In RE: Prashant Bhushan Case: A missed opportunity for Examination of Contempt Law

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Abstract

The law of criminal contempt and its arbitrary use has garnered much academic attention in major liberal democracies. The evolution of a liberal free speech jurisprudence through landmark decisions of constitutional courts in India, and its apparent inconsistency with the vague use of criminal contempt jurisdiction by these courts has been a problematic trend of our times. Recently, this issue was before the Apex Court in the case of "RE: Prashant Bhushan" where the decision of the Court re-highlighted the judicial trend on this issue. This case was widely discussed and criticized for a narrow application of criminal contempt power and failure to maintain balance vis-a-vis a broader fundamental right of freedom of legitimate expression. The questions which arise after this case are multi-faceted and revolve around the use of the concerned law itself. Therefore, this piece seeks to explore those questions and their relevance by questioning the exercise of contempt itself. In this piece, I shall examine the inherent contempt power of the court and its tussle with the fairness of proceedings. Subsequently, as a core part of this piece, I shall flag the issue of using obsolete definitions of criminal contempt and their relevance in present times. It contains observations on the obsoleteness of contempt and analyses its improper use. By placing reliance on these observations, an attempt has been made to give a brief critique of the contempt power. At the end, this piece argues for using various standard judicial tests and points to their non-application in this case.

Keywords: Criminal Contempt, Scandalisation of Court, reasonableness, judicial tests, precedent, jurisdiction

1. Introduction

The attempts of State to trample upon the individual liberties are often challenged in the Constitutional courts. However, little attention is paid on the cases where the judiciary, seen as *Sentinel on qui vive* is accused of such attempts. One such stark instance was the recent case of *IN RE: PRASHANT BHUSHAN & ANR*.[1] Due to the initiation of proceedings on a *Suo Moto* basis, this case exposed the issues hidden since long behind the law of criminal contempt. Though not criticized for its legal reasoning because it was a precedent-based ruling, this judgment calls for a fresh approach to the law of contempt itself. Running into 108 pages, it has added itself in a list of judgments where the courts were disinclined to take a liberal approach by avoiding the question of the vague and troublesome application of criminal contempt.[2] But before going into the broader contours highlighted by the case, it would be pertinent to get a brief account of the undisputed facts of this case as follows.

2. Facts of the Case

The case was taken up by the Supreme Court of India on a private petition alleging that two tweets by the alleged contemnor Prashant Bhushan constituted an offence of criminal contempt. The Court after considering all facts decided to place this matter before a three judges' bench by taking a *Suo Moto* cognizance of an alleged contempt. In the hearing, the defence submitted its arguments on two major issues. The first issue consisted of an alleged procedural error by the Court in the initiation of proceedings. Here, it was argued that contempt proceedings are subject to the Contempt of Courts Act, 1971 which provides under S. 15(1) that in case of criminal contempt filed by any other person other than the Attorney General, the express consent of the latter is necessary. Therefore, it was submitted that since this has not been followed in this case, the proceedings should be vitiated.[3]

The second issue dealt with the nature, limit, and reasonableness of the speech which allegedly amounted to contempt. It was contended that since the tweets were a general expression of anguish, without targeting the Court, it can't be treated as contempt. Further,

[1] 2020 SCC Online SC 646.
[2] See, *Ashwini Kumar Ghosh v. Arbinda Bose*, AIR 1952 SC 369; *Suo Moto Action by High Court of Allahabad v. State of UP.*, AIR 1933 All 211.
[3] *Supra* note 1, at para 9.

it was argued that all the surrounding facts at the time of tweets should be taken into consideration. In a nutshell, Defence submitted that these tweets fall within the ambit of reasonable criticism since they were merely an expression of opinion, which has been held as a fundamental right of speech.

The bench while rendering its judgment addressed both issues and rejected the first one which was concerned with error in the initiation of proceedings. For this, the bench relied heavily on a recent case of *Re: Vijay Kurle*[4] where it was held that the power of both High Courts and Supreme Court to take *Suo Moto* cognizance of criminal contempt emanates from Art. 129 of the Constitution and courts are not bound to follow the procedure of Contempt of Court Act, 1971.[5] After holding the first part as a doubtful submission, the bench dealt with the second point that whether tweets amounted to contempt or not. While discussing it, the Court elaborately defined the established law on criminal contempt. Cumulatively backing its judgment by the law propounded in various cases, it held that the tweets fall under the definition of scandalization of the court, thereby amounting to criminal contempt. Of equal relevance is the fact that the bench chose not to liberally expound the law on the controversial term "scandalisation of the Court" and confined its approach by sheltering the decision under precedents.

