

R. K. ANAND V. REGISTRAR, DELHI HIGH COURT: AN EXAMINATION OF THE LAW ON MEDIA TRIALS

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Abstract

R.K. Anand v. Registrar, Delhi High Court was decided in 2009 and has been hailed for its lucid exposition delineating the rights of a commercially motivated and often activist press vis-à-vis the rights of an accused, in a sub judice matter. The question which arose was whether the sting operation conducted by NDTV, exposing the nexus between the defence lawyers (R.K. Anand and I.U. Khan) and a prosecution witness amounted to a ‘trial by media’, and specifically, in the context of contempt, whether it prejudiced the fair trial of the accused in the BMW case. This article assesses the judgments in three parts: Part I explains the background of the case and its relevance in light of judicially evolved principles. Relying on the provisions of contempt for sub judice cases in United Kingdom and Australia, it analyzes whether the Supreme Court was correct in ignoring past precedent and comparative case law, while adopting a more pro-media stand. Part II lays out an interface between the press, the courts and the constitution, by detailing the Indian, British and American jurisprudence on the rights of the press and Article 19 of the Constitution. This lays the ground for Part III examining s.13 of the Contempt of Courts Act, 1971, which creates an exception to contempt proceedings, premised on the protection of Article 19(1)(a) rights. Building on these aforementioned ideas and the absence of reliance on existing case laws, this article offers a critique to the Supreme Court’s formulation of the ‘substantially true and accurate’ test and discusses the implications on the presumption of innocence of the accused.

I. INTRODUCTION

The recent spate of events (Judges’ Assets Scam Case, Justice Dinakaran’s nomination to the Supreme Court) has highlighted the importance of the media and its role in the dissemination of information and in shaping public opinion. While the use of technology has been integrated within our legal system for purposes of conducting trials,¹ the extent to which it, and in particular evidence obtained through subterfuge, can be used *during* the trial is an issue which has gained prominence. In light of the above, *R.K. Anand v. Registrar, Delhi High Court*² comes at an opportune time, pitting a sensational, commercially motivated press against the rights of the accused in high profile cases. The airing of a sting operation by

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1 Code of Criminal Procedure, 1973.

2 2009 (10) SCALE 164.

NDTV during the trial of the BMW case raised important considerations about its adverse and prejudicial impact on fair trial. Although the issue has the potential to redefine the contours of media trials; the Supreme Court in this three judge bench decision, merely ended up restating the law. We assess the judgment in three parts. Part I deals with the background of the case and its relevance in light of judicially evolved principles. Part II lays out an interface between the press, the courts and the constitution. We have relied on principles evolved in the UK and US to support the same. Part III of this paper examines s. 13 of the Contempt of Courts Act, 1971 [“the Act”] and its relationship with Article 19.

II. THE BACKGROUND

During the pendency of the famous BMW trial, NDTV aired a series of video tapes recorded by the star witness, Sunil Kulkarni, evidencing the collusion between the defence counsel, R.K. Anand, and the special public prosecutor, I.U. Khan, who were attempting to tutor his testimony. Taking *suo moto* cognizance, the Delhi High Court instituted contempt proceedings against the lawyers *vide* s. 2(c)(ii) and (iii) of the Act³ and *inter alia*, prohibited them from appearing before the High Court and subordinate courts for four months. Nevertheless, the Court did not consider the question of NDTV’s responsibility and liability under the Act. On appeal, the Supreme Court raised and negated this contention. Although the central issue in this note is related to the impugned contempt of NDTV, it is necessary to examine the circumstances surrounding the airing of the show to determine whether it came under the exception of public interest drafted in s. 13 (b) of the Act.⁴

The larger question raised by the court was whether the sting operation in the instant case amounted to a ‘trial by media’ and specifically, in the context of contempt, whether it prejudiced the fair trial of the accused in the BMW case. This assumed importance in light of the fact that the only prior elucidation on this, in the entire Supreme Court jurisprudence was in *M.P. Lohia*.⁵ Here, the publication of facts, material to the *sub judice* trial, was held to interfere with the administration of justice and constitute ‘trial by media’.

