

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION [CIVIL] NO. 956 OF 2020**

IN THE MATTER OF

Firoz Iqbal Khan

...Petitioner

Versus

Union of India & anrs.

..Respondents

PRELIMINARY COUNTER AFFIDAVIT
ON BEHALF OF
THE UNION OF INDIA

[FOR INDEX PLEASE SEE INSIDE]

FILED BY:-

**G. S. MAKKER
ADVOCATE FOR THE RESPONDENT UOI**

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I, Vijay Kaushik, having my office at Ministry of Information and Broadcasting, A- wing Shastri Bhavan, Dr Rajendra Prasad Marg, New Delhi-100001 do hereby solemnly affirm and state as under :-

1. That I am working as under-secretary in the Ministry of Information and Broadcasting above matter and am conversant with the facts and circumstances of the case. Furthermore, I have been duly authorized by the respondent abovenamed and as such competent to swear this affidavit.

2. At the outset, I state and submit that the subject matter of the present petition namely balancing between the journalist freedom and responsible journalism is a field already occupied either by the statutory provisions made by the Parliament or by the judgments of this Hon'ble Court.

3. It is respectfully submitted that in view of the issue having already received attention of the Parliament, as well as, of this Hon'ble Court, the present petition be confined to only one channel namely Sudarshan T.V. and this Hon'ble Court may not undertake the exercise of laying down any further guidelines with or without appointment of an Amicus or a Committee of persons as Amicus.

4. It is respectfully submitted that the fact situation in each case shall have to be decided on a case to case basis and a broader exercise which is too general in nature is neither warranted nor permissible.

5. It state and submit that as already pointed out even if this Hon'ble Court considers it appropriate to undertake the said exercise, there is no justification to confine this exercise only to mainstream electronic media. The media includes mainstream electronic media, mainstream print media as well as a parallel media namely digital print media and digital web-based news portal and you tube channels as well as 'Over The Top' platforms [OTTs].

6. It is submitted that while in a mainstream media [whether electronic or print], the publication / telecast is a one-time act, the digital media has faster reach from wider range of viewership / readership and has the potential to become viral because of several electronic applications like whatsapp, tweeter, facebook. Considering the serious impact and the potential, it is desirable that if this Hon'ble Court decides to undertake the exercise, it

should first be undertaken with regard to digital media as there already exists sufficient framework and judicial pronouncements with regard to electronic media and print media. Reliance in this regard is placed on this Hon'ble courts judgment rendered in the case of *Pravasi Bhalai Sangathan vs Union of India* reported in (2014) 11 SCC 477, wherein, this Hon'ble court has been pleased to hold as under:-

DR B.S. CHAUHAN, J.— *The instant writ petition has been preferred by an organisation dedicated to the welfare of inter-State migrants in the nature of public interest seeking exercise of this Court's extraordinary jurisdiction under Article 32 of the Constitution of India to remedy the concerns that have arisen because of "hate speeches" through the following prayers:*

.....

(b) Issue appropriate writ, order, decree in the nature of mandamus declaring hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) to be an act against the Union of India which undermines the unity and integrity of the country and militates against non-discrimination and fraternity;

.....

(e) Issue appropriate writ, order, decree in the nature of mandamus directing mandatory imposition of "gag order" restraining the author of hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) from addressing the public anywhere within the territory of India till the disposal of the criminal proceeding initiated against him as a necessary precondition for grant of bail by the Magistrate;

.....

(g) Issue appropriate writ, order, decree in the nature of mandamus directing suspension of membership of authors of hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) from the Union/State Legislature and other elected bodies till the final disposal of the criminal proceedings;

.....

8. *Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the*

group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.

9. *Black's Law Dictionary, 9th Edn. defines the expression "hate speech" as under:*

"hate speech.—Speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence."

10. *In Ramesh v. Union of India [(1988) 1 SCC 668 : 1988 SCC (Cri) 266 : AIR 1988 SC 775] , while dealing with the subject, this Court observed: (SCC p. 676, para 13)*

"13. ... that the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view."

such disastrous consequences of hate speeches, the Indian legal framework has enacted several statutory provisions dealing with the subject which are referred to as under:

Sl. No.	Statute	Provisions
1.	<i>Penal Code, 1860</i>	<i>Sections 124-A, 153-A, 153-B, 295-A, 298, 505(1) and 505(2)</i>
2.	<i>Representation of the People Act, 1951</i>	<i>Sections 8, 123(3-A) and 125</i>
3.	<i>Information Technology Act, 2000 and Information Technology (Intermediaries Guidelines) Rules, 2011</i>	<i>Sections 66-A, 69 and 69-A Rule 3(2)(b) and Rule 3(2)(i)</i>
4.	<i>Code of Criminal Procedure, 1973</i>	<i>Sections 95, 107, 144, 151 and 160</i>

5.	<i>Unlawful Activities (Prevention) Act, 1967</i>	Sections 2(f), 10, 11 and 12
6.	<i>Protection of Civil Rights Act, 1955</i>	Section 7
7.	<i>Religious Institutions (Prevention of Misuse) Act, 1988</i>	Sections 3 and 6
8.	<i>Cable Television Networks (Regulation) Act, 1995 and the Cable Television Networks Rules, 1994</i>	Sections 5, 6, 11, 12, 16, 17, 19, 20 and Rules 6 and 7
9.	<i>Cinematographers Act, 1952</i>	Sections 4, 5-B and 7

12. *In addition thereto, the Central Government has always provided support to the State Governments and Union Territory administrations in several ways to maintain communal harmony in the country and in case of need the Central Government also sends advisories in this regard from time to time. However, in such cases, as police and public order being a State subject under the Seventh Schedule of the Constitution, the responsibility of registration and prosecution of crime including those involved in hate speeches, primarily rests with the respective State Governments.*

14. *So far as the statutory provisions, as referred to hereinabove, are concerned, Section 124-A of the Penal Code, 1860 (hereinafter referred to as "IPC") makes sedition an offence punishable i.e. when any person attempts to bring into hatred or contempt or attempts to excite disaffection towards the Government established by law. (Vide Kedar Nath Singh v. State of Bihar [AIR 1962 SC 955 : (1962) 2 Cri LJ 103] .)*

15. *Sections 153-A and 153-B IPC make any act which promotes enmity between the groups on grounds of religions and race, etc. or which are prejudicial to national integration punishable. The purpose of enactment of such a provision was to "check fissiparous communal and separatist tendencies and secure fraternity so as to ensure the dignity of the individual and the unity of the nation". Undoubtedly, religious freedom may be accompanied by liberty of expression of religious opinions together with the liberty to reasonably criticise the religious beliefs of others, but as has been held by the courts time and again, with powers come responsibility.*

16. Section 295-A IPC deals with offences related to religion and provides for a punishment up to 3 years for speech, writings or signs which are made with deliberate and malicious intention to insult the religion or the religious beliefs of any class of citizens. This Court in *Ramji Lal Modi v. State of U.P.* [AIR 1957 SC 620 : 1957 Cri LJ 1006] , has upheld the constitutional validity of the section. Likewise Section 298 IPC provides that any act with deliberate and malicious intention of hurting the religious feelings of any person is punishable. However, Section 295-A IPC deals with far more serious offences. Furthermore, Section 505(2) IPC provides that making statements that create or promote enmity, hatred or ill will between different classes of society is a punishable offence involving imprisonment up to three years or fine or both.

17. The Protection of Civil Rights Act, 1955, which was enacted to supplement the constitutional mandate of abolishing “untouchability” in India, contains provisions penalising hate speech against the historically marginalised “Dalit” communities. Section 7(1)(c) of the Act prohibits the incitement or encouragement of the practice of “untouchability” in any form (by words, either spoken or written, or by signs or by visible representations or otherwise) by any person or class of persons or the public generally. Similarly, intentional public humiliation of members of the “Scheduled Castes” and “Scheduled Tribes” is penalised under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

19. Article 20(2) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) restrains advocacy of national, racial or religious hatred that may result in incitement for discrimination, hostility or violence classifying it as prohibited by law. Similarly, Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (LCERD) prohibits the elements of hate speech and mandates the member States to make a law prohibiting any kind of hate speech through a suitable framework of law.

22. Be that as it may, this Court has consistently clarified that the directions have been issued by the Court only when there has been a total vacuum in law i.e. complete absence of active law to provide for the effective enforcement of a basic human right. In case there is inaction on the part of the executive for whatsoever reason, the court has stepped in, in exercise of its constitutional obligations to enforce the law. In case of vacuum of legal regime

to deal with a particular situation the court may issue guidelines to provide absolution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field. Thus, direction can be issued only in a situation where the will of the elected legislature has not yet been expressed.