Since this decision was based on precedents, it would be unwise to go into its correctness from a legal viewpoint. Therefore, rather than delving into the reasoning except at few places, I shall try to examine the broader questions of doubtful exercise of contempt jurisdiction, lack of a progressive approach in Court's dealing, and lastly, a critique of this law.

3. Criminal Contempt Jurisdiction – Tracing its Boundaries

Immediately after the commencement of proceedings, the Court received a petition, calling for testing the constitutional validity of the law of contempt laid down under the Act.[6]

[4] 2020 SCC Online SC 407.
[5] Art 129 of the Constitution of India states that: The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself
[6] Legal Correpondent, "N Ram, Arun Shauri and Prashant Bhushan move Supreme Court against Contempt of Court Act", *The Hindu* Aug.1, 2020, *available at* <https://www.thehindu.com/news/national/n-ram-arun-

Though it was withdrawn by the parties during the proceedings, it ensued in a debate that whether there is a place of such a law in the modern Indian legal system or not. For years, it has been the main question mark on the use of contempt law. Therefore, this case has necessitated an examination into its suitability as a law that satisfies the requirement of inflicting minimum possible harm on other rights.

At the outset, the Court broadly interpreted its power of Contempt under Art. 129. As a result of which it assumed sweeping contempt jurisdiction and held conclusively that no legislative enactment can stultify it, which is subject only to its own rules and natural justice. By relying on the recent case of *Re: Vijay Kurle*, it conclusively observed that:

> *"It is also equally settled, that as far as the Suo moto petitions are concerned, there is no requirement for taking consent of anybody, including the learned Attorney General …. It is equally well settled, that once the Court takes cognizance, the matter is purely between the Court and the contemnor. The only requirement is that the procedure followed is required to be just and fair and in accordance with the principles of natural justice."*[7] (Emphasis mine)

Taking almost similar view on the first submission of defence that the Court should follow the procedure established by the Act, it further remarked that:

> *"The Court also held that Section 15(of 1971 Act) is not a substantive provision conferring contempt jurisdiction and, therefore, is only a procedural section especially in so far as Suo moto contempt's are concerned. It is thus clear that the powers of the Supreme Court to punish for contempt committed of itself is a power not subject to the provisions of the Act."*[8] (Emphasis mine)

As an essential facet of the first point of arguments, defence had also questioned the decision of the Court to invoke the contempt jurisdiction. By placing reliance on the Contempt of Courts Act, 1971, it submitted that for convicting someone, it should be proved that comment/publication in question interferes substantially with the administration of justice.[9] In counter of this submission, as it is reproduced above, the

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[7] *Supra* note 1, at para 18.

[8] *Id.*

[9] See, S. 13 of the Contempt of Courts Act, 1971.

bench declined to accept the view that the Court is bound by the provisions of this Act. Additionally, in parts of its decision, it held that these enactments may act as a guide but it will follow its own rules. Subsequently, the Court referred to its rules on contempt procedure known as "The Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975". However, this reasoning of the Court requires an examination. A close perusal of these rules when compared with the S. 13 of the Act of 1971 leaves doubt about the hearings being just and fair. S. 5 of the rules lays down that there should be only a *Prima Facie* case of contempt for issuing notice to the contemnor. Apart from this, the question of substantial interference with justice is not discussed anywhere in the rules as well as in the judgment. Not only this but the precedents cited by the bench also didn't answer this question of substantial interference being a pre-requisite for moving wheels of contempt law. Therefore, in the absence of the application of S. 13 of the Act, this power enunciated on basis of these rules appears to be of grey and dubious nature.

Taking all these remarks into consideration, two points arise here for our examination. First, the scope and reach of this contempt power; and the second, whether the provisions are neatly defined for their application or not.

4. Scope of the Contempt Power

As it is in common knowledge, the contempt jurisdiction has been used by the courts in India since they have borrowed this concept from England. But barring certain exceptional cases, the contempt jurisprudence in India is partially settled and few cases are also found to be grossly inconsistent in their application.[10]After the development of vast liberal jurisprudence on the freedom of speech, its necessity in its current form is seen as somewhat incompatible or unbalanced due to non-uniform judicial pronouncements. Due to this discord, its unchecked and continuous use has also been termed as "anarchic" and "anachronistic".[11] Even when the Courts frequently cite quotations from various English as well as Indian cases on its cautious and sparing use, it's perceptible that they have not

