions raised hereinabove, a para-wise response to the contents of the counter-affidavit dated 21.07.2020 is given below.

23. The contents of para 1 are a matter of official record, and are neither admitted nor denied for want of knowledge.

24. The contents of para 2 are denied on the same terms as the Preliminary Submissions inasmuch as Respondent No. 3 has failed to demonstrate how it has "fully and faithfully" carried out "all directions" issued by this Hon'ble Court in its judgment, ***FMP (supra)*** dated 11.05.2020. It is further submitted that the said paragraph under reply is defective and improper, insofar as the deponent (representing the Union of India, Respondent No. 3) is not competent to swear / affirm the contents or depose in any manner on

behalf of the "concerned officials" of the "Government of the Union Territory of Jammu & Kashmir".

25. The contents of para 3 and 4 are a matter of record and require no comments.

26. The contents of para 5 are wholly denied inasmuch as there is an actual (and not an "alleged") failure on the part of the Respondents herein to carry out the mandate of this Hon'ble Court's judgment and order dated 11.05.2020.

27. The contents of para 6 are erroneous to the extent that Respondent No. 3 was still required to publish the dates of the meetings, minutes of meeting, and decision taken by the Committee online; as it has been doing with the orders passed by Respondent No. 4 restricting internet access to 2G speeds.

28. The contents of para 7 are denied for want of knowledge and the averments made by the Petitioner in the Preliminary Submissions is reiterated. It is submitted that since the facts alleged by Respondent No. 3 are not in public domain, and no documents have been provided to the Petitioner substantiating the same, there is no way for the Petitioner to ascertain the veracity of Respondent No. 3's claims. However, it is worth pointing out that even the paragraph under reply does not mention that any fresh material was placed before the Special Committee that warranted the continuance of the existing restrictions, which fails the test for periodic review.

29. The contents of para 8 are vehemently denied in terms of the Preliminary Submissions above. It is reiterated that

filing the so-called Report/decision of the Special Committee in a sealed cover is antithetical to the letter and spirit of the judgments of this Hon'ble Court in ***Anuradha Bhasin (supra)*** and ***FMP (supra*)**, which had given full recognition to the importance of institutional oversight, rule of law, and transparency. The submission of the Report *only* to this Hon'ble Court, while expressly withholding it from the Petitioner, without the permission of this Hon'ble Court and without claiming privilege on affidavit is highly unjustified; and consequently, the Report cannot be considered by this Hon'ble Court while deciding the present petition.

30. The contents of para 9 are denied as being false and incorrect. Apart from the fact that the orders dated 17.06.2020 and 08.07.2020 passed by Respondent No. 4 are disproportionate and unconstitutional, it is reiterated that the Special Committee or Respondent No. 3 has never had a chance to formally review the same. Thus, Respondent No. 3 cannot speak to the alleged constitutionality of such orders.

31. The contents of para 10 are denied as irrelevant, baseless, and unsubstantiated in the same terms as the submissions made by the Petitioner herein above.

32. In light of the above, the prayers sought for in the present contempt petition ought to be allowed.

33. Due to the prevailing circumstances, the present Rejoinder is being filed without a notarized affidavit from the Petitioner and payment of Court fee. The Petitioner

undertakes to file a notarized affidavit in support of the Rejoinder as soon as the same is feasible and also undertakes to pay any deficit in Court-Fee subsequently.

FILED BY:

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27.07.2020