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# To Report or Not to Report: Zooming in the Case of Chief Election Commissioner of India v/s M.R. Vijayabhaskar & Ors.

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**Prerna Dhingra***

**Abstract**

*Complexities are witnessed when there is a juggling act carried out amongst the crucial pillars forming the edifice of democracy namely: Freedom of speech & expression; Right to information of citizens; Accountability of judges. These concepts are not juxtaposed to one another rather complement one another; resultant is the flourishing of democracy with sophistication. Scrutinization by means of putting everything in the eyes of the public results in the ushering in of utter transparency. But the pertinent question is- Should there be limitations as to what forms & should form part of the public domain? Therefore, constraints on public scrutiny must have solid parameters. One of the 2021 landmark judgments delivered by the Hon'ble apex court is- Chief Election Commissioner of India v/s M.R. Vijayabhaskar & Others[1] This judgment analyses appurtenant questions surrounding freedom of expression of media, the concept of open courts, freedom & constraints of judicial conduct, all given in the context of increasing contours of the digital era.*

## Introduction

In roughly over 3 decades following globalization, we have witnessed exponential strides in technological developments. Every domain has adopted technology to usher inefficiency. An open- arm approach in terms of technological adoption has also been witnessed in one

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1 Chief Election Commissioner of India v/s M.R. Vijayabhaskar, 2021 SCC Online SC 364.

of the organs of government namely, the judiciary. The very recent launch of SUPACE (Supreme Court Portal for Assistance in Court's Efficiency) by the Supreme Court's AI Committee shows the Indian apex court's commitment in harmonizing artificial & human intelligence.[2]

Use of Artificial Intelligence, though not a substitute to the existing system, is definitely aiding courts- ranging from e-filing & the use of video conferencing apps like Cisco WebEx, to live streaming of proceedings making justice delivery system accessible to masses- particularly when the world has witnessed one of the toughest & worst times in over a period of decades in the form of COVID-19 pandemic.

A discussion on transparency, accountability and live streaming of court proceedings will be incomplete if the reference to Swapnil Tripathi v/s Supreme Court of India[3] case is not made; the judgment[4] made the stance crystal clear to the effect that right to access justice is inherent and flows from Article 21[5] of the Indian Constitution that contemplates right to life and personal liberty, except according to procedure established by law. Lord Chief Justice Hewart appropriately said, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done." 26th of September, 2018 is the day on which a curtain was unveiled that changed the entire face of the Indian legal system, i.e., we get to see how justice is done.[6] Live streaming of court proceedings in present came as a present to us through the said judgment.

Live streaming of court proceedings is definitely one crucial aspect of freedom of speech & expression but the extent of the permissibility of streaming by reporting the undocumented part, i.e. to say, oral remarks not forming part of the judgment, is another facet to the coin that may pose perplexing situations. However, post the judgment delivered in *Chief Election Commissioner of India v/s M.R. Vijayabhaskar & Others*, this perplexing question has received its rational answer.

2 Srishti Ojha, *Won't Let Artificial Intelligence Do Decision Making; Judges' Autonomy & Discretion Will Be Retained : CJI Bobde*, Live Law (Apr. 06, 2021) https://www.livelaw.in/top-stories/supreme-court-artificial-intelligence-portal-supace-chief-justice-sa-bobde-172220.

3 Swapnil Tripathi v/s Supreme Court of India, (2018) 10 SCC 639.

4 *Id.*

5 INDIA CONST. art 21.

6 The SC's Decision to Reveal it All: Understanding the 'Live Telecasting' Judgement; Swapnil Tripathi and Ors. v. Supreme Court of India and Ors., 9 CPJLJ (2019) 305.