3 S. 2 (c) of the Act defines ‘criminal contempt’ as the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which:

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding.
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

4 S. 13 of the Act states that “Notwithstanding anything contained in any law for the time being in force... (b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.”

5 AIR 2005 SC 790, para. 10.

This helps contextualize the importance of *R.K. Anand*, insofar as it purported to lay down the law on the issue of trial by media and the conduct and responsibility of news-channels in reporting *sub judice* cases. It is submitted that although the court took upon an onerous burden, it posited a colloquial definition, without reference to the catena of case law.⁶ ‘Trial by media’ was thus stated to be the adverse impact of coverage on the reputation of the accused creating a ‘widespread perception of guilt’,⁷ even before he went to trial, thereby contravening his right to presumption of innocence. Given the widespread importance of this issue and the legal implications of the definition vis-à-vis the liability of the media houses, it was important for the court to have discussed the extent to which the right of the media extended insofar as it did not breach the right to presumption of innocence of the accused.

International instruments such as the Madrid Principles seek to give effect to this fundamental principle in law by enshrining it in their text. In 1985, the UN Principles on the Independence of the Judiciary⁸ were published and reviewed by the International Commission of Jurists and the Spanish Committee of UNICEF which have come to be known as the Madrid Principles. A conjoint reading of these texts leads to the inference that the freedom of the media constitutes one of the essential foundations of every democratic society. It is the function and right of the media to gather and 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. Investigation is to be carried out in secrecy and to the presumption of innocence. It also provides that there can be laws for restricting the application of these principles in relation to criminal proceedings in the interest of administration of justice if it is likely to prejudice a defendant, or for the prevention of improper pressure on a witness, member of a Jury or a victim.⁹ In fact, it also advocates the establishment of bodies which would be suitably placed to dispose of complaints of affected groups.¹⁰

At this juncture, it is useful to briefly discuss the provisions in other common law countries. In Australia, it is referred to as ‘*sub judice*’ contempt while in the UK, the same falls under the ‘the strict liability rule’ defined under the Contempt of Court Act, 1981. In fact, the enactment of the Contempt of Court Act, 1981 by the British Parliament was due to the landmark decision of the European Court of Human Rights in *The Sunday Times v. The United Kingdom* in which it was held that

6 *Infra* n.7.

7 *R.K. Anand*, para 174.

8 “Basic Principles on the Independence of the Judiciary”, Office of the United Nations High Commission for Human Rights, sourced from <<http://www2.ohchr.org/english/law/indjudiciary.htm>>.

9 Principle 10.

10 *R.K. Anand*, para. 3.

the prevailing law in UK did not adhere to the European Convention on Human Rights.¹¹ Ss. 1-7 of UK's Contempt of Court Act, 1971 deal with the strict liability rule.¹² S. 4(1) of the Act protects a person from criminal proceedings if he is responsible for publication of a fair and accurate report of legal proceedings held in public which was published contemporaneously and in good faith.¹³ However, this enactment has been criticised as it increased the protection extended to publishers only to a very limited extent and carries a great deal of uncertainty in interpretation of the phrase 'substantial risk' to the 'course of justice in the proceedings in question'¹⁴ - a problem which has arisen in the Indian context as well.

The landmark case determining the rights and liabilities in case of a *sub judice contempt* was that of *Hinch v. Attorney General (Vic)*,¹⁵ decided by the Australian High Court. While attempting to reconcile the conflicting ideals of public interest, freedom of speech and fair administration of justice, it adopted a combination of a subjective and objective standard. Thus, if the court is satisfied that in publishing the material, the publisher sought to serve, and did serve a public interest outweighing the prejudicial effect of the publication, then he would be exonerated.¹⁶ This built on the existing principle that in Australia, a publisher would not be held guilty unless the proceedings are *sub judice*, that is, 'pending' before any court.¹⁷

Thus, *Hinch* and the Contempt of Court Act, 1981, lay down two different tests- one of balance and the other of 'substantial risk' respectively - the latter being the test which is employed by the Indian Contempt of Court Act, 1971 as well. It

11 [1979] 2 E.H.R.R. 245.

