'C.R.'

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C).NO.40775 OF 2017 (V)

&

W.P.(C).NO.2949 OF 2018 (P)

Dated this the 15th day of May, 2018

JUDGMENT

A former Chief Minister, and a former Home Minister, of the State of Kerala, are the petitioners in these writ petitions that impugn the report of a Commission of Inquiry that was constituted to inquire into allegations pertaining to, what has now come to be infamously known as, the Solar Scam in Kerala.

2. In June 2013, one Saritha S. Nair and Biju Balakrishnan were arrested in a series of cheating cases that were filed on the basis of complaints received from various persons who claimed to be victims of fraudulent activities carried on by the said two persons. The offence alleged in those cases was that the duo cheated various customers in the State of Kerala to the tune of approximately Rs.6 Crores of Rupees by promising to install Solar Energy Panels and Wind Mills. Probably on account of the enormity of the cheating and the public attention that it attracted, the cases came to be collectively

known as the Solar Scam. The scam attracted media attention because the duo, along with some of their aids through a Company called Team Solar Renewable Energy Solutions (P) Ltd, claimed that they had high connections with well-known politicians and this claim was used to impress their customers.

3. It would appear that 36 criminal cases were registered against Team Solar and considering the public demand, the State Government constituted a Special Investigation Team to inquire into the matter. After an investigation conducted by the said team, final reports were filed in the said 33 cases. The details of the cases lodged against the Solar Scam accused are given in tabular form in Ext.P3 produced in W.P.(C).No.40775 of 2017. On account of continued political objections, however, the State Government appointed a one-man commission of Inquiry headed by Justice (Retd.) G. Sivarajan, under the Commissions of Inquiry Act, 1952, vide Ext.P4 Notification No.77989/SSA2/2013/Home dated 28.10.2013, published in the Kerala Gazette (Extraordinary) No.3096, Vol.II dated 29.10.2013. The terms of reference (hereinafter referred to as "ToR" for brevity) were as follows:

i. Whether there is any substance in the allegations related to the Solar Scam and allied financial transactions raised in the floor of Kerala Legislative Assembly and outside? If so what? Who are the persons responsible for the same?

ii. Whether the Government has sustained any financial loss in connection with transactions involved in the said allegations? If so how much? Whether this could have been avoided? Who are the persons responsible for the same?

iii. Whether the Government has issued any work orders or any other orders illegally to the company or persons involved in the said allegations referred above? If so whether the Government have sustained any financial loss on that behalf? If so how much? Whether this could have been avoided? Who are responsible for the same?

iv. Whether any lapse occurred in dealing with the complaints being raised since 2005 with regard to the persons involved in the solar scam and allied financial transactions? If so, who are responsible for them?

v. Whether the existing laws and arrangements are adequate to prevent cheating and deception of the public extensively by giving false promises and to take action against these? If not, what are the suggestions for making stringent laws and for taking other appropriate measures to eliminate such cheating and deception?

vi. Suggestions to get back the amount lost to those who are subjected to financial scams as referred above?

4. One year into the inquiry, the Commission opined that there was some ambiguity in the first ToR and, after collecting further material from the State Government, the Commission, vide Ext.P6 order dated 07.11.2014, proceeded to sum up the allegations under the first ToR as under:

> "The Chief Minister, his office, his personal assistants, his personal security officer, close party worker and his aid at Delhi are all partisans to the solar scam deals of the prime accused Saritha S.Nair and Biju Radhakrishnan and rendered all help to them for cheating their solar scam customers in one way or the other. Though Tenny Joppan was made an accused, the Chief Minister, his personal staff, his personal security officer and his aid at Delhi, all similarly placed were purposely excluded from the array of accused by the Special Investigation Team by dubious methods. The then Home Minister Sri. Thiruvanchoor Radhakrishnan had also helped the solar scam accused Saritha S.Nair and Shalu Menon in escaping from the clutches of law by his connection with them and also took interest in protecting the Chief Minister by all means by using his position as the Home Minister which is also indicative of his involvement in the solar scam affairs of the accused. The phone call details from the mobile phone used by Saritha Nair available with the media opened the gate for connecting some of the Cabinet Ministers, their Private Secretaries, one former Central Minister, many members of the Kerala Legislative Assembly and other political leaders in the solar scam deals of Saritha S.Nair. The reports also disclose the call details of Saritha S.Nair with high personalities which is indicative of their connection with the solar scam accused."

5. In the inquiry proceedings that followed, the Commission examined 214 witnesses and marked 827 documents. The witnesses examined included the complainants in the criminal cases lodged against the solar scam accused, the accused themselves, the MLA's

who raised objections in the floor of the Assembly, representatives of various media, persons who were impleaded as parties before the Commission and leaders of various political parties. Thereafter, the Commission submitted its report, in four volumes, to the State Government on 26.09.2017.

6. Through a press note dated 11.10.2017 (Ext.P18), the State Government declared that certain decisions had been taken by the Government based on the report of the Commission. Thereafter, on 08.11.2017, pursuant to a cabinet meeting, the State Government also approved the findings and recommendations of the Commission and issued certain directions with regard to the steps to be taken pursuant to the report. The said Government order dated 08.11.2017 is produced as Ext.P21 and the English translation of it reads as under:

Government of Kerala

Abstract

Home Department – Decision on the findings of recommendation of Justice Sivarajan Commission regarding solar scam and ancillary financial transactions – orders issued.

Home (Secret Section A) Department)

G.O.(MS) No.231/2017/Home **Dated, Thiruvananthapuram, 8.11.2017**

Read:
1) G.O.(P) No.344/60/Home dated 3.6.1960
2) G.O.(MS) No.525/64/Home dated 21.12.1964
3) G.O.(P) No.65/92/Vig. Dated 12.5.1992.
4) G.O.(P) No.15/97/Vig. Dated 26.3.1997
5) G.O.(P) No.18/97/Vig. Dated 5.4.1997
6) G.O.(Rt) No.4/02/Vig. Dated 3.1.2002.
7) Proceedings No.D1/57609/2013 dated 14.6.2013 of the State Police Chief
8) G.O.(Rt) No.2263/2013/Home dated 17.8.2013.
9) Govt. Notification No.77989/SSA2/2013 dated 28.10.2013 issued as SRO No.867/2013.
10) G.O.(P) No.9/2017/Vig. Dated 29.3.2017.
11) Solar Commission report submitted by Justice G. Sivarajan on 26.9.2017
12) Letter No.SS.28/2017 dated 10.102017 of the Advocate General
13) Letter dated 10.10.2017 of the Director General of Prosecution
14) G.O.(Rt) No.2672/2017/Home dated 21.10.2017
15) Legal advice dated 6.11.2017 tendered by Dr. Justice Arijit Pasayath

ORDER

Justice (Rtd.) Sivarajan has been appointed on 28.10.2013 as the enquiry commission to probe into the solar scam and its allied financial transactions and the Commission by adducing evidences for four years by examining 214 witnesses, 812 documents, considering the arguments of the parties concerned submitted report, containing 1073 pages in four volumes, before the Government on 26.9.2017. It has been found in the report that assistance have been given to the solar accused persons misusing the Government machinery to deceive the public, huge amount have been accepted and made corruption and sexual exploitation at large scale by the higher authorities themselves. On the basis of the detailed examination of the report the conclusions and recommendations thereon are accepted generally and issue orders accordingly.