24. *Judicial review is subject to the principles of judicial restraint and must not become unmanageable in other aspects. (Vide King Emperor v. Khwaja Nazir Ahmad [(1943-44) 71 IA 203 : (1945) 58 LW 57 : AIR 1945 PC 18] , State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] and Akhilesh Yadav v. Vishwanath Chaturvedi [(2013) 2 SCC 1 : (2013) 1 SCC (Civ) 881 : (2013) 1 SCC (Cri) 788 : (2013) 1 SCC (L&S) 371] .)*

23. *Further, the court should not grant a relief or pass order/direction which is not capable of implementation. This Court in State of U.P. v. U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti [(2008) 12 SCC 675 : (2009) 1 SCC (L&S) 237] has held as under: (SCC pp. 690-91, para 48)*

“48. To us, one of the considerations in such matters is whether an order passed or direction issued is susceptible of implementation and enforcement, and if it is not implemented whether appropriate proceedings including proceedings for wilful disobedience of the order of the Court can be initiated against the opposite party. The direction issued by the High Court falls short of this test and on that ground also, the order is vulnerable.”

(emphasis supplied)

25. *It is desirable to put reasonable prohibition on unwarranted actions but there may arise difficulty in confining the prohibition to some manageable standard and in doing so, it may encompass all sorts of speeches, which needs to be avoided. For a long time the US courts were content in upholding legislations curtailing “hate speech” and related issues. However, of lately, the courts have shifted gears thereby paving the way for myriad of rulings which side with individual freedom of speech and expression as opposed to the order of a manageable society. (See Beauharnais v. Illinois [96 L Ed 919 : 343 US 250 (1952)] , Brandenburg v. Ohio [23 L Ed 2d 430 : 395 US 444 (1969)] and R.A.V. v. City of St. Paul [120 L Ed 2d 305 : 112 S Ct 2538 : 505 US 377 (1992)] .)*

26. *In view of the above, the law can be summarised to the effect that if any action is taken by any person which is arbitrary, unreasonable or otherwise in contravention of any statutory provisions or penal law, the court can grant relief keeping in view*

the evidence before it and considering the statutory provisions involved. However, the court should not pass any judicially unmanageable order which is incapable of enforcement.

27. *As referred to hereinabove, the statutory provisions and particularly the penal law provide sufficient remedy to curb the menace of “hate speeches”. Thus, person aggrieved must resort to the remedy provided under a particular statute. The root of the problem is not the absence of laws but rather a lack of their effective execution. Therefore, the executive as well as civil society has to perform its role in enforcing the already existing legal regime. Effective regulation of “hate speeches” at all levels is required as the authors of such speeches can be booked under the existing penal law and all the law enforcing agencies must ensure that the existing law is not rendered a dead letter. Enforcement of the aforesaid provisions is required being in consonance with the proposition *salus reipublicae suprema lex* (safety of the State is the supreme law).*

28. *Thus, we should not entertain a petition calling for issuing certain directions which are incapable of enforcement/execution. The National Human Rights Commission would be well within its power if it decides to initiate suo motu proceedings against the alleged authors of hate speech.”*

A copy of the aforesaid judgment rendered by this Hon'ble court in the case of *Pravasi Bhalai Sangathan vs Union of India* reported in (2014) 11 SCC 477 is annexed hereto and marked as **Annexure A.**

Similarly reliance is also placed on the judgment of this Hon'ble court rendered in the case of *Common Cause v. Union of India*, reported in (2018) 13 SCC 440, wherein this Hon'ble court was pleased to hold as under:-

“WP (C) No. 1024 of 2013

3. *The primary issue, which arises for consideration in the instant case, is with reference to the introduction of a complaint*

redressal mechanism. Such a mechanism is sought in respect of complaints made against television and radio programmes. Illustratively, our attention has been drawn to the Cable Television Networks (Regulation) Act, 1995, and to the rules framed thereunder, namely, Cable Television Networks Rules, 1994. We may illustratively refer to Rule 6, which is extracted hereunder:

“6. Programme Code.—*(1) No programme should be carried in the cable service which—*

- (a) offends against good taste or decency;*
- (b) contains criticism of friendly countries;*
- (c) contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes;*
- (d) contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half-truths;*
- (e) is likely to encourage or incite violence or contains anything against maintenance of law and order or which promote anti-national attitudes;*
- (f) contains anything amounting to contempt of court;*
- (g) contains aspersions against the integrity of the President and Judiciary;*
- (h) contains anything affecting the integrity of the Nation;*
- (i) criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country;*
- (j) encourages superstition or blind belief;*
- (k) denigrates women through the depiction in any manner of the figure of a women, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to women, or is likely to deprave, corrupt or injure the public morality or morals;*
- (l) denigrates children;*

- (m) *contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups;*
- (n) *contravenes the provisions of the Cinematograph Act, 1952 (37 of 1952);*
- (o) *is not suitable for unrestricted public exhibition:*

Provided that no film or film song or film promo or film trailer or music video or music albums or their promos, whether produced in India or abroad, shall be carried through cable service unless it has been certified by the Central Board of Film Certification (CBFC) as suitable for unrestricted public exhibition in India.