12 S. 1, Contempt of Court Act, 1981 reads as follows: "In this Act 'the strict liability rule' means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so."

S. 2 of the Act elucidates upon the rule by posing limitations to its operation. It reads as follows: "... (1)The strict liability rule applies only in relation to publications, and for this purpose 'publication' includes any speech, writing, programme included in a cable programme service] or other communication in whatever form, which is addressed to the public at large or any section of the public.

(2)The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

(3)The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication..."

13 S. 4(1), Contempt of Court Act, 1981 reads as follows: "Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith."

14 J. Young, "The Contempt of Court Act 1981", *British Journal of Law and Society*, Vol. 8, No. 2 (Winter, 1981), pp. 243-255, at 245.

15 (1987) 164 C.L.R. 15; See also: M. Chesterman, "Contempt: In the Common Law, but Not the Civil Law", *The International and Comparative Law Quarterly*, Vol. 46, No. 3 (Jul., 1997), pp. 521- 560, at 526.

16 (1987) 164 C.L.R. 15; See also: S. Walker, "Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared", *The International and Comparative Law Quarterly*, Vol. 40, No. 3 (Jul., 1991), pp. 583- 606, at 588.

17 *James v. Robinson*, (1963) 109 C.L.R. 593.

light of the aforementioned comparative jurisprudence, it is surprising that the Indian Supreme Court did not refer to any of the abovementioned case law, nor did they trace the development of law in India while purportedly employing a new pro-media standard.

In *R.K. Anand*, there was no discussion on whether the publication affected the presumption of innocence of Sanjeev Nanda in the BMW Trial and later, R. K. Anand's innocence regarding the contempt proceedings against him which were initiated after NDTV's broadcast of the videos. Alam J.'s copious comments within parentheses splintered throughout the text of the judgment,¹⁸ wherein he unduly presumed a lack of integrity of the accused (R.K. Anand) and Sunil Kulkarini on the basis of their conduct, point towards the possibility of Alam J. himself having been affected by the videos. Given that this case dealt with the integrity of the lawyers involved, such a presumption is likely to adversely affect the accused's right to presumption of innocence.

III. THE PRESS, THE COURTS AND THE CONSTITUTION OF INDIA

In India, the jurisprudence on the limits on the rights of the press has been in line of the contours laid out by Article 19.¹⁹ In *Harijai Singh v. Vijay Kumar*,²⁰ the Supreme Court stated that the press enjoys no special right of freedom of expression and the extent of this freedom was the same as available to every other citizen. In *Union of India v. Naveen Jindal*,²¹ echoing the decision in *Reliance Petrochemicals v. Proprietor of Indian Express*,²² it was held that when Article 19(1)(a) is juxtaposed against the minimum restriction regime enshrined by First Amendment in the US, it can be said to allow for restrictions permissible under Article 19(2)(a). Thus, the rights of the media, although viewed as essential to our democratic framework are not sacrosanct inasmuch as they have not been granted any special privilege or immunity from law

In *M.P. Lohia v. State of West Bengal*,²³ a woman committed suicide in Calcutta in her parents' house and a case was filed against the husband and in-laws under the Indian Penal Code for murder alleging that it was a case of dowry death. The husband had filed several documents to prove that the woman was a schizophrenic psychotic patient and her parents filed documents to prove their allegations of dowry demands by the accused. While a Special Leave Petition was pending before the

18 *R.K. Anand*, paras 24, 78, 84 and 125.

19 "Trial by Media: Free Speech and Fair Trial Under Criminal Procedure Code, 1973", 200th Report of the Law Commission of India, 2006, at 36.

20 (1996) 6 SCC 466.

21 (2004) 2 SCC 510.

22 (1988) 4 SCC 592.

