A PRAVASI BHALAI SANGATHAN

*v.*

UNION OF INDIA & ORS.

(Writ Petiton (C) No. 157 of 2013)

MARCH 12, 2014

B

**[DR. B.S. CHAUHAN, M.Y. EQBAL AND A.K. SIKRI, JJ.]**

*CONSTITUTION OF INDIA, 1950:*

C

*Articles 14, 15, 19, 21 read with Article 38; Article 51-A (a), (b), (c), (e), (f), (i), (j) – Hate speeches delivered by elected representatives, political and religious leaders mainly based on religion, caste, region or ethnicity – Writ petition seeking* D *stringent pre-emptory action on the part of Central and State Governments on the ground that the hate speeches militate against the Constitutional idea of fraternity and violates Articles 14, 15, 19, 21 read with Article 38 and are in derogation of the fundamental duties under Article 51-A (a),* E *(b), (c), (e), (f), (i), (j) – Held: The statutory provisions and particularly the penal laws 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* F *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* G *law is not rendered a dead letter – Enforcement of the provisions is required being in consonance with the proposition "salus reipublicae suprema lex" (safety of the state is the supreme law) – Thus, petition calling for issuing certain*

H

*directions which are incapable of enforcement/execution should not be entertained – 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 – Penal Code, 1860 – ss.124A, 153A, 153B, 295A, 298, 505(2) – Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Representation of People Act – ss.123(3), 125 – Maxim "salus reipublicae suprema lex".*

*HUMAN RIGHTS:*

*Hate speech – Steps taken by Government – Held: The Indian legal framework has enacted several statutory provisions dealing with the subject – 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 – The Central Government has also issued revised guidelines to promote communal harmony to the States and Union Territories in 2008 which provides inter-alia that strict action should be taken against anyone inflaming passions and stroking communal tension by intemperate and inflammatory speeches and utterances –Penal Code, 1860 makes offences related to religion punishable – Similarly, intentional public humiliation of members of the 'Scheduled Castes' and 'Scheduled Tribes' is penalized under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – R.P. Act also restrains any political party or the candidate to create feelings of enmity or hatred between different classes of citizens of India by making such an act a punishable offence – Article 20(2) of the International Covenant on Civil & 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*

A *by law – Similarly Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD) prohibits the elements of hate speech and mandates the member states to make a law prohibiting any kind of hate speech through a suitable* B *framework of law – Penal Code, 1860 – ss.124A, 153A, 153B, 295A, 298, 505(2) – Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Representation of People Act – ss.123(3), 125.*

*Hate speech – Duty of courts – Held: Courts must apply* C *the hate speech prohibition objectively –The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred – The key is to determine the likely effect of the expression on its audience, keeping in mind* D *the legislative objectives to reduce or eliminate discrimination.*

*JUDICIAL INTERVENTION: Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature – If there is a law,* E *Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it – The court cannot re-write, re-cast or reframe the legislation for the very good reason that it has no power to legislate –However, of lately, judicial activism of the superior courts in India has raised pubic eyebrow time and* F *again – The directions are 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 –* G *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*

H

*legislature has not yet been expressed – Judicial activism – Judicial review.* A

*Words and phrases: Hate speech – Meaning and its effect – Held: 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.* B C D

**The instant writ petition in the nature of public interest has been preferred by an organisation dedicated to the welfare of inter-state migrants, seeking exercise of extraordinary jurisdiction under Article 32 of the Constitution of India, 1950 to remedy the concerns that have arisen because of "hate speeches" on the ground that these "hate speeches" delivered by elected representatives, political and religious leaders mainly based on religion, caste, region or ethnicity militate against the Constitutional idea of fraternity and violates Articles 14, 15, 19, 21 read with Article 38 of the Constitution and are in derogation of the fundamental duties under Article 51-A (a), (b), (c), (e), (f), (i), (j) of the Constitution and, therefore, warrant stringent pre-emptory action on the part of Central and State Governments.** E F G

