IN THE SUPREME COURT OF INDIA

[REVIEW JURISDICTION]

REVIEW PETITION (CRIMINAL) NO. OF 2020

in

SUO MOTU CONTEMPT PETITION (CRL.) NO. 1 OF 2020

IN THE MATTER OF:

IN RE PRASHANT BHUSHAN & Anr. ....Petitioner

PETITION UNDER ARTICLE 137 OF THE CONSTITUTION OF INDIA READ WITH ORDER XLVII OF THE SUPREME COURT RULES, 2013 SEEKING REVIEW OF JUDGEMENT DATED 31.08.2020 PASSED BY THIS HON'BLE COURT IN SUO MOTU CONTEMPT PETITION (CRL.) NO. 1 OF 2020.

To,

The Hon'ble Chief Justice of India
And His Companion Judges of
the Supreme Court of India

THE HUMBLE PETITION
OF
THE PETITIONER ABOVE-NAMED

MOST RESPECTFULLY SHOWETH:

1. That this petition seeks review of the judgement dated 31.08.2020 passed by a bench of three judges of this Hon'ble Court by which the Petitioner herein was sentenced, consequent on conviction by judgment of the same bench dated 14.08.2020, as follows:

> "*...If we do not take cognizance of such conduct it will give a wrong message to the lawyers and*

litigants throughout the country. However, by showing magnanimity, instead of imposing any severe punishment, we are sentencing the contemnor with a nominal fine of Re.1/(Rupee one).

We, therefore, sentence the contemnor with a fine or Re.1/(Rupee one) to be deposited with the Registry of this Court by 15.09.2020, failing which he shall undergo a simple imprisonment for a period of three months and further be debarred from practising in this Court for a period of three years."

2. **FACTS:**

2.1 By a **Petition dated 02.07.20**, one Mahek Maheshwari moved this Hon'ble Court to initiate contempt proceedings under Article 129 read with Section 15 of the Contempt of Courts Act, 1971 and Rule 3 of the Rules to Regulate Proceedings for Contempt pf the Supreme Court, 1975 and to take *suo motu* against the Petitioner herein. The said complaint was directed against the following tweet by the Petitioner a social media platform:

> *"CJI rides a 50 Lakh motorcycle belonging to a BJP leader at Raj Bhavan Nagpur, without a mask or helmet, at a time when he keeps the SC in Lockdown mode*

denying citizens their fundamental right to access justice!"

The petitioner to date does not have a copy of the petition on the basis of which action has been instituted against him and has had no opportunity of traversing pleadings therein despite having formally made an application seeking the same under Rule 6(2) of Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975.

2.2 By **Order dated 22.07.20**, this Hon'ble Court took up the petition dated 02.07.20 and *suo motu* enlarged the scope of the proceedings to include the following tweet which was made on 27.06.2020 by the Petitioner and which had purportedly been published in the Times of India on the day of the hearing:

> "*When historians in future look back at the last 6 years to see how democracy has been destroyed in India even without a formal Emergency, they will particularly mark the role of the Supreme Court in this destruction, & more particularly the role of the last 4 CJIs.*"

By said order, this Hon'ble Court issued notice to the Petitioner as well as the Hon'ble Attorney

General, who was eventually not heard in the proceedings pertaining to the conviction of the Petitioner herein.

A copy of **order dated 22.07.20**, is annexed herewith as **Annexure P1 at Pages ____ to ____**

2.3 By **letter dated 28.07.2020**, the Petitioner wrote to the Secretary General of the Supreme Court, seeking a copy of the petition filed against him and the unusual administrative orders through which the matter came to be taken up by the presiding bench. These were not provided.

A copy of **letter dated 28.07.2020**, is annexed herewith as **Annexure P2 at Pages ____ to ____**

2.4 In **Prashant Bhushan v Secretary General, Supreme Court of India Writ Petition (Civil) No. 792 of 2020 filed on 31.7.20**, the Petitioner brought to the notice of this Hon'ble Court the numerous procedural defects in the petition of Mr. Maheshwari, the manner in which it came to be placed before this Hon'ble Court and the order of 22.07.20 by which action for contempt against the Petitioner was initiated. The Petitioner prayed for the following reliefs:

"*a) Issue a Writ of Declaration or a Writ in the nature of Declaration or any other appropriate writ, order or direction holding and declaring that the Respondent has acted unconstitutionally and illegally in taking cognizance of petitions filed by Mehak Maheshwari and its clearing, putting before the Hon'ble Court on administrative side and then listing it before the Hon'ble Court on Judicial side on 22.07.2020;*

b) Recall the orders dated 22.07.2020 as well as Notice dated 24.07.2020 issued to the Petitioner herein in Suo Motu Contempt Petition (Crl) No. 1 of 2020 and order dated 24.07.2020 in Contempt Petition (Crl) No. 10 of 2009;

c) In the alternative, desist from hearing the Suo Motu Contempt Petition (Crl) No. 1 of 2020 and Contempt Petition (Crl) No. 10 of 2009 by video-conferencing and list the matters for physical hearing as and when this Hon'ble Court resumes physical hearings;"

A copy of **Prashant Bhushan v Secretary General, Supreme Court of India Writ Petition (Civil) No. 791 of 2020 filed on**

31.7.20 is annexed herewith as **Annexure P3 at Pages ____ to ____**

2.5 The Petitioner filed an **Affidavit-in-Reply** on **02.08.2020** offering an explanation for the tweets in issue and pleading, with particulars, the defence of truth and *bona fide* opinion. Para 2 of the affidavit made it clear that it was a preliminary reply as under which was reiterated by counsel for petitioner in the oral hearing of 05.08.2020 as well:

> *I had written on 28.07.2020 to Secretary General of the Supreme Court, seeking a copy of these documents, which have since not been provided to me. In the absence of that,* ***I am somewhat handicapped in dealing with this contempt notice. However, without prejudice to the above, my preliminary reply to the notice issued to me is as under.*** (emphasis supplied)

A copy of the **Affidavit-in-Reply filed on 02.08.2020** is annexed herewith as **Annexure P4 at Pages ____ to ____**

2.6 By **Order dated 05.08.20**, this Hon'ble Court dismissed **Prashant Bhushan v. Secretary**

General, Supreme Court of India W.P. (C) No. 792 of 2020 *in limine* and reserved judgment in Suo Motu (Crl.) 1 of 2020 on the issue of the Petitioner's culpability for contempt though the court had issued notice to Attorney General, who was present in video conferencing during the entire hearing but was pointedly not heard, despite the petitioner's counsel requesting the court to at least afford a hearing to the Attorney General.

A copy of the **order dated 05.08.20** is annexed herewith as **Annexure P5 at Pages ____ to ____**

2.7 By an **Interim Application dated 06.08.2020** preferred under Section 17(5) of the Contempt of Courts Act, 1971, the Petitioner herein moved this Hon'ble Court for the following reliefs:

> *"i)* ***In case the Hon'ble Court is not satisfied by my preliminary reply and wishes to proceed further in the matter allow me to lead further evidence*** *u/s 17(5) of the Contempt of Courts Act, 1971,* ***after supplying copy of the complaint by Mr. Mehak Maheshwari to me in accordance with Paras 1 & 2 of Vijay Kurle, In re, (2019)***

9 SCC 521 : 2019 SCC OnLine SC 1274 at page 521.

ii. ***Direct that proceedings as regards the suo moto notice issued to me with respect to tweet of 27.06.2020 be placed before the Hon'ble Chief Justice of India for allocation of bench as per Para 39 of Vijay Kurle, In Re, 2020 SCC Online SC 407***"

A copy of the **Interim Application dated 06.08.2020** is annexed herewith as **Annexure P6 at Pages ____ to ____**

2.8 By **Judgment dated 14.08.20** in **Suo Motu (Crl.) No. 1 of 2020**, this Hon'ble Court convicted the Petitioner of criminal contempt for both tweets, without fully considering his defence of truth and *bona fide* opinion. The Court also did not supply a copy of Mahak Maheshwari's Complaint, nor did it give the petitioner any opportunity to file further affidavit or lead evidence in support of his averments in the preliminary reply filed by him. By an **order** of the same day, the matter was directed to be listed on 20.08.2020 for hearing on sentence.

A copy of the **Convicting Judgment dated 14.08.20** in **Suo Motu (Crl.) No. 1 of 2020** is annexed herewith as **Annexure P7 at Pages ____ to ____**

2.9 By **Order dated 20.08.20** in **Suo Motu (Crl.) No. 1 of 2020**, this Hon'ble Court, after hearing some arguments from counsel for the Petitioner, recorded that:

> "*We have given time to the contemnor to submit unconditional apology, if he so desires. Let it be filed by 24.08.2020.*"

A copy of the **Order dated 20.08.20** is annexed herewith as **Annexure P8 at Pages ____ to ____**

2.10 By **Supplementary Statement dated 24.08.2020**, the Petitioner clarified that, during the course of the proceedings, the Court had requested him to reconsider his earlier statement rather than to make an unconditional apology, reaffirmed his general faith in the Court and its capacity for institutional reform in response to constructive criticism and re-asserted his defence of truth and *bona fide* opinion. On the same date, **Written Submissions dated 24.08.2020**

pertaining to issues arising in sentencing were filed on behalf of the Petitioner.