23 (2005) 2 SCC 686.

Supreme Court, pursuant to the disposal of the application for anticipatory bail by the Calcutta High Court, a magazine ‘Saga’ published two articles portraying the story from the deceased victim’s perspective. By extensively quoting her father, it presented a unilateral view, which was censured by the Supreme Court for setting out only the allegations made by her parents but not referring to the documents filed by the accused to prove that the deceased was a schizophrenic. While noting that the publishers were responsible for “indulging in such trial by media when the issue is *sub judice*,” the court recorded its displeasure at the interference with the administration of justice.²⁴ Furthermore, in *State of Maharashtra v. Rajendra Jawanmal Gandhi*,²⁵ the court cautioned the judges to guard themselves against the pressure generated by a trial by press by way of a public agitation. This was held to be the very anti-thesis of rule of law, often leading to a miscarriage of justice.

The jurisprudence evolving from these cases must have borne in mind of the judges while deciding *R.K. Anand*. The facts therein necessitated an examination of the role of Article 19(2) of the Constitution of India, as a ground for imposing reasonable restrictions, in the context of contempt cases. An ‘overactive’ media, driven by competitive and commercial motives, often misuses technological advancements and ignores ethical concerns. Although this was recognized in *Labour Liberation Front v. State of Andhra Pradesh*;²⁶ courts in England, relying on similar considerations have advised judges to take note of the interlocutory proceedings which have taken place prior to the trial.²⁷ Thus reasonable restrictions need to be imposed to prevent the ‘gross misuse’ of the Article 19 rights.²⁸ This is premised on the human nature of judges and the effect of irresponsible print on the administration of justice; a fact recognized in England in *Attorney General v. BBC*²⁹ by Lord Dilhorne who admitted that judges and jurors could not claim to be super human and may be influenced subconsciously. This was relied on by the Supreme Court in *Reliance Petrochemicals v. Proprietor of Indian Express*³⁰ and *Re P.C. Sen*.³¹

In the United States however, the opposite view persists. That trained Judges and jurors are *not* influenced by publication in the media was concretized in *Nebraska Press Association v. Hugh Stuart*.³² Nevertheless, Frankfurter J. in his powerful and influential dissent in *John D. Pennekamp v. State of Florida*³³ accepted that judges

24 *Id.*, para. 10.

25 (1997) 8 SCC 386.

26 2005 (1) ALT 740.

27 *Cleveland Bridge UK Limited v. Multiplex Constructions (UK) Limited*, [2005] EWHC 2101 (TCC).

28 LABOUR LIBERATION FRONT, para. 14.

29 1981 AC 303 (HL).

30 (1988) 4 SCC 592.

31 AIR 1970 SC 1821.

32 (1976) 427 US 539.

33 (1946) 328 US 331.

and jurors are likely to be influenced which has laid the seeds for the possible change in the law in the near future. Such considerations must be kept in mind by the reader while examining and evaluating the correctness and relevance of the decision in *R.K. Anand*.

IV. THE EXCEPTIONS IN THE CONTEMPT OF COURT ACT, 1971

S. 13 of the Act which carves out an exception to contempt proceedings is essentially based on protection of Article 19(1)(a) rights. These rights, as aforementioned, are not absolute but are often upheld when the publication of certain matter is in public interest or in cases of *bona fide* application. It protects the individual concerned from prosecution under the Act unless the Court is satisfied “that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice”³⁴ Further, it also allows “justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is *bona fide*.”³⁵ Subsequently, questions as to what ‘substantially interferes’ or even tends to substantially interfere with the due course of justice arise. It is in this context that the interplay of the right to freedom of speech guaranteed under Article 19 and the exception given under s. 13(b) needs to be examined by courts.