On the recommendations, based on the legal opinion tendered by the Advocate General, Director General of Prosecution and former Supreme Court Judge Justice Arijith Pasayath orders are issuing taking the following action:

(i) It is understood from the Report that political, bureaucratic, administrative heads, their staff and persons connected with them have been accepted large

amounts as bribe and helped the Solar Company to cheat their customers. Enquiry in the above findings should be conducted as per provisions of the Cr.Pr.Code, PC Act and IPC.

(ii) It is seen in the Report that the SIT appointed vide papers 7 & 8 read above has adopted dubious methods to protect the political – bureaucratic administrative persons involved in the solar crimes. It is also seen that the SIR has not properly examined the CDR, evidences and other documents which show the criminal roles played by State Ministers, Govt. officials, Union Ministers, MLAs and the Police officers who investigated the cases. The Report reveals that one State Minister, Officers who investigated the solar crimes and who supervised them, before the SIT was formed have attempted to sabotage the enquiry and destroy evidences. The Commission has found out that former MLAs have tried to settled the solar cases with a view to protecting the administrative heads. Enquiry on the above matters as per provisions of the Cr.PC, PC Act, IPC and other relevant laws should be conducted.

(iii) The Report shows that the persons mentioned in the letter dated 19.07.2013 written by one of the solar accused were in contact with her and her advocate over phone. Enquiry should be made whether such contacts were to sabotage the enquiry.

(iv) There are evidences to show that there were sexual advances to one of the accused in the solar crimes. The matters mentioned in the letter written by her on 19.07.2013 also have to be enquired into as per the provisions of the Cr.PC, PC Act, IPC and other relevant laws.

(v) The Commission has recommended strong action against the Secretary of the Kerala Police Association for indiscipline. It has also suggested to explore the possibility of applying PC Act against him. Departmental action also should be taken against him after conducting departmental enquiry. The allegations against him should be enquired as per provisions of the Cr.PC, PC Act, IPC and other relevant laws.

(vi) The Commission has proposed the formation of an effective Agency to suggest measures by which the discipline among the police force can be raised. The Commission found that the jail and police officials are not taking adequate precautionary steps when criminals and undertrials are taken to the courts. Mr.Biju Radhakrishnan, accused in the solar scam is a criminal sentenced to life imprisonment in a murder case. Even amidst intelligence reports that he is likely to jump the police custody, only 2 police constables were assigned with the task of taking him by bus/train to the courts inside and outside the State. It is inevitable that strict directions should be given in the case of prisoners like him. Adequate police escort should be provided by the jail and police authorities in such cases. Separate notification appointing a 3 member Commission with Justice (Retd) C.N.Ramachandran nair as Chairman will be issued to propose reforms to be made in the police and jail departments.

(vii) In order to ensure security for the Secretariat, CCTV visuals should be preserved at least for one year for which 500 GB hard disc should be fixed and the visuals in it transferred and preserved in every 15 days. The Home Addl. Chief Secretary is entrusted with the task of examining this issue in detail.

(viii) ANERT is functioning under the Power Department. It is to be reorganised as nodal agency to propagate non-conventional energy fruitfully using the projects proposed by the Central Government and taking them forward. The Power Department Additional Chief Secretary is entrusted with the task of examining it.

(ix) It it seen in the Report that besides accepting bribe money, sexual satisfaction was obtained from one of the accused in the solar case in return for special favours. The Commission has recommended that the State Government should seriously consider the applicability of the provisions of the PC Act against whom corruption,

acceptance of bribe money, illegal gratification are alleged on the basis of evidences produced before the Commission. Enquiry should be made against all persons involved in the corruption and mentioned in the Report as per the provisions of PC Act.

(x) In addition to the aforesaid issues, enquiry should be done on all new complaints, documents and evidences with regard to the solar scam, made available after the publication of Justice Sivarajan Commission Report. Enquiry could also be made if any new crimes are generated from the previous enquiry.

Special investigation team as per section 21(2)(b) for conducting investigations above said is hereby constituted and orders issued. Investigation team would be as follows:

1) Shri Rajesh Diwan, DGP North Zone (Chief of the Investigation Team)
2) Shri Dinendra Kashyap, IG, PHQ
3) Shri P.B.Rajeevan, S.P., Crime Branch, Kozhikode
4) Shri E.S.Bijumon, Dy.S.P., Vigilance, S.I.U-1, Thiruvananthapuram
5) Shri A.Shanavas, Dy.S.P., CBCID, Thiruvananthapuram
6) Shri B.Radhakrishna Pillai, Dy.S.P., SBCID, Kollam Dettachment

Shri Dinendra Kashyap I.G.P, Police Head Quarters shall be the Station House Officer as per Section 2(0) of the Code of Criminal Procedure. Separate Orders will be issued regarding this.

Orders will be issued after taking appropriate decision by the Government on the recommendations of the Special Investigation Team through the State Police Chief, for including new officials or for excluding any one existing in the investigation team.

The Special Investigation Team is hereby authorised to conduct investigations in the above said subjects and to submit charge sheet before the court of any offence is

revealed. Not withstanding anything differently mentioned about investigation of the offences under the Prevention of Corruption Act as provided in the Government orders read as 1 to 6 and in 10.

Separate order and notification shall be issued if it becomes necessary regarding this.

Special investigation team constituted as per orders read as 7 and 8 is hereby dismissed. Newly constituted special investigation team shall take lawful further steps in the cases pending now before various courts relation to solar scam.

By Order of Governor

Dr. K.M. Abraham
Chief Secretary

Additional Chief Secretary (Home & Vig.) Department
Additional Chief Secretary (Power) Department
Director General of Police
State Intelligence Chief
Shri Rajesh Diwan, DGP, North Zone
Director, Vigilance & Anti-Corruption Bureau
Director General of Police (Crimes)
Advocate General (in name cover)
Director General of Prosecution
Finance Department
Law Department
Vigilance Department
General Administration (Special C) Department
Home (A) Department

Forwarded/By Order

Sd/-

Section Officer

7. The Commission report itself was placed before the Kerala Legislative Assembly in a special session on 09.11.2017 and was also published by the Government on its website as well as in the Social

media. An action taken report (Ext.P20) was also tabled along with the Commission report. Immediately after tabling the report in the Legislative Assembly, a further Press Note was issued on 09.11.2017, which is produced as Ext.P22 in the writ petition. The report of the Commission as well as Ext.P21 Government Order issued pursuant thereto are impugned in the writ petition, in which there is also a prayer for expunging Ext.P17 (a) letter dated 19.07.2013 and all defamatory remarks against the petitioners and other leaders of their party, based on the said letter, in the report of the Commission. The petitioners also pray for a GAG order restraining the respondents, their agencies, politicians and the media from reporting the contents, discussion and publication of Ext.P17 (a) letter, which was marked as Exts.X-531 and X-639 (b) in the report of the Commission.