## Structure of Judgment

Total Number of Paragraphs: 51[7]

Decision: Unanimous; no dissent

Bifurcation of paragraphs as under:

- Factual Background/Matrix: Paragraphs 3 to 12
- Proceedings before the Supreme Court as this SLP:[8]
  - Contentions of Petitioners through Learned Senior Counsel: Paragraph 14
  - Contentions of Respondents through Learned Counsel: Paragraph 15
  - Legal Position & Analysis with respect to Issues: Paragraphs 17 to 49
    1. Open Courts & the Indian Judiciary: Paragraphs 20 to 25
    2. Freedom of Expression of the Media: Paragraphs 26 to 32
    3. Public Discourse, Media Reporting & Judicial Accountability: Paragraphs 33 to 37
    4. Freedom & Constraints of judicial conduct: Paragraphs 38 to 49
  - Conclusion: Paragraph 50 & 51

## Factual Matrix

A tabular representation of facts (contained in Paragraphs 3 to 12) will make them quite comprehensible. Therefore, Table 2.1 may be referred to in this regard:

Table 2.1

| DATES | ASSOCIATED EVENT(S) |
|---|---|
| 26 February, 2021 | Announcement of Elections by the Election Commissioner (EC) to various Legislative Assemblies, inter alia Tamil Nadu Legislative Assembly |
| 12 March, 2021 | EC addressing the issue of observance of COVID-19 protocols during elections vide means of letters to the Presidents and General Secretaries of all national & State political parties. |

7 *Supra* note 1.

8 SLP (C) No. 6731 of 2021.

| | |
|---|---|
| 6 April, 2021 | Polling scheduled for Tamil Nadu Legislative Assembly elections. |
| 9 April, 2021 | EC's another letter to political parties stating that COVID-19 related protocols not followed by candidates; continued breach of the norms to result in banning of public meetings and rallies. |
| 16 April, 2021 | Result of continued breach of norms: EC ordered banning of public meetings, street plays and rallies between 7 P.M. & 10 A.M.<br>Another letter by EC re-emphasizing on the strict adherence of COVID-19 related safety protocols.<br>Representation by the respondent for EC to take adequate precautions & measures to ensure the health & safety of officers in the counting booth.<br>No response by EC on respondent's representation<br>Result: Respondent approached High Court u/ Article 226 of the Indian Constitution and sought direction for fair counting on May 2' 2021 (scheduled counting day) with COVID-19 protocols in place. |
| 26 April, 2021 | Hearing before the Division Bench of the Madras HC |
| 27 April, 2021 | Complaint by an individual against EC's officials u/s. 269/270/304 r/w 120B of IPC, 1860<br>Filing of counter- affidavit & miscellaneous application by EC |
| 30 April, 2021 | Order passed by DB of Madras HC; miscellaneous application closed |
| 2 May, 2021 | Counting of Votes (Tamil Nadu Assembly Elections) |

## Contentions

**Petitioner through Learned Senior Counsel**

It was contended on behalf of the Election Commissioner that the oral remarks of the High Court of Madras to the effect that the institution (EC) "*is singularly responsible for the second wave of COVID-19*" and that it "*should be put up for murder charges*" neither had relevance to the controversy nor were supported with any proof or material and that the EC was also not given an opportunity to explain their stance on ensuring the requisite protocols.

Further contentions were such that the oral remarks being reported in media have resulted in EC's image being tarnished and people's faith wobbling. Furthermore, the judiciary must be cautious while making its observations on another constitutional body, herein the EC.

EC cannot be attributed liability for it formulated guidelines and took adequate measures and, that the enforcement of ensuring protocols is the matter of State machinery.

Moreover, elections can't be responsible for the surge in cases of COVID-19 since states where no elections were held also witnessed an exponential surge in the cases.

The balance between the conduct of court proceedings and freedom of media must be maintained, for reporting of undocumented part of judgment viz. oral remarks exceed the boundaries of judicial propriety.

**Respondents through Learned Counsel**

The averments of respondents were such that, owing to the wide range of powers conferred on EC, it was responsible for enforcement of the requisite protocols & measures related to COVID-19 during elections.

## Ratio Decidendi & Analysis

The matter was placed before the Division Bench of the Hon'ble Supreme Court of India comprising: Hon'ble Justices- Dhananjaya Y.Chandrachud & Justice M.R. Shah. The judgment in the SLP (C) No. 6731 of 2021 was delivered singularly by Hon'ble Justice Dhananjaya Y. Chandrachud to which there was no dissent expressed by Hon'ble Justice M.R. Shah, hence, the decision, in this case, was unanimous.