The second question, and perhaps the more pertinent question which has been discussed in detail by the Court, is related to defining and explaining what amounts to ‘public interest’ and ‘truth’. In *R.K. Anand*, it was held that the contents of video tapes aired were ‘substantially true and accurate’. The Act however does not envisage a ‘substantial truth’ test. The question of picking frames which are out of context and giving them a slant so as to propagate a certain point of view was raised by Mr. Gopal Subramaniam, the learned *amicus curiae*. The Court’s response to this is surprising. Alam J. pointed out that there were ‘incorrect and misleading’³⁶ statements made by the anchors on NDTV. Furthermore, he also noticed and censured the Delhi High Court for omission to notice that a particular statement regarding the role of Sunil Kulkarni in the BMW trial was omitted from the manuscript presented to the Court but was present on the CD of the telecast shown to the court.³⁷ In spite of this omission being adjudged ‘fallacious and misleading’,³⁸ the Court proceeded to hold that the telecast was ‘substantially true’ and consequently did not interfere with the course of justice, as it could not have affected the BMW trial.

34 S. 13(a), CONTEMPT OF COURTS ACT, 1971.

35 S. 13(b), CONTEMPT OF COURTS ACT, 1971.

36 *R.K. Anand*, para. 181.

37 *Id.*, paras 183, 184.

38 *Id.*, paras 185, 186.

To set such a precedent is misleading and potentially dangerous, since the conclusion was not in consonance with the acknowledgment of the inaccuracies and inconsistencies of the presentation of the information by the NDTV anchors. They alleged that Sunil Kulkarni was a prosecution witness who had not been examined for a long time, implying that the prosecution has ‘dropped’ him. This was completely untrue, insofar as he was a Court witness.³⁹ It is submitted that the aforementioned allegations can cast aspersions not only on the prosecution and the defence counsel, but also subconsciously affect the judge in the BMW case, considering the human nature of the judges, as elucidated earlier, and the fact that the matter was *sub judice*.

The judgment has thus evolved a new and hitherto untested, more liberal standard of ‘substantial truth’ by *suo moto* reading down the exception carved out *vide* s. 13(b), without referencing any authorities.⁴⁰ The substantial truth test has been employed in common law jurisdictions in the context of libel cases and thus an examination of this standard is apposite. This would help determine whether the test was correctly employed in *R.K. Anand* keeping in mind that the test has made it permissible for channels to broadcast information which is untrue in parts, with the purported effect of giving it a slant and prejudicing the public and possibly the judge.

In the United States, a statement cannot be held to be slanderous or libelous if it is true. In *Nathan v. Journal Co.*,⁴¹ it was held that the substantial truth doctrine extends its protection by holding that a statement with ‘slight inaccuracies of expression’ does not make the alleged libel false. This position has been further clarified in *Gomba v. McLaughlin*⁴² where it was held that a defendant using truth as a defence in a defamation case is not required to justify every word of the alleged defamatory statements. It is sufficient to prove that “the substance, the gist, the sting, of the matter is true”.⁴³

In *Grobbelaar v. News Group Newspapers Ltd.*,⁴⁴ a House of Lords decision, a lucid illustration of how substantial truth is to be determined can be found. In this case, The Sun had published articles which conveyed the message that Mr. Grobbelaar was involved in dishonest taking of bribes to fix the outcome of matches. In its defence, the Court called upon The Sun to prove the substantial truth of the defamatory charges published. For this, it had already been admitted that the meaning

³⁹ *Id.*, para 22.

⁴⁰ Since S. 13(b) was introduced in 2006 as an amendment to the Act, there has been no case directly dealing with this provision. However, principles emerging from the cases discussed above were not referred to either.

⁴¹ 30 Wis.2d 146, 158, 140 N.W.2d 417, 423 (1966).

⁴² 180 Colo. 232, 236, 504 P.2d 337, 339 (1972).

⁴³ *Id.*

⁴⁴ 2002 WL 31257361 No. [2002] UKHL 40.

of the articles was essentially that Mr. Grobbelaar was involved in dishonest taking of bribes to fix the outcome of matches. Evidence had to prove that dishonest taking of bribes to fix the outcome of matches was something that Mr Grobbelaar did or at least was prepared to do or to try to do. The Court relied upon the reasonable conclusion that any person reading those articles would reach and had to juxtapose that conclusion with the truth.