8. When the matter came up for admission before this Court on 19.12.2017, after hearing the submissions of learned Senior Counsel Sri. Kapil Sibal, appearing for the petitioners, as also the learned Senior Government Pleader on behalf of the State, I passed the following interim order:

> "Admit. The learned Government Pleader takes notice for the respondents.
>
> Post on 15.01.2018 for the counter affidavit of the respondents.

> While I am not inclined to stay further proceedings pursuant to Ext.P23 report of the Justice Sivarajan Commission of Enquiry, I am of the view that a public discussion on the letter dated 19.07.2013 and its contents, the evidential value of which has not been tested in judicial proceedings, could prejudicially affect the petitioner and others who could face a trial, in the event of such proceedings being initiated against them by the respondents, based on the Commission report aforementioned. An excessive publicity could also prejudice the petitioner by creating a public opinion that could interfere with the administration of justice, whilst denying the petitioner a fair trial in the proceedings, if any, initiated against him by the respondents.
>
> I am also of the view that, the adverse publicity that may arise from a publication or discussion of the letter aforementioned could affect the reputation of the petitioner, and thereby infringe his fundamental rights under Article 21 of the Constitution of India. I, therefore, restrain the respondents, their agents and assigns and/or any other person or entity, in the print or electronic media or the internet, from (i) reporting the contents of, (ii) publicly discussing, or (iii) publishing, the said letter, which is produced as Ext.P17(a) in the writ petition, and which is marked as Exts.X-531 and X-639(b) in the report of the Commission. It is made clear that, this direction shall operate for a period of two months, purely as a temporary measure, and will be subject to further orders passed by this Court."

9. Detailed counter affidavits have since been filed on behalf of the State Government in both the writ petitions, refuting the averments in the writ petitions and justifying the findings in the report of the Commission as also the action taken report of the State Government that was tabled in the legislative assembly.

Impleadment applications:

Various impleadment applications were filed by persons who

had been arrayed as parties before the Commission and those who had given evidence before it [I.A.No.20838/2017 in W.P.(C).No.40775/2017 filed on behalf of Sri. K. Surendran; I.A.No.1178/2018 in W.P.(C).No.40775/2017 filed on behalf of Sri. John Joseph; I.A.No.2321/2018 in W.P.(C).No.40775/2017 filed on behalf of the All India Lawyers Union (AILU); I.A.No.3182/2018 in W.P.(C).No.40775/2017 filed on behalf of Sri. C.L. Anto; I.A.No.4213/2018 in W.P.(C).No.40775/2017 filed on behalf of Ms. Saritha S. Nair and I.A.No.5306/2018 in W.P.(C).No.40775/2017 filed on behalf of Sri. Reghuthaman]. While this court was of the view that the impleadment applications were not maintainable, it nevertheless permitted counsel for the various impleadment applicants, as also two of the applicants themselves, who appeared as parties in person, to make their submissions in the matter at the time of final hearing of the writ petitions. As already noted, it is my view that the impleadment applications are not maintainable as the parties who seek to get impleaded are neither proper parties nor necessary parties to the *lis* before this court.

The principles that govern an application for impleadment are well settled. An application for impleadment by an intervener should

be allowed only if the court feels that the intervener can address arguments on behalf of one side or the other (***See: Saraswati Industrial Syndicate v. CIT – (1999) 3 SCC 141; State of TN v. Board of Trustees of Port of Madras – (1999) 4 SCC 630***). The court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of a person as a party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit. A necessary party is one in whose absence an effective decree cannot be passed by the court. A proper party is one whose presence would enable the court to completely, effectively and properly adjudicate upon all the matters and issues though he may not be a person in favour or against whom a decree is to be made. If a person is not a necessary or proper party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff/petitioner. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action, which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule

between the direct interest or the legal interest and the commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action ie. he can say that the litigation may lead to a result which will affect him legally, that is, by curtailing his legal rights (***See: Ramesh Hirachand case – (1992) 2 SCC 524; Poonam v. State of UP – (2016) 2 SCC 779***). In the case of the interveners, who have filed applications for impleadment, I did not find the above tests being satisfied since they were only persons who participated in a fact-finding enquiry and gave evidence before it. The challenge in the writ petitions before this court being on the legality of the findings of the Commission vis-à-vis the fundamental rights available to the petitioners, the applicants in the impleadment applications are not, in my opinion, either proper parties or necessary parties to the *lis*. I therefore dismiss the impleadment applications although, as already noted, I had permitted the applicants to make legal submissions at the time of final hearing of the writ petitions.

Legal submissions:

Learned Senior Counsel Sri. Kapil Sibal, duly assisted by Adv. Sri. Millu Dandapani appearing on behalf of the petitioner in W.P.(C) No.40775 of 2017 would submit as follows:

- Section 3 of the Commissions of Inquiry Act states in unambiguous terms that the appropriate Government, when setting up a Commission of Inquiry under the Act, must do so only in respect of a definite matter of public importance and only after arriving at a *prima facie* opinion that it is necessary so to do. A Commission of inquiry cannot be set up on the basis of mere allegations, but only after the appropriate government has formed a *prima facie* opinion based on the allegations. In the instant case, the State Government referred the allegations itself for an inquiry by the Commission, and the ToR itself was to find out whether there was any substance in the allegations. Reliance is placed on the decisions in ***Ram Krishna Dalmia v. Sri. Justice S.R.Tendolkar & Ors – AIR 1958 SC 538 (Paras 9, 13, 16); State of Madhya Pradesh v. Arjun Singh – (1993) 1 SCC 51 (Paras 5,7 and 8) and Bansi Lal, MLA v. State of Haryana & Ors – (2003) 2 SCC RCR (Civil) 99 (Paras 52-56)***.

- The Commission erred in expanding the ToR's, by independently identifying the allegations that needed to be inquired into, after going through the material that was made available before it by the State Government. The Commission was effectively doing what the State Government was expected to do before constituting the Commission viz. form a *prima facie* opinion with regard to the substance of the allegations and as to whether they constituted a matter of definite public importance that needed to be inquired into. Reliance is placed on the decision of the Madras High Court in ***Vijayalakshmi Shanmugham v. Chief Secretary – 2002 (1) CTC 14 (Para 13)*** and the Supreme Court in ***Bhikhubhai Vithlabhai Patel & Ors v. State of Gujarat & Anr – (2008) 4 SCC 144 (Paras 24-26, 32-33)***, for the said proposition.

- The ToR which required the Commission to identify the names of persons involved in the Solar Scam and allied financial transactions who were allegedly responsible for the scam, essentially required the Commission to render a finding on criminal culpability, an

exercise that could be conducted only through the process of law available under the Code of Criminal Procedure. This is more so when it is admitted by the State Government that, at the time of setting up the Commission of Inquiry, there were already 33 cases that were lodged and pending in various criminal courts in Kerala. Having a parallel investigation done in respect of matters that were pending before the criminal courts could not have been the basis for setting up a Commission of Inquiry.