Date of judgment- May 06, 2021

**Open Courts & Indian Judiciary**

Paragraphs 20 to 25 of the judgment have been beautifully carved out to discuss the aspect of open courts (in both physical & metaphorical sense) and, public scrutiny being intrinsic for transparency whilst ensuring public faith & confidence in the system and also quintessential for safeguarding valuable constitutional freedoms; its exception being "in-camera" proceedings in exceptional cases, inter alia sexual abuse.

It was further observed that an open court system ensures that judges act in accordance

with law & probity. However, there are certain exceptions to the rule of open courts as aforementioned including the fact that the purpose of scrounging truth & ensuring fair trial will be defeated if witnesses are subject to public gaze.

The court made reference to the cases of *Mohammad Shahabuddin v/s State of Bihar*[9] wherein the concurring opinion noted that an open court grants right to access and entry to all people; *R v/s Socialist Workers Printers, ex p Attorney General*[10] wherein the disciplinary effect on judges' conduct is witnessed when there is the presence of public and press in courts, summing up the role of public hearings on judicial conduct; *Shridhar Mirajkar v/s State of Maharashtra*[11] wherein it was rightly observed that open courts pave way for and maintain the confidence of the general public as well as keep the conduct therein wholesomely checked; & *Swapnil Tripathi*[12](supra) highlighting the significance of live streaming of judicial proceedings furthering the ends of the open judiciary.

**Freedom of Expression of Media**

Paragraphs 26 to 32 of the judgment observe the aspect of freedom of expression of media. Article 19(1) (a)[13] that speaks of freedom of speech and expression is wide enough to include the right to freedom of press within its amplitude, that is to say, freedom of press is constitutionally guaranteed fundamental right. Furthermore, freedom of media extends to reporting of judicial proceedings. However, the freedom of speech & expression not being absolute in nature places reasonable restrictions as envisaged under Article 19(1) (2) of the Indian Constitution.[14]

The Hon'ble Apex Court emphasizing on the importance of freedom of media referred to 1st principle of the Madrid Principles on the Relationship between the Media and Judicial Independence:[15]

> *"1. Freedom of expression (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and*

9 (2010) 4 SCC 653.

10 (1974) 3 WLR 801.

11 (1966) 3 SCR 744.

12 *Supra* note 3.

13 INDIA CONST. art. 19, cl. 1(a).

14 INDIA CONST. art. 19, cl. 2.

15 Madrid Principles on the Relationship between the Media and Judicial Independence, (Mar. 1994) http://www.icj.org/wp-content/uploads/1994/01/madrid-principles-on-media-and-judicial-independence-publication-1994-eng.pdf.

> *convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence."*

In furtherance of the same, it was also observed that media has undergone revolutions & refashioned itself given the technological advancements &, internet ushering in an era of digitization. Thus, technology has brought about significant changes and resultant is new reality.

The court also made reference to a bunch of cases namely, *Express Newspaper (P) Limited v/s Union of India*[16] wherein it was held that free press/ freedom of press is implicit in the language of Article 19(1)(a) of the Indian Constitution providing for freedom of speech & expression; *LIC v/s Manubhai D. Shah (Prof.)*[17] wherein it was observed that in a democratic set-up particularly, dissemination of news & views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2) of the Indian Constitution; & the judgment of *Swapnil Tripathi*[18] (supra) duly acknowledging the inevitability of the revolutionized technology in the judicial system ensuring virtual accessibility.

**Public Discourse, Media Reporting & Judicial Accountability**

Paragraphs 33 to 37 of the judgment scrutinize the aspect of public discourse, media reporting & judicial accountability. The Hon'ble apex court observed that not just reporting of verdicts that are pronounced in the courts of law are crucial but, equally essential are the quirks of counsel(s) & judges that facilitate useful context for the study of law. Further observation was made as regards the apprehension of the "virtual extensión" of open courts is concerned, which accordingly was stated to rather bolster the judiciary's integrity. Public participation vide means of open viewing of courts as live streaming of proceedings promotes the limb of access to justice.