**Disposing of the writ petition, the court** H

A **HELD: 1. The Supreme Court of Canada succeeded in bringing out the "human rights" obligations leading to control on publication of "hate speeches" for protection of human rights defining the expression "hate speech" observing that the definition of "hatred" set out in** B ***Canada (Human Rights Commission)* with some modifications, provides a workable approach to interpreting the word "hatred" as is used in legislative provisions prohibiting hate speech. Three main prescriptions must be followed. First, courts must apply** C **the hate speech prohibition objectively. The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred. Second, the legislative term "hatred" or "hatred or** D **contempt" must be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other** E **harmful effects. Third, tribunals must focus their analysis on the effect of the expression at issue, namely whether it is likely to expose the targeted person or group to hatred by others. The repugnancy of the ideas being expressed is not sufficient to justify restricting the** F **expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment is irrelevant. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate** G **discrimination. [Para 6] [465-A-G]**

*Saskatchewan (Human Rights Commission) v. Whatcott* **2013 SCC 11; *Canada (Human Rights Commission) v. Taylor* (1990) 3 SCR 892 –referred to.**

H

**2. 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. Given such disastrous consequences of hate speeches, the Indian legal framework has enacted several statutory provisions dealing with the subject. 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 7th Schedule of Constitution, the responsibility of registration and prosecution of crime including those involved in hate speeches, primarily rests with the respective State Governments. [Para 7, 10, 11] [465-G-H; 466-A-B, F; 467-F-G]**

*Ramesh v. Union of India* **AIR 1988 SC 775: 1988 ( 2 ) SCR 1011 – relied on.**

*Black's Law Dictionary, 9th Edn.* **– referred to.**

**3.1. The Central Government has also issued revised guidelines to promote communal harmony to the States and Union Territories in 2008 which provides *inter-alia***

A **that strict action should be taken against anyone inflaming passions and stroking communal tension by intemperate and inflammatory speeches and utterances. The "Guidelines On Communal Harmony, 2008" issued by the Ministry of Home Affairs, Government of India seek**
B **to prevent and avoid communal disturbances/riots and in the event of such disturbances occurring, action to control the same and measures to provide assistance and relief to the affected persons are provided therein including rehabilitation. The detailed guidelines have**
C **been issued to take preventive/remedial measures and to impose responsibilities of the administration and to enforce the same. Various modalities have been formulated to deal with the issue which have been emphasised on participation of the stake holders. Section 124A of Penal Code, 1860 makes sedition an offence**
D **punishable, i.e., when any person attempts to bring into hatred or contempt or attempts to excite disaffection towards the Government established by law. [Paras 12 and 13] [467-H; 468-A-E]**

E *Kedar Nath Singh v. State of Bihar* **AIR 1962 SC 955: 1962 Suppl. SCR 769 – relied on.**

**3.2. Sections 153A and 153B IPC makes any act which promotes enmity between the groups on grounds of religions and race etc. or which are prejudicial to**
F **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**
G **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 courts time and again, with powers come responsibility. Section 295A IPC deals with offences related to religion**
H **and provides for a punishment upto 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. 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 295A 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 upto three years or fine or both. The Protection of Civil Rights Act 1955, which was enacted to supplement the constitutional mandate of abolishing 'untouchability' in India, contains provisions penalizing 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 penalized under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Section 123(3) of the R.P. Act, provides *inter-alia* that no party or candidate shall appeal for vote on the ground of religion, race, caste, community, language etc. Section 125 of the R.P.Act further restrains any political party or the candidate to create feelings of enmity or hatred between different classes of citizens of India by making such an act a punishable offence. [Paras 14 to 18] [468-F-H; 469-A-H]**

*Ramji Lal Modi v. State of U.P.* **AIR 1957 SC 620: 1957 SCR 860 – relied on.**

**4. Article 20(2) of the International Covenant on Civil & Political Rights, 1966 (ICCPR) restrains advocacy of**

A 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 (ICERD) prohibits
B 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. Thus, it is evident that the Legislature had already provided sufficient and effective remedy for prosecution of the author, who
C indulge in such activities. In spite of this, petitioner sought reliefs which tantamount to legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature.
D Consequently, the Anglo-Saxon legal tradition has insisted that the judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the judge is simply not authorised to legislate law. "If there is a law,
E Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The court cannot re-write, re-cast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts in India
F has raised pubic eyebrow time and again. Though judicial activism is regarded as the active interpretation of an existing provision with the view of enhancing the utility of legislation for social betterment in accordance with the Constitution, the courts under its garb have actively
G strived to achieve the constitutional aspirations of socio-economic justice. In many cases, this Court issued various guidelines/directions to prevent fraud upon the statutes, or when it was found that certain beneficiary provisions were being mis-used by the undeserving
H