A copy of the **Supplementary Statement dated 24.08.2020** is annexed herewith as **Annexure P9 at Pages ____ to ____**

A copy of the **Written Submissions dated 24.08.2020** are annexed herewith as **Annexure P10 at Pages ____ to ____**

2.11 By **Order dated 25.08.2020**, this Hon'ble Court reserved judgment on sentencing after hearing arguments from Counsel for the Petitioner, and cursorily calling upon the Attorney General for India, who submitted that this case was not a fit one in for the imposition of any punishment, but conceded some discomfort at the prospect of the statements contained in the Petitioner's Affidavit-in-Reply being put to trial in order to ascertain their veracity.

A copy of the **Order dated 25.08.2020** is annexed herewith as **Annexure P11 at Pages ____ to ____**

2.12 By **Judgment dated 31.08.2020** in **Suo Motu (Crl.) No. 1 of 2020**, which is impugned in this

petition, this Hon'ble Court imposed the following sentence:

"*We, therefore, sentence the contemnor with a fine or Re.1/(Rupee one) to be deposited with the Registry of this Court by 15.09.2020, failing which he shall undergo a simple imprisonment for a period of three months and further be debarred from practising in this Court for a period of three years.*"

3. The Petitioner has already sought review of Judgment dated 14.08.2020 by which he was convicted of criminal contempt of this Hon'ble Court by a separate petition, bearing Diary No. _____.

4. The Petitioner seeks review of Judgment dated 31.08.2020 in Suo Motu Contempt Petition (Crl.) No. 1 of 2020 on the grounds undermentioned.

GROUNDS

A. **BECAUSE,** at no point during the judicial proceedings in this matter did this Hon'ble Court even slightly indicate that it was contemplating disbarring the Petitioner-Advocate herein from appearing before this Hon'ble Court. However, without any prior notice, the impugned order imposed on the petitioner a sentence in the alternative disbarring him from appearing before this

Hon'ble Court for a period of three years which is ***per incuriam*** as per the law laid down by a co-ordinate three judge bench in **R.K. Anand v. Delhi High Court, (2009) 8 SCC 106** where this Hon'ble Court held:

> *This extract is taken from R.K. Anand v. Delhi High Court, (2009) 8 SCC 106 : (2010) 2 SCC (Cri) 563 at page 187*
>
> *"242 ....**The rules of natural justice, therefore, demand that before passing an order debarring an advocate from appearing in courts he must be clearly told that his alleged conduct or actions are such that if found guilty he might be debarred from appearing in courts for a specific period. The warning may be given in the initial notice of contempt issued under Section 14 or Section 17 (as the case may be) of the Contempt of Courts Act. Or such a notice may be given after the proceedee is held guilty of criminal contempt before dealing with the question of punishment."***

That the impugned judgement renders this per incuriam sentence despite the fact that in the Written Submissions of Dr. Rajeev Dhavan for the petitioner this aspect was specifically stated at Para 7.2 of Page 36 and the said submission was also

made orally by Dr. Dhavan during the hearing on sentencing. No clarification was sought from Dr. Dhavan as regards the same. At no point was petitioner put to notice that the court was contemplating such a drastic action against him. The impugned judgement records this submission at Para 2(XII) as under:

> *"(xii) Debarring an advocate from appearing is to be done only in rare cases, as a last resort, only after giving requisite notice for the same, as held in R.K. Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106."*

Yet, the impugned judgement thereafter fails to deal with this aspect and is *per incuriam.*

B. **BECAUSE,** the judgement is further ***per incuriam*** as no semblance of procedure has been followed by this Hon'ble Court in the instant matter.

a. The petitioner was denied a copy of the petition of Mr. Maheshwari which is his right under Rule 6(2) of Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975.
b. He was denied an opportunity to file a fresh affidavit in case the court was not satisfied by his preliminary reply.
c. The proceedings as regards the second tweet of 27.06.2020 coincidentally published on the

date when this Hon'ble Court took up this matter on 22.07.2020 and of which the court took suo moto cognizance was not placed before CJI for appropriate directions in the face of settled law.

d. The petitioner was further denied an opportunity to lead evidence under Section 17(5) of Contempt of Courts Act, 1971, to substantiate averments in his preliminary reply.