- The Commission erred in taking cognizance of a letter dated 19.07.2013, alleged to have been written by one of the accused in the criminal cases viz. Saritha Nair, and devoting almost 800 pages of its report to the allegations with reference to the said letter. While a Section 8-B notice was issued to the petitioner on 09.07.2015, the said notice was issued in connection with the ToR's, as expanded by the order dated 07.11.2014 of the Commission. The petitioner was not called upon to deal with any other issue. The said notice also did not disclose any allegation in respect of the conduct of the petitioner. A copy of the letter dated 19.07.2013 was sent to the petitioner on 14.06.2016, for information. There was no notice under Section 8-B served on the petitioner calling upon him to answer to any proposal of the Commission, placing reliance on the said letter. Making observations against the petitioner based on allegations drawn from the said letter was, therefore, in breach of the principles of natural justice and fairness. The procedure followed by the Commission, in this regard, was also inconsistent with the petitioner's rights under Articles 14 and 21 of the Constitution of India. Reliance is placed on the decisions in ***State of Bihar v. Lal Krishna Advani – (2003) 8 SCC 361 (Paras 6, 8, 9 and 11)***; ***Jai Prakash Associates Ltd, Lucknow v. State of UP & Anr – 2004 All LJ 2448 (Para 16)***; ***Kiran Bedi v. Committee of Inquiry & Anr – (1989) 1 SCC 494***; ***Sri. K.Vijayabhaskar Reddy v. Government of Andhra Pradesh & Ors – AIR 1996 AP 62 (Paras 51-53)***

- The allegations that stemmed from the letter dated 19.07.2013 were such as affected the reputation and dignity of the petitioner. The decision of the Supreme Court in ***K.S.Puttaswamy & Anr v. Union of India & Ors. – (2017) 10 SCC 1*** has held that the right to privacy is part of Article 21 and that, to allow allegations of this nature to be put in the private domain is a clear violation of the right to privacy. Allegations of this nature have to be first investigated by the appropriate authority and, only when a charge sheet is filed, do they become matters open to the public. The procedure followed by the Commission allowed such matters to be publicly debated without following the due process of law and thereby occasioned a breach of the petitioner's right to privacy.

- The Commission erred in recommending in its report that the allegations disclosed in the letter dated 19.07.2013 required the appropriate Government to seriously consider the applicability of the provisions of the Prevention of Corruption Act, 1998 against all persons referred to in the said letter, thereby suggesting that the allegations made in the said letter were that of illegal gratifications attracting the provisions of the 1998 Act. The allegations in the letter were not part of the ToR; the Government had not applied its mind on the question as to whether the contents of the letter revealed a matter of definite public importance that required an inquiry to be conducted; the allegations did not form part of the Section 8-B notice sent to the petitioner; and, most importantly, there were conflicting versions as regards the genuineness of the letter itself viz. as to whether it was of 21 pages, 25 pages, 31 pages or merely 4 pages. There could not, therefore, have been any finding based on the said letter, without first establishing the veracity of the said letter.

- The procedure followed by the Commission was illegal. While it impleaded various persons as parties before it, it also erred in permitting those persons to cross examine the petitioner, who was a notice under Section 8-B of the Act, in purported exercise of the power under Section 8-C. The latter provision doesn't provide for a

cross-examination of a Section 8-B noticee, and cross-examination is permitted only of witnesses before the Commission.

Senior Advocate Sri. S. Sreekumar, duly assisted by Adv. P.K.Soyuz and Adv. Martin Jose, appearing on behalf of the petitioner in W.P (C) No.2949 of 2018, would submit as follows:

- Apart from adopting the arguments of Sri.Kapil Sibal, to the extent applicable in his case, it is contended that, when the Commission reframed the first ToR, the allegations therein, as against the then Home Minister, were not the allegations that were actually raised in the floor of the assembly or outside. The Commission therefore erred in framing a wrong ToR for inquiry against the petitioner.

- It is contended that insofar as Ms. Saritha Nair was also a Section 8B noticee, and the letter dated 19.07.2013 that was marked through her, was one that she had used in her defence, the contents of the said letter could not have been relied upon to enter findings against the petitioner. This was more so because the Section 8B notice issued to the petitioner did not refer to the said letter as material relied upon, to which the petitioner was to offer his defence. It is also stated that the letter cannot be seen as having been produced before the Commission under Section 5 (2) of the Act since when directions were given by the Commission in terms of the said provision, Ms. Saritha Nair had obtained a stay order from the High Court against the said directions.

- It is pointed out that while the findings of the Commission are in respect of the investigation conducted by the Special Investigation Team (SIT), and the Commission opines that the investigation was not satisfactory in that there was no investigation into the role played by political bigwigs in the alleged cheating cases, there was no material to justify a finding that the petitioner, in his capacity as

Home Minister, had prevented an investigation against those in power, or was in any manner responsible for the alleged flawed investigation.

Replying to the submissions made on behalf of the petitioners in the writ petitions, the submissions of Senior Advocate Sri. Ranjith Kumar, duly assisted by the Senior Government Pleader Adv. Narayanan, appearing on behalf of the State Government, and Senior Advocate Sri. K.Ramakumar, Adv. T.B.Hood, Adv. C.Rajendran, Adv. Sri. Krishnadas P. Nair, Adv. Sri. B. Premod, Adv. Sri. M.R. Sasith and Adv. Sri. C. Rajendran appearing on behalf of the interveners, briefly stated, are as follows;

- Rebutting the contention of the petitioners that there was no formation of opinion by the State Government before appointing the Commission of Inquiry, it is pointed out that the Commission was appointed at a time when the Executive Government comprised of the petitioners as Chief Minister and Home Minister respectively. That, after having furnished the clarifications and documents sought for by the Commission and, thereafter, participated in the proceedings before it, the petitioners could not be heard to question the legality of the appointment of the Commission itself. It is also relevant to note that the Government Order appointing the Commission was never challenged by the petitioners in any proceedings and, further, there are no pleadings in the instant writ petitions to suggest such a challenge.

- It is further contended, placing reliance upon the decision of the

Supreme Court in ***Swadeshi Cotton Mills v. State Industrial Tribunal, UP – AIR 1961 SC 1381; State of Haryana v. Hari Ram Yadav – (1994) 2 SCC 617; P. Janardhan Reddy v. State of A.P. & Ors - (2001) 6 SCC 50***, that the Notification appointing the Commission had clearly indicated in its recitals that the State Government had formed an opinion as regards the desirability of appointing the Commission of Inquiry. If the petitioners chose to deny the said fact, therefore, the burden of proof was upon them to show that no such opinion had been formed by the State Government and, in the instant case, there was no material produced by the petitioners to establish that.

- With regard to the contention of the petitioners that the Commission erred in *suo motu* expanding the first ToR to include matters that did not form part of the allegations raised in the floor of the assembly or outside, reference is made to the material made available to the Commission to point out that, while it was open to the State Government to constitute a Commission to inquire into mere allegations, that nevertheless involved a matter of public importance, the first ToR was recast in order to provide clarity and make specific, the allegations that could be drawn out from the material before the Commission. It is stated that the Commission did not expand the first ToR but only clarified the scope and content of the inquiry envisaged with respect to the first ToR.