A perusal of the aforementioned cases, helps contextualize various fact situations to determine what amounts to substantial truth. In the context of s. 13, the court purported to use this standard to determine whether the NDTV broadcast was ‘substantially true and accurate’ and assuming this standard was met, whether it impeded the due course of justice in the BMW case. Alam J.’s decision applied this test to conclude that the NDTV broadcast was substantially true and accurate.⁴⁵

Alam J.’s decision fails to make any attempt to define what he meant by substantial truth, let alone examine whether the videos were substantially true. He merely states that it was substantially true. No evidence regarding whether any transfer of money had actually taken place or would have taken place was even referred to. Such an analysis is required as India follows a similar standard⁴⁶ and the judgment, by recording its observations and subsequently applying this test, is not in line with the Indian precedents or the principles accepted in common law or U.S.A. Thus, it substantially waters down the test for truth and hence, enlarges the scope of the exemption relied on by the media in future cases.

Furthermore, it is submitted that Alam J.’s analysis of whether the broadcast obstructed the due course of this contempt case was inadequate, since he considered the limited question. Of the impact of the telecast on the BMW proceedings, which he held was in the interest of justice. However, he did not consider the impact of the telecast on the contempt case which was also *sub judice* in December, 2007,⁴⁷ which was insufficient.

V. CONCLUSION

R.K. Anand presented the Supreme Court with an opportunity to concretize the law on sting operations conducted for *sub judice* cases and the resulting contempt proceedings. Although there is prevalent case law dealing with the interplay between Article 19 and s. 13 of the Act, it is ambivalent insofar as Courts have applied

⁴⁵ *R.K. Anand*, para 178.

⁴⁶ *Sanwant Singh v. State of Rajasthan*, AIR 1961 SC 715; *Baljit Singh v. State of Uttar Pradesh*, AIR 1976 SC 2273.

⁴⁷ On 7th August 2007 the Delhi High Court *suo motu* initiated proceedings for contempt *vide* Article 215 and issued notice to Mr. R.K. Anand and Mr. I.U. Khan. However, in December 2007, NDTV aired another program alluding to the collusion between Mr. R.K. Anand and Sunil Kulkarni, which was objected to by Mr. Anand the next day. *R.K. Anand*, paras 42, 47.

varying standards of what constitutes ‘truth’ and ‘public interest’ *vide* s. 13. The implication of this ambiguity is not only undesirable but also dangerous insofar as the media has been afforded the opportunity to engage in irresponsible and often inaccurate journalism under the guise of ‘public interest’.

The United Kingdom Contempt of Court Act, 1981 specifically provides for an exemption when the publication is ‘fair and accurate’.⁴⁸ The Australian *Hinch* test also provides for a literal balancing of rights test. Thus it is seen, that regardless of the merits and flaws (i.e., the inherent subjectivity of the *Hinch* test and the limited scope of application of the United Kingdom Act) of the abovementioned tests, at least there is a working definition available in case law. However, the same does not exist in Indian jurisprudence - a problem magnified by the lacunae left behind by *R. K. Anand*.

Hence, to conclude, the *R.K. Anand* judgment failed in explaining what the ‘substantial truth’ test entails when it was necessarily required of it to explain the same with the help of precedent as it was the first case to adopt the same. Even though *R.K. Anand* was expected to clarify and lay down the law on trial by media and contempt, it merely reaffirmed and employed existing principles which did not apply directly to the facts in issue, thereby causing the law on contempt to become nebulous. Furthermore, it ignored the existing common law jurisprudence on the fetters placed on the media while reporting cases which are *sub judice*. Instead, it used its own conception of what a trial by media is in concluding on NDTV’s culpability. This could adversely impact the rights of the accused under trial and the presumption of innocence. Therefore, even though it has been hailed as a landmark judgment, a close reading of the same would not suggest the same.

48 S. 4(1), Contempt of Court Act, 1981.