The conviction and sentencing has occurred solely on the basis of a "*preliminary reply*" filed on 02.08.2020 which clearly stated that it was in fact a preliminary reply at para 2 which was read out and emphasized by counsel for petitioner on hearing of 05.08.2020 as under:

> *I had written on 28.07.2020 to Secretary General of the Supreme Court, seeking a copy of these documents, which have since not been provided to me. In the absence of that,* ***I am somewhat handicapped in dealing with this contempt notice. However, without prejudice to the above, my preliminary reply to the notice issued to me is as under.*** (emphasis supplied)

After the hearing, the petitioner moved an application u/s 17(5) of the Contempt of Courts, Act, 1971, praying,

> "1. *In case the Hon'ble Court is not satisfied by my* ***preliminary reply*** *and wishes to proceed further in the matter* ***allow me to lead further evidence u/s 17(5) of the Contempt of Courts Act, 1971, after supplying copy of the complaint by Mr. Mehak Maheshwari*** *to me in accordance with* ***Paras 1 & 2 of Vijay Kurle, In re, (2019) 9 SCC 521 : 2019 SCC OnLine SC 1274 at page 521***
>
> *2. Direct that proceedings as regards the suo moto notice issued to me with respect to tweet of 27.06.2020 be placed before the Hon'ble Chief Justice of India for allocation of bench as per* ***Para 39 of Vijay Kurle, In Re, 2020 SCC Online SC 407"***

There appears to be no discernible reason for having denied the petitioner the prayers aforementioned. The denial of opportunity to lead evidence is not only in explicit contravention of the Contempt of Courts Act, 1971, but in the teeth of judgement of Co-ordinate bench in **R.K. Anand v. Delhi High Court, (2009) 8 SCC 106** and ***per incuriam*** as it was held,

207. Mr P.P. Rao submitted that the approach of the High Court was quite unfair. The proceeding before the High Court was not in the nature of a suit or a criminal trial. ***In response to the notice issued by the Court the appellant had made a positive statement in his reply-affidavit. The statement was not formally traversed by anyone. There was, therefore, no reason for the appellant to assume that he would be required to produce evidence in support of the statement. In case the High Court felt the need for some evidence in support of the averment it should have at least made it known to the appellant. But the High Court without giving any inkling to the appellant rejected the plea in the final judgment. The appellant was thus clearly denied a proper opportunity to defend himself.***

208. ***We find that the submission is not without substance.*** *The proceeding before the High Court was under the Contempt of Courts Act and the High Court was not following any well-known and well-established format. In that situation* ***it was only fair to give notice to the proceedees to substantiate the pleas taken in the reply-affidavit by leading proper evidence.*** *It must, therefore be held that the*

High Court rejected a material plea raised on behalf of I.U. Khan without giving him any opportunity to substantiate it.

The denial of proper opportunity to defend himself is particularly egregious in the instant case as the petitioner had actually filed an application under Section 17(5) seeking to lead evidence which was denied for no discernible reason.

C. **BECAUSE,** the denial of proper opportunity to defend himself in the case of petitioner (apart from reasons elaborated in Ground 'B') is further exacerbated by the fact that the Court at the time of convicting the petitioner apparently did not even traverse his "*preliminary reply*" apparently because it was under a misconception that the petitioner's counsel had not pressed it. The impugned judgment on sentencing notes at **Paragraph 13** that this Hon'ble Court had proceeded on the assumption that the defence of truth, as it is made out by the Petitioner's Affidavit-in Reply dated 02.08.20, was not pressed in view of the fact that Counsel for the Petitioner did not read the document out in full in court to amount to a concession on this point. It is submitted that this conclusion is patently in error in view of the fact that Counsel for the Petitioner expressly noted and drew attention to the said Affidavit/preliminary reply, read indicatively from it

and left it to the Court to examine its particulars due to the sensitive nature of the averments contained therein. Throughout the hearing, Counsel for the Petitioner was at pains to press the truth and bona fides of the Petitioner's statements, and no concession was made at any point in this regard. It is law settled in ***Moran Mar Basselios Catholicos v. Mar Poulouse Athanasius AIR 1954 SC 526 at paragraph 36*** that a misconception of the Court about whether a concession was made by counsel in argument is analogous to an error apparent on the face of the record and furnishes a ground for review.