- Replying to the contention of the petitioner in W.P (C) No.2949 of 2018, that the issue with regard to the active involvement of the Home Minister in protecting the Chief Minister's office from an investigation was not one that was covered by the allegations raised, either in the floor of the assembly or outside, reference is made to the said allegations to point out that the shoddy manner in which the investigation was conducted against the prime accused in the solar scam, especially without making any inquiry against the personnel in the Chief Minister's office and personal staff, or making them parties in the criminal cases that were registered, clearly showed that the alleged involvement of the Home Minister,

who supervised the Police Force in the State, in protecting the Chief Minister's office from an investigation, was an allegation that was raised during the relevant period.

- Referring to the report of the Commission, it is contended that there was ample material, other than the letter dated 19.07.2013, that was available before the Commission to come to the conclusion that there was substance in the allegations raised against the petitioners in the floor of the assembly and outside. In particular there was material to suggest that the then Chief Minister and his office personnel knew the prime accused in the criminal cases and that the denial, by the then Chief Minister, of the said fact was not acceptable. It is also stated that there was material to suggest that the investigation by the police authorities, in the criminal cases that were filed, was shoddy, and that there was an attempt to shield those in power from the said proceedings. The shoddy investigation, it is stated, must be taken as indicative of directions given to the investigating officers, by superior officers in the Police department and the Home Minister who was in charge of the Police department, to insulate those in power from any investigation.

- As regards the procedure followed by the Commission, especially in the matter of issuing notices under Section 8B of the Act and permitting cross-examination of witnesses under Section 8C of the Act, it is stated that the petitioners having validly participated in the proceedings before the Commission, and having consented to being cross-examined by the other parties, without demur, cannot now turn around and allege a violation of the statutory procedures by the Commission. It is contended that through their consent to the procedure adopted by the Commission and active participation in the proceedings without demur, they had effectively waived any statutory rights that accrued to their benefit under the aforesaid statutory provisions. Reference is made to the decisions in ***Karnati Ravi and Anr v. Commissioner Survey Settlements and Land Records and Ors – AIR 2017 SC 3611; Ashok Kumar and Anr***

v. State of Bihar and Ors – AIR 2016 SC 5069 and Tessy Abraham v. Anithakumary K.S and Ors – 2011 (2) KHC 571 in support of the said proposition.

- With specific reference to the provisions of Section 8B of the Act, it is stated that the decisions of the High Court of Delhi in ***Prabhat Kumar v. The Liberhan Ayodhya Commission – 1997 (70) DLT 671***, the Gauhati High Court in ***District Administration v. Commission of Inquiry and Ors – 2007 (1) GLR 319*** clearly indicate that there is no mandatory requirement of issuing a notice under Section 8B and all that is required is that a reasonable opportunity be afforded to a person, whose conduct is sought to be probed or whose reputation is likely to be affected by the probe, to adduce evidence in his defence. It is pointed out that in the instant case, the petitioners were issued a Section 8B notice and it was open to them to inspect the voluminous records available with the Commission before adducing evidence in their defence. By not choosing to do so, the petitioners had waived their rights under the statute and could not now challenge the procedure followed by the Commission. Referring to the decisions of the Orissa High Court in ***Surendra Singh Bhanja Deo v. The Commission of Inquiry, Liquor – 1995 II OLR 177*** and the Andhra Pradesh High Court in ***Md. Ibrahim Khan v. Susheel Kumar and Anr – AIR 1983 AP 69***, it is contended that whenever a witness is examined by a Commission, the right to cross-examine him accrues and hence, inasmuch as the petitioners had voluntarily consented to give evidence and allowed themselves to be cross-examined by other witnesses and parties, they could not turn around and impugn the procedure followed by the Commissioner as being violative of their rights under Section 8C of the Act.

- As regards the submissions made on behalf of the petitioners with regard to infringement of their right to privacy, it is contended, placing reliance on the decision of the Supreme Court in ***R.Rajagopal @ RR Gopal and Anr v. State of TN and Anr – 1994 KHC 900*** that inasmuch as the report of the Commission

had already been placed before the legislature and the same had now become public, apart fro being a property of the legislature, a right to privacy no longer subsisted as regards the report or its contents. It is pointed out that the decision in ***Rajagopal (Supra)*** was upheld in ***Justice K.S.Puttaswamy (Retd.) and Anr v. Union of India and Ors - (2017) 10 SCC 1***. It is further contended that if the petitioners were apprehensive of an invasion of their right to reputation, then their rights were personal in nature, and the content of their rights had to be examined in the light of Article 19(i)(a) of the Constitution and the reasonable restrictions permitted under Article 19(2). The remedy of the petitioners lay in taking recourse to the provisions of the IPC/Crl.PC dealing with defamation, and having already done that, it was not open to them to take recourse to proceedings under Article 226 of the Constitution for the same remedy.

10. I have gone through the voluminous pleadings in these writ petitions and considered the facts and circumstances of the case as also the submissions made across the bar.

The scope of judicial review of the report of a Commission of Inquiry:

At the very outset, I feel it would be apposite to examine the nature of the inquiry that is contemplated under the Commissions of Inquiry Act and the extent to which the findings in a Commission's report would affect the rights of individuals. This would throw light on the circumstances under which this Court would be justified in interfering with the findings of the Commission, in these proceedings

under Article 226 of the Constitution of India.

11. Section 3 of the Act indicates that the appropriate government may, if it is of the opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the legislature of the State, by notification in the official gazette, appoint a Commission of Inquiry for the purposes of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification. It is clear, therefore, that, in the absence of a resolution passed by the State legislature, it is in the discretion of the appropriate government to appoint a Commission of Inquiry and that such a Commission may be appointed only if the appropriate government forms an opinion that it is necessary to do so in order to inquire into a matter of definite public importance. Speaking on the scope of the inquiry contemplated under the Act, a constitution bench of the Supreme Court in ***Sri Ram Krishna Dalmia & Ors v. Justice S.R.Tendolkar & Ors – AIR 1958 SC 538*** – opined that an inquiry necessarily involved investigation into facts and necessitated the collection of material facts from the evidence adduced before, or brought to the notice of the person conducting the inquiry, and the recording of its findings on those facts

in its report is an act that is ancillary to the inquiry itself. An inquiry would be useless unless the inquiry authority rendered its findings, on the subject matter of inquiry, to the Government that set up the inquiry, so that the latter could consider taking up such measures as it deemed fit to take. The whole purpose of setting up a Commission of Inquiry would be frustrated, and the elaborate process of inquiry would be deprived of its utility if the opinion and advise of the expert body, as regards the measures to be adopted, was not placed before the Government for its consideration.

12. Thus, once a Commission of Inquiry is set up by the appropriate Government, and it embarks upon its duty based on the ToR's issued to it, it has to collect material from the evidence tendered before it, form its opinion with regard to the ToR's, and submit its report to the appropriate government so as to enable the Government to thereafter take appropriate action in relation to the subject matter of the inquiry. The observations and findings in the report of the Commission are only meant for the information of the Government, and acceptance of the report of the Commission by the Government would only suggest that, being bound by the rule of law and having a duty to act fairly, it has endorsed to act upon it (***See:***

T.T.Antony v. State of Kerala – (2001) 6 SCC 181).