**persons, depriving the legitimate claims of eligible persons. [Para 19 and 20] [470-A-H; 471-A]**

*S.P. Gupta v. Union of India & Anr.* **AIR 1982 SC 149: 1982 SCR 365;** *Bandhua Mukti Morcha v. Union of India & Ors.* **AIR 1984 SC 802: 1984 ( 2) SCR 67;** *Union of India & Anr. v. Deoki Nandan Aggarwal* **AIR 1992 SC 96;** *Supreme Court Advocates-on-Record Association & Ors. v. Union of India* **AIR 1994 SC 268: 1993 (2) Suppl. SCR 659;** *Vishaka & Ors. v. State of Rajasthan & Ors.* **AIR 1997 SC 3011 1997 (3) Suppl. SCR 404;** *Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass & Anr.* **(2008) 1 SCC 683 2007 (12) SCR 1084;** *Common Cause (A Regd. Society) v. Union of India & Ors.* **(2008) 5 SCC 511: 2008 (6) SCR 262;** *Nand Kishore v. State of Punjab* **(1995) 6 SCC 614: 1995 (4) Suppl. SCR 16 – relied on.**

**5. 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. Further, the court should not grant a relief or pass order/ direction which is not capable of implementation. [Paras 22 and 23] [471-F-H; 472-A]**

*State of U.P. & Anr. v. U.P. Rajya Khanij Vikas Nigam Sangarsh Samiti & Ors.* **(2008) 12 SCC 675: 2008 (7) SCR 536 – relied on.**

A **6. Judicial review is subject to the principles of judicial restraint and must not become unmanageable in other aspects. It is desirable to put reasonable prohibition on unwarranted actions but there may arise difficulty in confining the prohibition to some manageable standard**
B **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**
C **rulings which side with individual freedom of speech and expression as opposed to the order of a manageable society. [Paras 24, 25] [472-D, E-G]**

*King Emperor v. Khwaja Nazir Ahmed* **AIR 1945 PC 18;** *State ofHaryana & Ors. v. Ch. Bhajan Lal & Ors.* **AIR 1992**
D **SC 604: 1990 (3) Suppl. SCR 259;** *Akhilesh Yadav Etc. v. Vishwanath Chaturvedi* **(2013) 2 SCC 1: 2012 (13) SCR 949 – relied on.**

*Beauharnais v. Illinois,* 343 U.S. 250 (1952);
E *Brandenburg v. Ohio* **395 U.S. 444 (1969);** ***R.A.V. v. City of St. Paul*** **112 S. Ct. 2538 (1992) – referred to.**

**7. 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**
F **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. [Para 26] [473-A-B]**

G

**8. 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**
H **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 said provisions is required being in consonance with the proposition "*salus reipublicae suprema lex*" (safety of the state is the supreme law). Thus, a petition calling for issuing certain directions which are incapable of enforcement/execution should not be entertained. 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. However, in view of the fact that the Law Commission has undertaken the study as to whether the Election Commission should be conferred the power to de-recognise a political party disqualifying it or its members, if a party or its members commit any of such offences, the Law Commission may also examine the issues raised thoroughly and also to consider, if it deems proper, defining the expression "hate speech" and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of "hate speeches" irrespective of whenever made. [Para 27 and 28] [473-C-H; 474-A]

A B C D E F

Case Law Reference:

| | | |
|---|---|---|
| 2013 SCC 11 | Referred to | Para 6 |
| (1990) 3 SCR 892 | Referred to | Para 6 |
| 1988 (2) SCR 1011 | Relied on | Para 9 |
| 1962 Suppl. SCR 769 | Relied on | Para 13 |
| 1957 SCR 860 | Relied on | Para 15 |
| 1982 SCR 365 | Relied on | Para 20 |

G H

| | | | |
|---|---|---|---|
| A | 1984 (2) SCR 67 | Relied on | Para 20 |
| | AIR 1992 SC 96 | Relied on | Para 20 |
| | 1993 (2) Suppl. SCR 659 | Relied on | Para 20 |
| B | 1997 (3) Suppl. SCR 404 | Relied on | Para 20 |
| | 2007 (12) SCR 1084 | Relied on | Para 20 |
| | 2008 (6) SCR 262 | Relied on | Para 20 |
| | 1995 (4) Suppl. SCR 16 | Relied on | Para 21 |
| C | 2008 (7) SCR 536 | Relied on | Para 23 |
| | AIR 1945 PC 18 | Relied on | Para 24 |
| | 1990 (3) Suppl. SCR 259 | Relied on | Para 24 |
| D | 2012 (13) SCR 949 | Relied on | Para 24 |

CIVIL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of Inda.