Suo motu powers to proceed summarily and punish for contempt under Article 129 are incidents of this Hon'ble Courts status as a court of record, i.e., a court before whom all acts and proceedings are "*enrolled for perpetual memorial and testimony*" ***[Delhi Judicial Service Assn. v. State of Gujarat (1991) 4 SCC 406 at paragraphs 19 to 21]***. It is therefore especially egregious for this Hon'ble Court to disregard its duties to have due regard to its own record in the exercise of a power available to it as an incident of its status as a court of record. Thus, upon acceptance of a pleading by the Registry of a Court of Record constitutionally recognized as such by Article 129, and in extraordinary and summary proceedings in which this Hon'ble Court sits in exercise powers which are incidents of its status as

a court of record, a material and manifest injustice is done to the Petitioner by a failure to consider a pleading brought on to the record and retained thereon, particularly after the court's attention has expressly been drawn to it.

D. **BECAUSE,** second part of Article 20(1) of the Constitution of India provides that "*no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence*". The said part of the Article impliedly mandates that there should be certainty in the nature and quantum of sentence to be imposed on a convict. **Imposing any punishment on a person (who has been convicted for contempt of court) which is not strictly in accordance with the types and quantum of punishments prescribed under Section 12 of Contempt of Courts Act, 1971, is violative of second part of Article 20(1)**. This Hon'ble Court has observed in **Pallav Sheth v. Custodian, (2001) 7 SCC 549 as follows:**

> *"31. This Court has always frowned upon the grant or existence of absolute or unbridled power. Just as power or jurisdiction under Article 226 has to be exercised in accordance with law, if any, enacted by the legislature, it would stand to reason that the power under*

Article 129 and/or Article 215 should be exercised in consonance with the provisions of a validly enacted law. In case of apparent or likelihood of conflict the provisions should be construed harmoniously."

It is respectfully submitted that in absence of any requirement for this Hon'ble Court, acting in exercise of its contempt jurisdiction, to impose punishment strictly in terms of Section-12 of Contempt of Courts Act, 1971, there is no certainty in the nature and quantum of sentence that may be imposed on a convict and the same depends entirely upon the discretion of the bench hearing the case. A possible corollary of this is that a convicted person may be imposed a fine of Re. 1 or Rs. 1 crores, solely depending upon the discretion of the bench. Similarly, depending upon the discretion of the bench, a convicted person may be sentenced to simple imprisonment of a day or rigorous imprisonment of 6 months and he may even be sentenced to death or in case the convicted person is an advocate he may be debarred from practicing for any number of years (even for lifetime) as a punishment. Thus, in the humble submission of the Petitioner herein, by harmoniously interpreting Articles 20(1), 129 and 142(2) of the Constitution of India, the judicial power and discretion to impose punishment for contempt of court should be strictly

in terms of Section 12 of the Contempt of Courts Act, 1971.

E. **BECAUSE,** the sentence of imprisonment in default of the fine is disproportionate and contrary to statutory guidelines and policy underlying Code of Criminal Procedure, 1973, and Indian Penal Code, 1860. In view of the fact that the power to punish for contempt under Article 129 is not absolute, this Hon'ble Court had to comply with guidance available under statute in determining the sentence or, in the alternative, provide an independent reasoned basis for departure from generally applicable statutory guidelines.

In particular:

Section 4(2) of the Code of Criminal Procedure, 1973 provides that the Code governs how offences are to be dealt with, except where another law has made provision for it, reads as follows:

> *"**4. Trial of offences under the Indian Penal Code and other laws**.— (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*

> *(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences."*

Further, Proviso (b) to Section 4(2) of the Code of Criminal Procedure, 1973, sets an upper limit on the proportion of a sentence of imprisonment statutorily provided for which can be imposed in default of a fine, reads as follows:

> ***"30. Sentence of imprisonment in default of fine.—*** *(1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law: Provided that the term— (a) is not in excess of the powers of the Magistrate under section 29;* ***(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine."***

The underlying public policy is further underlined in Section 65 of Indian Penal Code, 1860, as under:

> ***65. Limit to imprisonment for non-payment of fine, when imprison-ment and fine awardable.***—*The term for which the Court directs the offender to be imprisoned in default of payment of a fine* ***shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.***