13. Section 6 of the Act states that no statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceedings except a prosecution for giving false evidence by such statement. Thus, the statements made by a witness before the Commission cannot be used in criminal or civil proceedings, either for the purposes of cross-examination to contradict the witness or to impeach his credit, for they have no evidentiary value in any such trial. The same principle holds good for the report of the Commission as well, for the report only indicates the opinion of the Commission based on the statements of the witnesses before it. (***See: Kehar Singh v. Delhi Administration – (1988) 3 SCC 609***). That apart, as the Commission is only a fact finding authority, in which no judicial or quasi-judicial powers are vested, the report drawn up by it is only intended to enable the appropriate government to reach an ultimate administrative decision. (***See: Balakrishna Pillai v. State of Kerala – 1988 KHC 637***)

14. It would follow from the above discussion that, since the

report of the Commission is, ultimately, only the expression of an opinion by a fact finding authority, that is not vested with any judicial or quasi-judicial powers to determine the inter-se rights of the persons deposing before it, and is intended only to furnish the appropriate Government with material on which it could act in relation to the subject matter of the inquiry, the report per se, or the acceptance of it by the Government, would not ordinarily be prejudicial to the legal rights of any person who might have to subsequently face proceedings before a judicial or quasi-judicial forum, pursuant to any action taken by the appropriate Government based on the Commission's report. Consequently, this Court also would not, ordinarily, in exercise of its jurisdiction under Article 226 of the Constitution of India, interfere with such factual findings contained in the report of an Inquiry Commission. This is not to say, however, that under no circumstances would this Court interfere with the findings in a report of a Commission of Inquiry. If, in the course of rendering a factual finding, the Commission does not follow the statutorily prescribed procedure or otherwise violates any of the statutory or Constitutional rights of a citizen, then this Court would be failing in its duty if it did not interfere with the report of the Commission so as to redress the illegality.

The report of the Commission of Inquiry

A cursory look at the report of the Commission of Inquiry reveals how the Commission dealt with the ToR's referred to it. The report itself is voluminous and comprises of 1072 pages spread over four volumes. The discussion with regard to the ToR's, and the recommendations of the Commission, are contained in 849 pages covering three of the four volumes. A major portion of the discussion is with regard to the first ToR, which the Commission analyses under four limbs covering the three volumes. As regards the 2nd and 3rd ToR's, the Commission finds that the State Government has not sustained any direct financial loss in connection with the transactions involved in the allegations inquired into by it. The 4th ToR was also answered by the Commission in the negative. The 5th and 6th ToR concerns the recommendations made by the Commission to the State Government. As such, for the purposes of these writ petitions, this court need concern itself only with the 1st ToR and the report and recommendations made by the Commission on the said ToR.

Is there a case warranting interference with the report of the Commission?

The petitioner's herein impugn the report of the Commission of Inquiry on various grounds viz. that the appropriate government did not fulfill the conditions precedent for exercise of the power to appoint a commission of inquiry and required the Commission to look into matters which were the subject matter of pending criminal proceedings, that the Commission erred in *suo motu* expanding the terms of reference and inquiring into matters that were not the subject matter of the allegations within and outside the legislative assembly, that the procedure followed by the Commission in issuing notices to the various parties, and in the matter of cross-examination of witnesses, was flawed, that the Commission was not justified in placing reliance on the letter dated 19.07.2013, stated to have been written by the prime accused in the cheating cases – Ms. Saritha Nair, while entering its findings, and making recommendations based thereon, in its report submitted before the Government and lastly, that the discussion of the said letter in the report of the Commission, and the subsequent press note of the Government incorporating the contents of the said letter, effectively violate the fundamental rights of the petitioners under Article 21 of the Constitution both in relation to their right to protection of their reputation as also in relation to their right to a fair trial. I shall now proceed to individually examine each of

these contentions on merits.

Re: Fulfillment of conditions precedent for exercise of power under Section 3 of the 1952 Act.

The first contention raised by counsel for the petitioners is that there was no formation of any opinion by the State Government, as required under Section 3 of the 1952 Act, as regards the necessity to inquire into the issue of whether there was any substance in the allegations related to the solar scam and allied financial transactions raised in the floor of the Kerala Legislative Assembly and outside. The provisions of Section 3 of the Act are relied upon to contend that, before a Commission of Inquiry is appointed, (i) the appropriate Government has to form an opinion that an inquiry is necessary and (ii) the inquiry must be for inquiring into a definite matter of public importance. It is stated that the State Government has not produced any material to show that these twin requirements were met in the instant case. Learned counsel for the respondent State Government would rely upon the judgment of the Supreme Court in ***Swadeshi Cotton Mills v. State Industrial Tribunal, UP - AIR 1961 SC 1381*** - to contend that when the notification appointing the

Commission contained a recital on the face of it, stating that an opinion had been formed, then the court would presume the regularity of the notification including the fulfillment of the conditions precedent and it would then be for the party challenging the legality to say that the recital was not correct and that the conditions precedent were, in fact not complied with by the authority. I find force in the said contention of the learned counsel for the respondents. While the authority cited is sufficient to hold that, in view of the express recitals in the notification appointing the Commission, this court need not trouble itself by examining whether or not the conditions precedent for exercise of the power were fulfilled in the instant case, it is also significant to note that the petitioners in these writ petitions were the Chief Minister and Home Minister of the very Government that issued the notification appointing the Commission. It would not, therefore, be open to them to now contend that the necessary pre-conditions for the exercise of a statutory power in public interest were not complied with, without inviting public criticism on the manner in which the Government of the day, of which they were an integral part, exercised a statutory power vested in it. It is also to be noted that the petitioners participated in the proceedings before the Commission without demur and an objection with regard to the legality of the

proceedings before the said Commission was not raised, either before the Commission or specifically before this Court in the pleadings in these writ petitions. Further, a perusal of the files produced before this Court would clearly reveal that the decision to appoint the Commission of Inquiry was taken by the Council of Ministers at its meeting dated 16.08.2013 and, it was after due deliberations at various levels that the ToR's were formulated at the meeting of the Council of Ministers on 10.10.2013. Thereafter, certain amendments were made to the said ToR's, and a decision was taken to appoint Justice (Retd) G. Sivarajan as the Commission of Inquiry, at the meeting held on 23.10.2013. It cannot, therefore, be contended that there was no deliberation of the issue, and consequent formation of any opinion, by the State Government for appointing the Commission of Inquiry.