[10] Nina R. Nariman, "Contempt of Court in India: A Critique*"*, 5 *SUPREME COURT CASES* 34 (2011); Also see, Samaraditya Pal, *The Law of Contempt- Contempt of Courts and Legislatures* (LexisNexis, 2012).
[11] J. Markandey Katju, "*Contempt of Court: The Need for a Fresh Look"*, Lecture at National Judicial Academy, Bhopal (Jan. 20, 2007); also see, *S. v. Mamabolo* [2001] 3 SA 409.

been applied in a proportion to their references. In this judgment and also in various others, the Court twice highlighted the need for a procedure based on natural justice. But surprisingly, it is to be noted that shortly after framing of its rules on contempt in 1975, CJ Beg hauled *Times of India* for an article which was directed against him, thus making him a judge in his own case.[12]

In the present case, while justifying its use of wide powers of criminal contempt, the Court relied on a constitution bench judgment of *Brahma Prakash Sharma*[13]and held:

> *"it is not necessary to prove affirmatively, that there has been an actual interference with the administration of justice by reason of such defamatory statement and it is enough if it is likely, or tends in any way, to interfere with the proper administration of justice."* (Emphasis mine)

A close of reading of this para along with the above-mentioned paras certainly gives the impression that the power of the Courts to hear contempt matter is neither checked by any enactment nor it's necessary to prove any substantial harm to the administration of justice in such cases. It can be well-argued that such a vague definition lacks the requirement of reasonableness as per current judicial standards. The test of reasonableness, which has been refined from time to time consists of an assessment of the surrounding environment, nature of rights infringed, the proportionality of action taken by the court, and its impact on the corresponding right.[14] Unless and until the Court considers all these principles along with other such balancing tests propounded in course of its history for preserving the freedom of speech, the chances of erosion through such pronouncement remain high.[15] This observation comes precisely due to the reason that though contempt power is necessary, equally important public criticism has to be given free streams.[16]

5. Adjudication with an obsolete mechanism

Though the power of contempt is without any express limit in the Constitution, Court's jurisdiction in such matters was shaped to a large extent by the different contempt of Court

[12] *Re: S. Mulgaokar,* (1978) 3 SCC 339.
[13] *Brahma Prakash Sharma and Others v. The State of Uttar Pradesh,* 1953 SCR 1169.
[14] *State of Madras v. V. G Row,* AIR 1952 SC 196.
[15] *Supra* note 12.
[16] *Perspective Publication(p) Ltd. v. The State of Maharashtra,* AIR 1971 SC 221.

Acts.[17] Prior to these enactments, the Court decided cases on its own terms, mostly by relying on the common law. It meant that the definitions were framed by the judiciary alone for a long time.[18] To put it simply, there was no sound judicial test, no binding law, lack of a fair procedure as per current standards, and most importantly, an unclear mechanism. But even after these enactments, there is no noticeable change in the trend till now except a few law expounding judgments such as *Re: S. Mulgaokar*.[19]

As noted, before, one consistent feature of all cited precedents was the use of the term "Scandalisation of the Court". In the cases of criminal contempt, it has been used even before independence, and after so many years, this case is also no exception to this rule. In this case, the Court again cited *Brahma Prakash Sharma* case and defined it:

> *"There are indeed innumerable ways... to obstruct the due administration of justice in courts. One type of such interference is… an act or publication which "amounts to scandalising the court itself"….it is an attack on individual Judges or the court as a whole with or without reference to particular cases casting unwarranted and defamatory aspersions upon the character or ability of the Judges. Such conduct is punished as contempt for this reason that it tends to create distrust in the popular mind and impair confidence of people in the courts which are of prime importance to the litigants in the protection of their rights and liberties."*[20]

Taking this definition as a guiding principle for conviction, it next observed that such a publication (tweets here) *need not be an actual interference with the administration*. These observations ended ultimately as an endnote when the Court categorized the tweets as a publication that undermined the authority of the Court by Scandalising it.

Undoubtedly, the question put forth against criminal contempt is the defining line and uncertainty of the criticism which shall be construed as contempt. Needless to add, the role

[17] The first enactment on contempt was the The Contempt of Courts Act, 1926 which was followed by the The Contempt of Courts Act, 1951. The present act governing contempt issues is the Contempt of Courts Act, 1926.

[18] Mriganka Shekhar Dutta and Amba Uttara Kak, "Contempt of Court: Finding the Limit", 2 *NUJS L Rev* 55 (2009).

[19] The judicial test given by J. V. Krishna Iyer for determination of the Contempt remains a progressive reading of this law. Also a few judgements have considered the test of 'imminent danger' to the administration of Justice by comments of contemnor. But the bench didn't consider this test along with the substantial damage test laid down in *S. Mulgaokar*. For the application of 'imminent danger' test in contempt cases, See, *P.N Duda v. P. Shivshankar & Others* (1988) 3 SCC 167.