F. **BECAUSE,** the impugned judgement contains serious errors apparent on the face of the record in treating the mere mounting of the defence of truth to be an "*aggravation*" of an instance of contempt for which the Petitioner already stood convicted. It is unknown to legal systems committed to the rule of law that the mere advancement of a defence available to an accused (under statute, namely in Section 13 of the Contempt of Courts Act, 1971 and under the precedent of the Court concerned, namely the decision of a Constitution Bench of 5 judges in ***Subramanian Swamy v Arun Shourie (2014) 12 SCC 344***) would create additional liability for the offence being defended against. If the act of pleading defence is a second offence, it calls for another trial. This Court's finding at **Paragraph 27** of the impugned judgment that, in the absence of bona fides and public interest, contains an error apparent

on the face of the record. The only consequence that may arise from the absence of one or more ingredients of a defence would be for the said defence to fail. No prejudice can be caused to an accused by raising a defence whose ingredients the court finds, upon consideration, not to be made out. As a result, in its capacity as the trial court, sitting to impose sentence, this Hon'ble Court committed a grave error on the face of the record in holding at **Paragraph 52** that the failure to withdraw his defence when pressed to do so further raises his offence to the stage of becoming "*one which cannot be ignored*":

> *"In spite of learned Attorney General's insistence that the averments made in the defence should be withdrawn and regret should be submitted, Dr. Dhavan, learned senior counsel, stated that the contemnor is not ready to withdraw the defence taken in the reply. That further makes it clear that while insisting with the unjustifiable defence and insistence to go with it makes the entire episode the one which cannot be ignored."*

The finding of an "aggravation" of contempt amounts to a fresh conviction and violates the constitutional protection against double jeopardy contained in Article 20(2) of the Constitution. Further, this additional conviction is arrived at on facts not specifically put to the accused and not tried and

deserves to be treated as a violation of the right to fair trial guaranteed under Article 14 and Article 21.

G. **BECAUSE,** the impugned judgement commits a serious error apparent on the face of the record in approaching the defence of truth in such a manner as to make it unavailable in any instance of criminal contempt. In **Paragraph 28** of the impugned judgment, this Court finds that entering into the question of truth would itself be "*derogatory to the reputation of this Court and would amount to further scandalizing and bringing administration of justice in disrepute*". The *bona fides* and effect on the public interest of statements critical of judges and the judiciary and of the effect of their actions on the fabric of democracy cannot be determined except by a trial of their veracity. This Hon'ble Court committed an error apparent in recording that a finding of truth or falsity of the statements was unnecessary, and then proceeding to negative the defence of truth for a supposed and untested lack of *bona fides* and public interest. Such an approach would also be inconsistent with Section 13(b) of the Contempt of Courts Act 1971 under which truth alone would be an incomplete defence, unless it is accompanied by *bona fides* and regard for public interest. No necessity to consider these two ingredients can arise in the absence of the main requirement of true statements. This Hon'ble Court commits a grave

error in reasoning, in effect, to dissolve the defence of truth altogether. In Paragraph 32, the Court states that "*[a]fter going through the various averments made in the affidavit in reply for supporting truth as defence, we are of the considered view that the defence taken is neither in the public interest nor bona fide one, but the contemnor has indulged in making reckless allegations against the institution of administration of justice*". It concludes at Paragraphs 33 that "*[t]he allegations made are scandalous and are capable of shaking the very edifice of the judicial administration and also shaking the faith of common man in the administration of justice.*" The same conclusion is restated at paragraph 50.

This Hon'ble Court takes no account of the patent fact that all statements critical of the court would *ipso facto* have this effect of shaking the faith of the common man in the administration of justice. Where the statement in question is true, this effect is likely to occur with greater intensity. More so when the impugned judgment disregards elementary constitutional values which are applicable in any democracy, and betrays a misunderstanding of the right to equality in the following observations:

> *"44. The contemnor has tried to justify the averments made on the basis of the Press Conference dated 12.01.2018 of the four seniormost Judges of this Court. Concept of*

equality before law, what is permissible not as to what is impermissible. It is settled that negative equality cannot be claimed as there is no concept of negative equality. We hope it was the first and the last occasion that the Judges have gone to press, and God gives wisdom to protect its dignity by internal mechanism, particularly, when allegations made, if any, publicly cannot be met by sufferer Judges. It would cause suffering to them till eternity. Truth can be the defence to the Judges also, but they are bound by their judicial norms, ethics, and code of conduct. Similarly, the code of conduct for advocates is equally applicable to the lawyers also, being part of the system. The Rules of Professional Ethics formed by the Bar Council, though couched under statutory power, are themselves not enough to prescribe or proscribe the nobility of profession in entirety. The nobility of profession encompasses, over and above, the Rules of Ethics."