15. As regards the contention that mere allegations could not have formed the subject matter of Inquiry by the Commission, it has to be noted that the Commission was appointed with a view to quell the doubts that arose in the public domain, as regards the merit of certain allegations that had been raised within and outside the Kerala Legislative Assembly. It was the wisdom of the then Government that

led it to appoint a Commission of Inquiry to inquire into whether or not there was any substance in the said allegations, and to submit a report to it on the said aspect, so that it could decide on an appropriate course of action. That mere allegations can constitute a matter of public importance for the purposes of the 1952 Act is clear from a reading of the judgment of the Supreme Court in ***State of Jammu & Kashmir v. Baksh Gulam Mohammed – 1967 KHC 438*** where the court opined that "Allegations may very well raise questions of great public importance". In the instant case, the State Government only wanted to ascertain whether there was any material to suggest that there was substance in the allegations, before initiating, what could well be long drawn and expensive legal proceedings, based on such allegations. I have, therefore, no hesitation in accepting the contention of the respondents that such action of the State Government had to be seen as one taken in public interest and in relation to a matter of public importance. The contentions of the petitioners to the contrary, as also their contention that the pre-requisites for invoking the power under Section 3 of the 1952 Act, to appoint the Commission of Inquiry, were not satisfied in the instant case, are accordingly rejected.

16. I am also not impressed with the contention of the petitioners that the ToR's required the Commission to probe into matters that were the subject matter of proceedings that were pending before various criminal courts. A reading of the ToR's in the light of the allegations that were raised within and outside the Legislative Assembly of the State would unequivocally indicate that the inquiry was to be with regard to the allegation that political bigwigs had been deliberately excluded from the investigation, and subsequent charge sheets that had been filed, in the cases that were pending before the various criminal courts. This was not the subject matter of the criminal cases that were pending. It cannot be said, therefore, that the Commission was called upon to undertake a parallel inquiry in respect of matters that were pending before the criminal courts.

Re: Alleged expansion of ToR's by the Commission:

The petitioners would next contend that the Commission exceeded its mandate when it *suo motu* expanded the ToR's and enlarged the scope of the inquiry to encompass matters that were not covered by any allegation raised either within the Legislative Assembly or outside it. The specific reference is to the order dated

07.11.2014 by which the Commission enumerated the allegations forming the subject matter of the first ToR. It will be recalled that the first ToR, as described in the notification appointing the Commission read as follows:

> "Whether there is any substance in the allegations related to the Solar Scam and allied financial transactions raised in the floor of the Kerala Legislative Assembly and outside? If so what? Who are the persons responsible for the same?"

By the order dated 07.11.2014, the Commission enumerated the allegations forming the subject matter of the first ToR as follows:

> "The Chief Minister, his office, his personal assistants, his personal security officer, close party worker and his aid at Delhi are all partisans to the solar scam deals of the prime accused Saritha S.Nair and Biju Radhakrishnan and rendered all help to them for cheating their solar scam customers in one way or the other. Though Tenny Joppan was made an accused, the Chief Minister, his personal staff, his personal security officer and his aid at Delhi, all similarly placed were purposely excluded from the array of accused by the Special Investigation Team by dubious methods. The then Home Minister Sri. Thiruvanchoor Radhakrishnan had also helped the solar scam accused Saritha S.Nair and Shalu Menon in escaping from the clutches of law by his connection with them and also took interest in protecting the Chief Minister by all means by using his position as the Home Minister which is also indicative of his involvement in the solar scam affairs of the accused. The phone call details from the mobile phone used by Saritha Nair available with the media opened the gate for connecting some of the Cabinet Ministers, their Private Secretaries, one former Central Minister, many

> members of the Kerala Legislative Assembly and other political leaders in the solar scam deals of Saritha S.Nair. The reports also disclose the call details of Saritha S.Nair with high personalities which is indicative of their connection with the solar scam accused."

17. It will be apparent from a reading of the order of the Commission, produced as Ext.P6 in W.P (C) No.40775 of 2017, that the Commission had only culled out the allegations from various materials such as the proceedings of the Kerala Legislative Assembly pertaining to the relevant period, representations of the LDF and the Thiruvananthapuram Citizens Protection Forum furnished by the State Government, and newspaper reports furnished by the respective Editors. This was done with a view to give a perspective to the Commission as regards the direction that the inquiry had to take. The Commission cannot be said to have expanded the first ToR itself. Thereafter, the Commission chose to analyse the material available before it, pertaining to the allegations enumerated above, under four limbs. Since it is nobody's case that the allegations, enumerated by the Commission in its order dated 07.11.2014, were based on material that was not available with the Commission, and pertaining to the period relevant for the inquiry, I do not find any force in the contention of the petitioners that the Commission had expanded the

scope of the ToR's.

Re: Procedure followed by the Commission under Section 8B and Section 8C of the 1952 Act.

I turn now to the contention of the petitioners with regard to alleged non-compliance, by the Commission, with the provisions of Section 8B and Section 8C of the 1952 Act before entering findings against them, and making recommendations based thereon, in the report submitted to the Government. The petitioners allege that in the notice issued to them, purportedly in terms of Section 8B of the Act, there was no specific reference to the formation of any opinion by the Commission, based on the material before it, that the conduct of the petitioners was required to be inquired into or that the reputation of the petitioners was likely to be prejudicially affected by the inquiry. It is their contention that recording of such an opinion of the Commission was a condition precedent for the issuance of a notice under Section 8 B to the petitioners. Per contra, learned counsel for the respondents would argue, that Section 8B does not contemplate the issuance of a notice in a prescribed format and so long as the petitioners were given a reasonable opportunity of being heard in the

inquiry and to produce evidence in their defence, the requirements of Section 8B must be seen as complied. It is further pointed out that, the petitioners had at no stage of the proceedings complained of a non-compliance with the provisions of Section 8B and, having participated in the proceedings without demur, consented to their being cross-examined by other witnesses, and even having cross-examined witnesses themselves, they cannot turn around and question the legality of the procedure followed by the Commission. In the alternative, it is contended that the petitioners, through their conduct should be seen as having waived their rights under Section 8B of the Act.

18. I have considered the rival submissions and gone through the authorities relied upon by either side. It would be fruitful to begin by examining the statutory provision.

Section 8B of the 1952 Act reads as follows:

> "8B. **Persons likely to be prejudicially affected to be heard.** – If, at any stage of the inquiry, the Commission;
>
> (a) considers it necessary to inquire into the conduct of any person: or
> (b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry,

the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:

Provided that nothing in this section shall apply where the credit of a witness is being impeached." (emphasis supplied)

19. It is seen from a reading of the statutory provision that, while there is no express requirement therein of issuing a notice in any particular format, if, at any stage during the proceedings before the Commission, the Commission feels that an inquiry is required into the conduct of any person, or that the reputation of any person is likely to be prejudicially affected by the inquiry then, that person, whose conduct is going to be inquired into and commented upon by the Commission, or whose reputation is likely to be prejudicially affected through any observation, finding or recommendation of the Commission, must be given a reasonable opportunity of being heard and producing evidence in his defence so as to avoid any undesirable comment or observation against him in the report of the Commission. In my view, the statutory provision is only an expression of the principles of natural justice and fairness and, in particular, the principle of *audi alteram partem* - that no man shall be condemned unheard. If, therefore, the petitioners were given an opportunity of being heard, and of producing evidence in their defence, vis-à-vis the

material that had been obtained by the Commission, relevant to the ToR's that the Commission was to inquire into, then the requirements of the Section must be seen as fulfilled. (***See: State of Bihar v. Lal Krishna Advani – (2003) 8 SCC 361 (Paras 6, 8, 9 and 11***); ***Jai Prakash Associates Ltd, Lucknow v. State of UP & Anr – 2004 All LJ 2448 (Para 16); Kiran Bedi v. Committee of Inquiry & Anr – (1989) 1 SCC 494; Sri. K.Vijayabhaskar Reddy v. Government of Andhra Pradesh & Ors – AIR 1996 AP 62 (Paras 51-53)***.