E Writ Petition (Civil) No. 157 of 2013.

Mohan Jain, Sidharth Luthra, ASGs, Basava Prabhu Patil, B.H. Marlapalle, Raj Singh Rana, Ajay Bansal, Manjit Singh, Gaurav Bhatia, Suryanarayana Singh, AAGs, Ravi Chandra Prakash, Purushottam Sharma, Tripathi, Filza Moonis, Mukesh F Kr. Singh, B. Subramanaya Prasad L.N. Dhiram Sharma, Durgadutt, Sanjeeb Panigrahi, Luv Kumar, Narendra Kumar Goyal, Soumitra G. Chaudhri, Anip Sachthey, Avijit Bhattacharjee, Gopal Singh, Ritu Raj Biswas, K.N. Madhusoodhanan, T.G. Naryanan Nair, Aruna Mathur, Yusuf G Khan (for Arputham, Aruna & Co.) Kirti Renu Mishra, Apurva Upmanyu, Asha Gopalan Nair, Abhishek Kumar Pandey, Jayesh Gaurav, Gopal Prasad, Krishna Sarma, Navnit Kumar (for Corporate Law Group), S.S. Shamshery, Bharat Sood, Varun Punia, Sandeep Singh, Ritesh Prakash Yadav, H Harshvardhan Singh Rathore, Amit Sharma, Ruchi Kohli, C.D.

Singh, Apoorv Kurup, Sakshi Kakkar, Kuldip Singh, Rajiv Nanda, Anuvrat Sharma, Balaji Srinivasan, Liz Mathew, M.F. Philip, Samir Ali Khan, M. Yogesh Kanna, Dr. Sudhir Bisla, Sumitra Bisla, Ranjan Mukerjee, Subhro Sanyal, D.K. Thakur, D.S. Mahra, Richa Pandey, Meenakshi Arora, Mohit D. Ram, D.L. Chidananda, Aditya Singhla, B. Krishna Prasad, J.S. Chhabra, Pardam Singh, Gaurav Yadav, K. Enatoli Sema, Amit Kumar Singh, Sapam Biswajit Meitei, Ashok Kumar Singh, Vivekta Singh, Nupur Chaudhary, Anil Shrivastav, Rituraj Biswas, Bansuri Swaraj, Nirnimesh Dube, Mukesh Verma, Ravi Prakash Mehrotra, Pragati Neekhra, R. Rakesh Sharma, B. Balaji for the appearing parties.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. 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, 1950 (hereinafter referred to as the 'Constitution') to remedy the concerns that have arisen because of "hate speeches", through the following prayers:

a. Issue appropriate writ, order, decree in the nature of mandamus declaring hate/derogatory speeches made by people representatives/political/religious leaders on religion, caste, region and ethnic lines are violative of Articles 14 (Equality before Law), 15 (Prohibition of discrimination on grounds of religion, race, caste or place of birth), 16 (Equality in matters of public employment), 19 (Protection of certain rights regarding freedom of speech etc.), 21 (Protection of Life and Personal Liberty) of Fundamental Rights read with Article 38 of the Directive Principles of State Policy and Fundamental Duties under Article 51-A(a), (b), (c), (e), (f), (i) & (j) of the Constitution and merits stringent pre-emptory action on part of the Central

A and State governments;

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;

c. Issue appropriate writ, order, decree in the nature of mandamus declaring that "Fraternity" forms part of "Basic Structure" of the Constitution;

d. Issue appropriate writ, order, decree in the nature of mandamus directing mandatory *suo motu* registration of FIR against authors of hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) by the Union and State Governments, in the alternative, constitution of a committee by the Union of India in consultation with this Court for taking cognizance of hate/derogatory speeches delivered within the territory of India with the power to recommend initiation of criminal proceeding against the authors;

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 pre-condition for grant of bail by the Magistrate;

f. Issue appropriate writ, order, decree in the nature of mandamus directing speedy disposal of criminal

proceedings against authors of hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) within a period of 6 months;