It is submitted that what the court was required to do was to assess whether a reasonable person on the basis of the statement of the the four seniormost Judges of this Court and other circumstances averred to in the preliminary reply could have formed a bonafide opinion about the functioning of this

Hon'ble Court and if he could hold and express that opinion under Article 19(1)(a).

H. **BECAUSE,** this Hon'ble Court committed errors apparent on the face of the record in its treatment of the Petitioner's conduct subsequent to conviction. The impugned judgment disregards the fundamental precept that **no man may be sentenced for conduct for which he was not duly tried.** In light of this principle, this Court was in error in considering the Petitioner's conduct after judgment on the conviction was reserved cannot be used otherwise than as a mitigating factor in sentencing. If the petitioner's conduct post conviction was further aggravating, notice should have been issued to the petitioner and an opportunity should have been given to him to defend himself. By contrast, the court uses supplementary statement and statements made to the press as factors which weigh against him. In paragraph 66, this Hon'ble Court holds:

> *"The lawyers and litigants going to press or media in a sub judice matter is another question that is at the fore in this matter. While hearing the matter, Shri Prashant Bhushan talked to the press and media. The statement which was made by Shri Prashant Bhushan, pursuant to the order dated 20.08.2020, was also published well in advance in extenso, word to word, in the*

newspaper and media. In a sub judice matter, releasing such statement to the press in advance is an act of impropriety and has the effect of interfering with the judicial process and the fair decision making and is clearly an attempt to coerce the decision of the Court by the influence of newspaper and media, which cannot be said to be conducive for the fair administration of justice and would further tantamount to undue interference in the independent judicial making process which is the very foundation of institution of administration of justice. If such kind of action is resorted to in a sub judice matter, that too by an advocate who is facing a criminal contempt, it virtually tantamount to using a forum or platform which is not supposed to be used ethically and legally. More so, in a serious case of criminal contempt and particularly after the conviction has been recorded by this Court, it indicates that the tolerance of the Court is being tested for no good reasons by resorting to unscrupulous methods."

Firstly, save for in proceedings which this Hon'ble Court designates as being in camera and pleadings and facts which it expressly strikes from the record or otherwise withholds (as for example, by the anonymisation of the name of a minor or victim of rape), there is no foundation for treating pleadings

filed before this Court as being secret or embargoed from public access. To so treat filings before a court of record in the aforesaid manner would be incompatible with every known precept of open justice and the rule of law.

Secondly, it is patently unconstitutional and incompatible with the precepts of open justice and of a free and independent press for this Hon'ble Court to deprecate, without qualification, the fact of a free press reporting on the contents of pleadings filed by this Court. The fact that such reporting on the contents of the pleadings takes place in advance of hearing does not diminish this fundamental right under Article 19(1)(a) of the press to report and of the public – whose confidence in the Court is at issue – to be able to access this information.

Thirdly, while there can be no dispute in relation to the need for limits on reporting matters which are sub-judice and the interest in avoiding media trials and the pre-judgement of cases involving trials on the evidence, there is no analogy between such matters and one whose sole and entire purpose is to vindicate public confidence in the court. Consequently, cases involving criminal contempt by publication – and particularly those raising questions over the manner in which the institution functions –demand and justify maximal

transparency in the manner in which the court proceeds in deciding them.

I. **BECAUSE,** the impugned judgment commits an error apparent on the face of the record in its treatment of the Petitioner's conduct in **Tehseen Poonawalla v. Union of India & Another, (2018) 6 SCC 72** by failing to put the circumstances in which the observations relating to the Petitioner's conduct in paragraph 101 of this court's decision in Tehseen Poonawalla v Union of India & Another (2018) 6 SCC 72 was made. In addition to failing to put the above circumstances to the Petitioner, the impugned judgment **fails to note the contents of the clarification issued by the same Bench in the reported judgment of Tehseen Poonawalla v Union of India & Another (2018) 10 SCC 418 at paragraph 6 in which it was held that observations made in Tehseen Poonawalla v Union of India & Another (2018) 6 SCC 72 were directed at the intervenors and petitioners in that case rather than at counsel acting in that case.**

J. **BECAUSE,** the impugned judgement approaches the freedom of speech and expression guaranteed under Article 19(1)(a) in such a manner as to nullify it in respect of all institutional and administrative matters relating to the judiciary and the

administration of justice. The impugned judgment holds that all critical statements relating to the judiciary which do not amount to "fair criticism of judgment" are not protected by Article 19(1)(a):