Explanation.— For the purpose of this clause, the expression “unrestricted public exhibition” shall have the same meaning as assigned to it in the Cinematograph Act, 1952 (37 of 1952);

- (2) *The cable operator should strive to carry programmes in his cable service which project women in a positive, leadership role of sobriety, moral and character building qualities.*
- (3) *No cable operator shall carry or include in his cable service any programme in respect of which copyright subsists under the Copyright Act, 1957 (14 of 1957) unless he has been granted a licence by owners of copyright under that Act in respect of such programme.*
- (4) *Care should be taken to ensure that programmes meant for children do not contain any bad language or explicit scenes of violence.*
- (5) *Programmes unsuitable for children must not be carried in the cable service at times when the largest numbers of children are viewing.*
- (6) *No cable operator shall carry or include in his cable service any television broadcast or channel, which has not been registered by the Central Government for being viewed within the territory of India:*

Provided that a cable operator may continue to carry or include in his cable service any television broadcast or channel, whose application for registration to the Central Government was made on or before 11-5-2006 and is under consideration, for a

period up to 15-6-2009 or till such registration has been granted or refused, whichever is earlier:

Provided further that channels uplinking from India, in accordance with permission for uplinking granted before 2-12-2005, shall be treated as “registered” television channels and can be carried or included in the cable service.”

10. *Having given our thoughtful consideration, to the submissions advanced at the hands of the learned counsel for the rival parties, we are satisfied in concluding, that there is indeed an existing mechanism, as has been referred to by the learned counsel representing the Union of India. However, the above mechanism, is not known to the general public. We are therefore of the view, that the same needs adequate publication. We, therefore, hereby direct the Union of India, to publish the mechanism, which has been brought to our notice, and is partly extracted hereinabove. This would enable complainants, to air their grievances, before the appropriate forum and to obtain a determination thereof, at the hands of the competent authority concerned, in the Ministry of Information and Broadcasting.*

11. *Even though we have concluded in the manner recorded hereinabove, we are of the view, that the Central Government, having framed Rules in the nature of Cable Television Networks Rules, 1994, would be well advised, to frame similar Rules, in exercise of the power vested with it under Section 22 of the Cable Television Networks (Regulation) Act, 1995, to formalise the complaint redressal mechanism, including the period of limitation within which a complaint can be filed, and the statutory authority concerned which shall adjudicate upon the same, including the appellate and other redressal mechanisms, leading to a final conclusive determination. We, therefore, hereby recommend, that the Central Government, within the framework of Section 22 of the Cable Television Networks (Regulation) Act, 1995, deliberate on the issue, and take a conscious decision thereon, and to finalise a similar statutory framework for radio programmes, as well. Till the above issue is considered and finalised, the existing mechanism of complaint redressal, shall remain in place.*

12. *The writ petition is disposed of in the above terms.*

A copy of the aforesaid judgment rendered by this Hon'ble court in the case of *Common Cause v. Union of India*, reported in

(2018) 13 SCC 440 is annexed hereto and marked as **Annexure B.**

7. It is respectfully submitted that the aforesaid quoted part lays down the correct legal proposition requiring no general exercise to be undertaken merely based upon one episode or few episodes of one channel namely Sudarshan T.V.

8. I state and submit that if this Hon'ble Court decides to undertake the said exercise, the Central Government reserves its right to file an Affidavit in detail which could not be filed due to paucity of time.

VERIFICATION:

I, the deponent abovenamed, do hereby verify that the contents of paras 1 to ___ of my above affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this the 17th day of September 2020.

DEPONENT
(विजय कौशिक)
(VIJAY KAUSHIK)
अवर सचिव/Under Secretary
सूचना एवं प्रसारण मन्त्रालय
Min. of Information & Broadcasting
भारत सरकार, नई दिल्ली
Govt. of India, New Delhi

DEPONENT
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