The apex court duly acknowledged the cases of *Attorney General v/s Leveller Magazine*[19] wherein Lord Diplock observed-"The principle of open justice requires that the court should do nothing to discourage fair and accurate report of proceedings; & *Mirajkar*[20] (supra) case wherein it was observed that publicity of court proceedings generates public

16 1959 SCR 12.
17 (1992) 3 SCC 637.
18 *Supra* note 3.
19 [1979] A.C. 440.
20 *Supra* note 11.

confidence; a reference to widespread reporting of Lokmanya Tilak's first sedition trial was also made wherein anti-colonial publications played a crucial role in circulating his words far and wide when he struggled to access legal aid.

**Freedom & Constraints of Judicial Conduct**

Paragraphs 38 to 49 of the judgment whilst emphasizing judiciary's independence from the legislature & executive, discusses a vital aspect of freedom & constraints of judicial conduct that form the two ends of the same spectrum. The Hon'ble Apex Court observed that live streaming is, therefore, quintessential when a constitutional body like High Court cannot be impleaded and oral remarks by such authority have implications on another constitutional body, herein the EC. The further observance was made as regards creativity & spontaneity of thought through oral remarks aiding both, the court & lawyers, moreover, enriching our jurisprudence in the process.

The court further observed that it is the higher courts that are tasked with the role of balancing not just the two spectrum ends, namely freedom of judicial conduct on one and constraints on judicial conduct at another, but also the two independent constitutional bodies- the Madras High Court & the EC in the present case.

The court also observed that caution must be exercised on the part of judges when making off- the cuff remarks in open court for judicial language is a window to a conscience sensitive to the constitutional ethos. The court further observed that oral remarks are made off the judicial record & the court being a staunch proponent of freedom of media to report court proceedings, disposed of the appeal finding no substance in EC's prayer to restrain media from such reporting.

The discussion became fructified when the observations were duly supported with references to the cases of *Sirros v/s Moore*[21] wherein Lord Denning observed that the judges must act honestly and judicially and in such a scenario, they are not to be plagued with allegations of ill will or malice or biasness; *Kashi Nath Roy v/s State of Bihar*[22] wherein the court observed the significance of appellate and revisional courts in correcting the errors committed by sub-ordinate courts and that judges in sub-ordinate courts must not be inflicted condemnation for such error(s) "unless there is something else and exceptional grounds"; *Dr. Raghubir Saran v/s State of Bihar*[23] wherein an observation & advise was

21 [1975] Q.B. 118.
22 (1996) 4 SCC 539.
23 (1964) 2 SCR 336.

made to the effect that higher courts must enable sub-ordinate courts to freely express their opinion ;& *A.M. Mathur v/s Pramod Kumar Gupta*[24] wherein highlighting the significance of judicial restraint and discipline, an important observation was made to the effect that the judges "cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses.."

## Conclusion

In this case, the appeal and pending applications (if any) were held to be disposed of; observing that the oral remarks are not a part of the official judicial record, and therefore, the question of expunging them does not arise.

However, through this very case, media has been given herculean power to report even the undocumented part of the judgment thereby making the Indian judiciary more cautious in its approach while making remarks of any kind which has a tendency to put it in jeopardy.

This case has further proven that media, which is said to constitute the 4th pillar of democracy, its very objective of democratizing & ensuring transparency can only be fructified if it is permitted to report justice. A twin objective will then be further achieved, of maintaining public faith & confidence in the judicial system of its nation on one hand and, giving virtual extension to freedom of speech & expression that constitutes freedom of media, on another.

Furthermore, an exact reporting of court proceedings by media is always better than a media trial. An honest, complete and diligent reporting must be done without a speck of sensationalization to usher in transparency & a true democratic regime.

24 (1990) 2 SCC 533.