> "*34. Though there is a Freedom of Speech, freedom is never absolute because the makers of the Constitution have imposed certain restrictions upon it. Particularly when such Freedom of Speech is sought to be abused and it has the effect of scandalising the institution as a whole and the persons who are part of the said institution and cannot defend themselves publicly, the same cannot be permitted in law.* ***Though a fair criticism of judgment is permissible in law, a person cannot exceed the right under Article 19(1)(a) of the Constitution to scandalize the institution.***"

In effect, the impugned judgment limits criticism to individual cases and puts all criticism of the institution or actions beyond the scope of the right. The above approach to Article 19(1)(a) completely disregards the principle that dissent and the free and fearless exchange of views concerning all matters pertaining to the state of Indian democracy are an especially central purpose of the right. The strength of this proposition is evidently compounded when these matters touch on the judiciary as an

institution, in view of its unelected and counter-majoritarian position.

K. **BECAUSE** the impugned judgement contains serious errors apparent on the face of the record in failing to distinguish between technical contempts and those inviting punishment. The impugned judgment is in error in concluding that any sentence was merited in this case. This conclusion ignores the express requirement under Section 13(a) of the Contempt of Courts Act 1971 which makes a clear finding – based on reasons – of a material and substantial obstruction of justice to be necessary to convert a technical instance of contempt into one which merits punishment. The identical requirement, coupled with the general caveat that the court apply a "scrupulous care" to the conduct of these cases, has also been set out by this Court in ***Baradakanta Mishra v. Registrar, Orissa High Court (1974) 1 SCC 374 at paragraph 49***. By treating instances of strident criticism of individual judges and of the institutional functioning and features of the Supreme Court at large as being ipso facto capable of affecting the administration of justice, this Hon'ble commits an manifest error. Such an approach to Section 13(a) reduces it contents – which operate as a safeguard to the benefit of accused persons – to a dead letter.

L. **BECAUSE** this petition raises questions demanding a decisive pronouncement by a bench of the appropriate strength in the interests of the maintenance of public confidence and the settlement of questions involving the interpretation of the Constitution. Where cases calling for "*authoritative enunciation of the constitutional principles*" arise, this Hon'ble Court has affirmed that it may refer these questions in the course of review to a bench of the appropriate strength. Following the aforesaid approach would only add to the majesty, authority,, and legitimacy of the judgments of this Hon'ble Court.

In considering review petitions filed in **Kantaru Rajeevaru v. Indian Young Lawyers Association (2020) 2 SCC 1 at paragraph 4**, a majority of three judges of a Constitution Bench of five, having noted **Article 145(3)** of the Constitution and the pendency of other cases in which the same questions fell to be answered, held that public confidence would be served by the settlement of questions touching the interpretation of rights by an "*authoritative pronouncement*" which would "*ensure consistency in approach for posterity*". The Court then proceeded to enumerate the questions which were to be referred to a bench of the appropriate strength. In the instant case, all of the factors set out in **Kantaru Rajeevaru**

(supra) obtain. As a result, the following questions *inter alia* demand authoritative settlement in the same manner as those arising in **Kantaru Rajeevaru (supra)**:

a. Whether the power under Article 129 is subject to the rigours of Part III of the Constitution, and the rights under Articles 19(1)(a), 20, 21, 22 and 32?

b. Whether a summary procedure in cases of criminal contempt which is not *ex facie curiae* is compatible with Part III of the Constitution of India?

c. Whether, in view of the fact that the *suo motu* proceedings for contempt of a constitutional court call for the court to act both as aggrevied and as adjudicator, the provision of a right to an intra-court appeal is necessary in interest of public confidence and the fundamental rights of accused persons under Articles 20, 21, 22 and 32 of the Constitution of India?

PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

I. Grant an oral hearing in open court to the Petitioner on the matter of the review of the Judgement dated 31.08.2020 as well as on the question of referral of questions of constitutional importance to a Bench of the appropriate strength as referred to in Ground L;

II. Review and recall the Judgement dated 31.08.2020;

III. Refer the questions noted at Ground L to a bench of the appropriate strength; and

IV. Pass such other order or orders as this Hon'ble Court deems just and proper in the facts and circumstances of this case.

FILED BY:

Ms. KAMINI JAISWAL
ADVOCATE FOR THE PETITIONER