[20] *Supra* note 1, at para 21.

of public confidence in judicial administration is quite important. But it is equally true that it is also prone to be degraded by improper application of contempt.[21]In contrast to India, the offence of scandalization has been abolished in England in 2012 as it was deemed to be obsolete based on a report by the law commission.[22] Its conflict with the free speech can also be well understood by a landmark decision of the US Supreme Court where it was held that for restricting this, there should be a 'clear and imminent danger' to the judicial process.[23] It was an important observation seeing the stifling effect of contempt on free speech. This 'Imminent and clear danger' test has been also followed by the Supreme Court of India in various landmark cases on free speech and stands as settled law.[24]However, it is unclear why the Court didn't apply its own test in this case where the same freedom was at stake. It also recorded that *it shall not go into the truthfulness of the tweet and held that it undermines the dignity of the Court its opinion*.[25] On its face, it appears that truth is not a defence in such cases due to the nature of the comments and its effect on the public perception. However, it only makes the process ambiguous and leaves a panoptic discretionary playing field for individual judges. Moreover, due to the subjectivity of public perception in the eyes of individual judges, a comment can be contempt for a sensitive judge (in contempt matters) but the same is not true in the case of a liberal judge.

Seen in this way, the law ultimately becomes a matter of individual judge's taste of public discourse which is quite problematic.[26] This was also evident in this case. Additionally, sound judicial response to few important questions such as what exactly is the composition of the public in whose eye reputation is damaged; is there a clear distinction between an aware citizen and a layman in contempt matters; is there any solid empirical analysis that punishing for contempt upholds the public faith; what should be the test for determination of the truth or accuracy of the contemptuous speech; what is the minimum threshold to initiate proceedings, is yet to given by the Courts. These questions are important because there are innumerable instances where the judgments of courts on criminal contempt lacks

[21] Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* (Penguin Random House, 2017).
[22] Law Commission, Contempt of Court (Law Com CP No 209, 2012).
[23] *Bridges v California*, 314 US 252, (1941).
[24] *Shreya Singhal v. Union of India* (2013) 12 SCC 73.
[25] *Supra* note 1, at para 71.
[26] Robert Martin, "Criticising the Judges", 28(1) *McGill Law Journal* 15 (1982).

any ground on which substantial interference with the administration of justice can be proved. That said, there are several cases where the charges of contempt are so petty that the justifiability of conviction is beyond legal reasoning.

It turns out to be an inimical approach of courts towards other civil rights when contempt powers are used without checks and balances. Presently, there seems to be no strong test adopted by the court to examine the legitimacy of alleged contempt. But this is a debatable issue because as far as the law on fundamental rights is concerned, it's settled through different tests for preserving the different rights. However, none of them were applied in this case even when there were some binding precedents before it. It is well manifested in the above-mentioned comments that there was a scope for the application of the test of substantial damage to the administration of justice, imminent danger, and undoubtedly the basic test of reasonableness. Without a fair application of these tests, the subjectivity and scope of court while convicting someone gets extreme. There appears to be no cogent reason against the application of a fair and reasonable test for curbing the power of contempt. Sadly, it remains a fact that in many cases like the present one, convictions were made without considering these tests.

6. Conclusion

As the analysis highlights, this case serves as a keyhole to look into the issues which are neglected for long due to an inconsistent jurisprudence. The Court, shortly after delivering its judgment, passed an order which seeks to examine few issues regarding a public statement on the judiciary, allegations by judges, and similar questions on 0the limit & procedure of contempt law.[27] The reason underlying this order was the renewed focus of scholars and legal fraternity on the chilling effects of contempt. Whatever be the purpose and scope of use of contempt power of courts, cases like the present one provides an opportunity for the courts to re-examine its application in a time when the legal system is regularly getting fused with progressive interpretations. It must understand that behind an

[27] Legal Correspondent, "SC to examine when corruption allegations against judiciary can be made public", *The Hindu* Aug. 1, 2020, *Available at* <https://www.thehindu.com/news/national/sc-to-examine-when-corruption-allegations-against-judiciary-can-be-made-public/article32374297.ece> (last visited on 04 Oct. 2020)

assertion of maintaining public confidence, there lies an equally important right of an individual's expression, which also outweighs the contempt power in the larger public interest. Along with this, the dangerous counter-effect of the silence of free criticism can't be altogether denied. Though the Court noted in its judgment that *Bona Fide* comments even when they are excessive to the limit is protected, it has failed to apply the letters in their spirit. Therefore, in light of these observations, it must not be forgotten that if the trend followed in this case continues, it will only bring more disrepute to the Court.