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;

h. Issue appropriate writ, order, decree in the nature of mandamus directing termination of membership of authors of hate/derogatory speech made on the lines of religion, caste, race and place of birth (region) from the Union/State Legislature and other elected bodies if found guilty;

i. Issue appropriate writ, order, decree in the nature of mandamus directing de-recognition of the political party of authors of hate/derogatory speech made on the lines of religion, caste, race and place of birth (region) by the Election Commission of India where the author is heading the political party in exercise of power vested *inter-alia* under Article 324 of the Constitution read with Sections 29A(5), 123(3) of the Representation of the People Act, 1951 and Section 16A of the Election Symbols (Reservation and Allotment) Order, 1968;

j. Issue appropriate writ, order, decree in the nature of mandamus directing the Union of India to have concurrent jurisdiction to prosecute authors of hate/ derogatory speeches in addition to the States in terms of the mandate of Articles 227, 355 read with Article 38 of the Constitution which merit stringent

A pre-emptory action on part of the Central Government;

k. Issue appropriate writ, order, decree in the nature of mandamus directing the Union of India and
B respective States to enforce Fundamental Duties under Article 51-A (a), (b), (c), (e), (f), (i) & (j) of the Constitution by taking proactive steps in promoting national integration and harmony amongst the citizens of India;

C l. Issue such other appropriate writ or direction that may be deemed to be just and equitable in the facts and circumstances of the case and in the interest of justice."

D 2. Shri Basava Prabhu S. Patil, learned senior counsel appearing on behalf of the petitioner, has submitted that the reliefs sought by the petitioner is in consonance with the scheme of our Constitution as the "hate speeches" delivered by elected representatives, political and religious leaders
E mainly based on religion, caste, region or ethnicity militate against the Constitutional idea of fraternity and violates Articles 14, 15, 19, 21 read with Article 38 of the Constitution and further is in derogation of the fundamental duties under Article 51-A (a), (b), (c), (e), (f), (i), (j) of the Constitution and therefore warrant stringent pre-emptory action on the part of Central and
F State Governments. The existing law dealing with the subject matter is not sufficient to cope with the menace of "hate speeches". Hate/derogatory speech has not been defined under any penal law. Accolade is given to the author of such speeches and they also get political patronage. In such fact-
G situation, this Court cannot remain merely a silent spectator, rather has to play an important role and issue guidelines/ directions in exercise of its powers under Article 142 of the Constitution which are necessary for the said purpose as the existing legal frame work is not sufficient to control the menace

H

of "hate speeches". Therefore, this Court should grant aforesaid reliefs.

3. Shri Sidharth Luthra, learned ASG, Shri Rajiv Nanda, Shri Gaurav Bhatia, learned AAG for the State of U.P., Ms. Asha Gopalan Nair, Shri Gopal Singh, Ms. Ruchi Kohli, Shri C.D. Singh, and all other standing counsel appearing on behalf of the respective States, have submitted that there are various statutory provisions dealing with the subject matter and the issue involved herein is a question of enforcement of the said statutory provisions and any person aggrieved can put the law into motion in such eventualities.

Shri Sidharth Luthra, learned ASG, has further submitted that the issue of decriminalisation of politics as part of electoral reforms is under consideration before this Court in Writ Petition (C) No. 536 of 2011 and in the said matter, this Court had framed certain issues and referred the matter to the Law Commission of India to study the subject with regard to the Representation of People Act, 1951 (hereinafter referred to as "R.P.Act") and may make appropriate suggestions (report) to the Government of India vide order dated 16.12.2013 and, thus, Shri Luthra has suggested that in case there is some deficiency in law, this Court should not act as super-legislature, rather make a recommendation to the Law Commission to undertake further study and submit its report to the Government of India for its consideration/acceptance.

4. Ms. Meenakshi Arora, learned senior counsel appearing on behalf of the Election Commission of India, has submitted that there are various provisions like Section 29A(5) & (7) of the R.P. Act empowering the Commission to examine the documents filed by a political party at the time of its registration and the application so filed must be accompanied by its constitution/rules which should contain a specific provision to the effect that the association/body would bear true faith and allegiance to the Constitution of India as by law established and to the principles of socialism, secularism and democracy and

A that they would uphold the sovereignty, integrity and unity of India. However, it has been suggested that Election Commission does not have the power to deregister/ derecognise a political party under the R.P. Act once it has been registered. A registered political party is entitled to recognition B as a State or national party only upon fulfilling the conditions laid down in paragraph 6A or 6B of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as "Symbols Order"). The Election Commission in exercise of its powers under Paragraph 16A of Symbols Order, can take C appropriate action against a political party on its failure to observe model code of conduct or in case the party fails to observe or follow the lawful directions and instructions of the Election Commission. The model code of conduct provides certain guidelines *inter-alia* that no party or candidate shall D indulge in any activity which may aggravate existing differences or create mutual hatred or cause tension between two different castes and communities, religious or linguistic and no political party shall make an appeal on the basis of caste or communal feelings for securing votes. It further provides that no religious place shall be used as forum for election propaganda. However, E the Election Commission only has power to control hate speeches during the subsistence of the code of conduct and not otherwise.

5. The Law Commission of India has prepared a F consultation paper and studied the matter further on various issues including whether the existing provisions (Constitutional or Statutory) relating to disqualification to contest elections need to be amended?

G The Law Commission had earlier in its 1998 recommendations emphasised on the need to strengthen the provision relating to disqualification and in view thereof, it has been submitted by Ms. Arora that it is only for the legislature to amend the law and empower the Election Commission to perform a balancing act in following the mandate of the relevant H Constitutional and statutory provisions.

6. The Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 11, succeeded in bringing out the "human rights" obligations leading to control on publication of "hate speeches" for protection of human rights defining the expression "hate speech" observing that the definition of "hatred" set out in *Canada (Human Rights Commission) v. Taylor,* (1990) 3 SCR 892, with some modifications, provides a workable approach to interpreting the word "hatred" as is used in legislative provisions prohibiting hate speech. Three main prescriptions must be followed. First, courts must apply the hate speech prohibition objectively. The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred. Second, the legislative term "hatred" or "hatred or contempt" must be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other harmful effects. Third, tribunals must focus their analysis on the effect of the expression at issue, namely whether it is likely to expose the targeted person or group to hatred by others. The repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment is irrelevant. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.

7. 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

A 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
B the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.

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

C "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."

D 9. In *Ramesh v. Union of India,* AIR 1988 SC 775, while dealing with the subject, this Court observed:

"..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
E minds, nor of those who scent danger in every hostile point of view."

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

| Sl.No. | Statute | Provisions |
|---|---|---|
| 1. | Indian Penal Code, 1860 | Sections 124A, 153A, 153B, 295-A, 298, 505(1), 505(2) |
| 2. | The Representation of People Act, 1951 | Sections 8, 123 (3A), 125 |

G

H

| | | |
|---|---|---|
| 3. | Information Technology Act, 2000 & Information Technology (Intermediaries guidelines) Rules, 2011 | Sections 66A, 69, 69A Rule 3(2)(b), Rule 3(2)(i) |
| 4. | Code of Criminal Procedure, 1973 | Sections 95, 107, 144, 151, 160 |
| 5. | Unlawful Activities (Prevention) Act, 1967 | Sections 2(f), 10, 11, 12 |
| 6. | Protection of Civil Rights Act, 1955 | Section 7 |
| 7. | Religious Institutions (Prevention of Misuse) Act, 1980 | Sections 3 and 6 |
| 8. | The Cable Television Networks (Regulation) Act, 1995 and The Cable Television Network (Rules), 1994 | Sections 5,6,11,12,16, 17, 19, 20 & Rules 6 & 7 |
| 9. | The Cinematographers Act, 1952 | Sections 4, 5B, 7 |

11. 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 7th Schedule of Constitution, the responsibility of registration and prosecution of crime including those involved in hate speeches, primarily rests with the respective State Governments.

12. The Central Government has also issued revised

A guidelines to promote communal harmony to the States and Union Territories in 2008 which provides *inter-alia* that strict action should be taken against anyone inflaming passions and stroking communal tension by intemperate and inflammatory speeches and utterances.

B

The "Guidelines On Communal Harmony, 2008" issued by the Ministry of Home Affairs, Government of India seek to prevent and avoid communal disturbances/riots and in the event of such disturbances occurring, action to control the same and measures to provide assistance and relief to the affected C persons are provided therein including rehabilitation. The detailed guidelines have been issued to take preventive/ remedial measures and to impose responsibilities of the administration and to enforce the same. Various modalities have been formulated to deal with the issue which have been D emphasised on participation of the stake holders.

13. So far as the statutory provisions, as referred to hereinabove, are concerned, Section 124A of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') makes E 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)

14. Sections 153A and 153B IPC makes any act which F 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 G 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 courts time and again, with powers come responsibility.

H

15. Section 295A IPC deals with offences related to religion and provides for a punishment upto 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, has upheld the Constitutional validity of the section.

16. 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 295A 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 upto 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 penalizing 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 penalized under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

18. Section 123(3) of the R.P. Act, provides *inter-alia* that no party or candidate shall appeal for vote on the ground of religion, race, caste, community, language etc.

Section 125 of the R.P.Act further restrains any political party or the candidate to create feelings of enmity or hatred between different classes of citizens of India by making such an act a punishable offence.

A 19. Article 20(2) of the International Covenant on Civil & 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.

B Similarly Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD) 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.

C 20. Thus, it is evident that the Legislature had already provided sufficient and effective remedy for prosecution of the author, who indulge in such activities. In spite of the above, petitioner sought reliefs which tantamount to legislation. This D Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the judges should only reflect the law regardless of the anticipated consequences, E considerations of fairness or public policy and the judge is simply not authorised to legislate law. "If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The court cannot re-write, re-cast or reframe the legislation for the very good reason that it has no power to F legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts in India has raised pubic eyebrow time and again. Though judicial activism is regarded as the active interpretation of an existing provision with the view of enhancing the utility of G legislation for social betterment in accordance with the Constitution, the courts under its garb have actively strived to achieve the constitutional aspirations of socio-economic justice. In many cases, this Court issued various guidelines/directions to prevent fraud upon the statutes, or when it was found that certain beneficiary provisions were being mis-used by the H

undeserving persons, depriving the legitimate claims of eligible persons. (See: *S.P. Gupta v. Union of India & Anr.*, AIR 1982 SC 149; *Bandhua Mukti Morcha v. Union of India & Ors.*, AIR 1984 SC 802; *Union of India & Anr. v. Deoki Nandan Aggarwal*, AIR 1992 SC 96; *Supreme Court Advocates-on-Record Association & Ors. v. Union of India*, AIR 1994 SC 268; *Vishaka & Ors. v. State of Rajasthan & Ors.*, AIR 1997 SC 3011: *Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass & Anr.*, (2008) 1 SCC 683; and *Common Cause (A Regd. Society) v. Union of India & Ors.*, (2008) 5 SCC 511).

21. While explaining the scope of Article 141 of the Constitution, in *Nand Kishore v. State of Punjab*, (1995) 6 SCC 614, this Court held as under:

> *"Their Lordships decisions declare the existing law but do not enact any fresh law, is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing, but much beyond that. The Court as a wing of the State is by itself a source of law. The law is what the Court says it is."*

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.

A 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. & Anr. v. U.P. Rajya Khanij Vikas Nigam Sangarsh Samiti & Ors.*, (2008) 12 SCC 675, has held as under:

B

> *"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*
> C *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 added)

D 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 Ahmed,* AIR 1945 PC 18; *State of Haryana & Ors. v. Ch. Bhajan Lal & Ors. v.,* AIR 1992 SC 604; and *Akhilesh Yadav Etc. v. Vishwanath*
E *Chaturvedi,* (2013) 2 SCC 1).

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
F 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
G of a manageable society. [See: *Beauharnais v. Illinois, 343 U.S. 250 (1952); Brandenburg v. Ohio,* 395 U.S. 444 (1969); and *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538 (1992)].

26. In view of the above, the law can be summarised to

H

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 herein above, 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.

However, in view of the fact that the Law Commission has undertaken the study as to whether the Election Commission should be conferred the power to de-recognise a political party disqualifying it or its members, if a party or its members commit the offences referred to hereinabove, we request the Law Commission to also examine the issues raised herein thoroughly and also to consider, if it deems proper, defining the expression "hate speech" and make recommendations to the

A Parliament to strengthen the Election Commission to curb the menace of "hate speeches" irrespective of whenever made.

With these observations, the writ petition stands disposed of.

B A copy of the judgment be sent to the Hon'ble Chairman of Law Commission of India.

D.G. Writ Petition disposed of.