20. In the instant case, I find that the entire material that formed the basis of the findings and recommendations of the Commission, save the letter dated 19.07.2013 of Smt. Saritha Nair, were available with the Commission at the time when the Section 8B notice was issued to the petitioners. It was open to the petitioners, on receipt of the notice, to examine the said material available with the Commission, in the backdrop of the ToR's which the Commission was to inquire into, and then offer their comments, or produce evidence in their defence, against any observation that the Commission could make, based on the said material. I cannot accept the contention of the petitioners that the Commission was required to refer specifically to the material before it, which led the Commission to form an

opinion, as regards necessity to inquire into their conduct, or that their reputation would be prejudicially affected, and state so in the notice issued to them. The statutory provision does not, in my view, cast such a responsibility on a Commission of Inquiry. So long as the factual and legal context in which the notice is issued is made known to the noticee, the requirement of the Section must be seen fulfilled. At any rate, in the instant case, the petitioners did avail the opportunity provided to them by participating in the proceedings without demur, and even cross-examining some of the witnesses and hence, they cannot now turn around and contend that they were not provided such an opportunity. As such, I also find force in the alternate contention of learned counsel for the respondents that the petitioners must be seen as having waived the right that was available to them, but which they allege were denied to them. For the same reasons, I also do not find any merit in the contention of the petitioners with regard to alleged violation of the provisions of Section 8C of the Act. The petitioners' acquiescence to the procedure followed by the Commission, without demur, prevents them from raising such a contention at this belated stage.

21. With specific reference to the petitioner in W.P.(C) No.2949

of 2018, it might be pointed out that the files produced before this Court reveal that there were allegations that suggested that the investigation by the police authorities, in the criminal cases that were filed, was shoddy, and that there was an attempt to shield those in power from the said proceedings. The allegation, in other words, was that there were directions given to the investigating officers, by superior officers in the Police department and the Home Minister who was in charge of the Police department, to insulate those in power from any investigation. It is not in dispute that, it was at a time when this material was available before the Commission that the Section 8B notice was issued to the petitioner in the said writ petition. That being the case, and in the light of the fact that the petitioner had willingly participated in the proceedings thereafter, without demur, I do not see any reason to interfere with the findings of the Commission as regards the conduct of the petitioner. As already noted, even a wrong finding by the Commission cannot be seen as prejudicial to the petitioner herein since the provisions of the 1952 Act grant sufficient protection to the petitioner in subsequent legal proceedings, if any initiated by the Government, based on the report of the Commission. The said finding of the Commission cannot be seen as violating the petitioners. right to reputation either, for the finding was one that was arrived at

after following a statutory procedure.

22. The position is wholly different, however, when it comes to the letter dated 19.07.2013, supposedly written by Smt. Saritha Nair, and produced before the Commission on 06.06.2016. The Section 8B notices issued to the petitioners were both dated 09.07.2015. The allegations summed up by the Commission, as constituting the subject matter of the first ToR, does not contain any reference to an allegation regarding sexual conduct of the petitioners or offering sexual gratification for obtaining favours from the Government. The said aspects are not borne out from any material that was available with the Commission at the time when it chose to specify the allegations that constituted the subject matter of the first ToR. Under the said circumstances, the petitioners are justified in contending that they were caught unaware with regard to the observations, findings and recommendations in the report of the Commission, based on the contents of the aforementioned letter dated 19.07.2013. The contents of the letter certainly had a bearing on the reputation of the petitioner in W.P.(C) No.40775 of 2017, and being so, the Commission was obliged to issue a fresh notice under Section 8B to the said petitioner before making any adverse observation against him based on the said

letter. What the Commission did, instead, was to send a copy of the said letter to him with a covering letter dated 14.06.2016. The said action of the Commission cannot be seen as satisfactory compliance with the requirements of Section 8B of the Act, more so when the sexual content of the letter had no nexus with the ToR's that were to be inquired into. Accordingly, I am of the view that those findings, observations and recommendations of the Commission in its report, that are based on the sexual content of the letter dated 19.07.2013, and the reproduction of the contents of the letter itself, in not less than four places in the report, have necessarily to be expunged from the report so that they are not acted/relied upon by the Government. I order accordingly.

Re: The petitioners' right to reputation

One of the main contentions of the petitioner in W.P.(C) No.40775 of 2017 is with regard to the legality of the action of the Commission in discussing the allegations that stemmed from the letter dated 19.07.2013, and giving suggestions based thereon, in its report submitted to the Government. The petitioner contends that inasmuch as the genuineness of the said letter or its contents had not been

subjected to evidential scrutiny in legal proceedings, it was not open to the Commission to discuss the contents of the letter in its report and thereby put into public domain such matters as had the effect of tarnishing the reputation and dignity of the petitioner. It is relevant to note that, while the Commission report, as well as the action taken report of the Government, were tabled in the Legislative Assembly and discussions had taken place in the Assembly, the said discussions do enjoy the privilege and protection granted under Articles 194 and 212 of the Constitution of India. The position is different, however, in respect of the discussions that take place in public, outside the Assembly. In the latter case, the question would arise as to whether or not such discussions would interfere with the fundamental rights of the petitioner to privacy, as well as his right to a fair trial, considering that an action based on the Commission report could drag the petitioner into civil or criminal litigation, where the genuineness and contents of the said letter would have to be proved in legal proceedings.

23. While the right to a fair trial has long been recognised as forming part of the fundamental right of a citizen under Article 21 of the Constitution, more recently, the right to privacy has also been

recognised as forming part of the said right through the judgment of the Supreme Court in ***K.S.Puttaswamy & Anr v. Union of India & Ors. - (2017) 10 SCC 1***. The relevant portions of the said judgment that deal with the nature of the right to privacy, and the inclusion of a right to preserve one's dignity and reputation within its ambit, read as follows:

> ***Per Dr. Chandrachud, J.***
>
> ***N. Is the statutory protection to privacy reason to deny a constitutional right?***
>
> **263.** The Union Government and some of the States which have supported it have urged before this Court that there is a statutory regime by virtue of which the right to privacy is adequately protected and hence it is not necessary to read a constitutional right to privacy into the fundamental rights. This submission is sought to be fortified by contending that privacy is merely a Common law right and the statutory protection is a reflection of that position.
>
> ***P. Not just a Common law right***
>
> **272.** There is also no merit in the defence of the Union and the States that privacy is merely a Common law right. The fact that a right may have been afforded protection at Common law does not constitute a bar to the constitutional recognition of the right. The Constitution recognises the right simply because it is an incident of a fundamental freedom or liberty which the draftsperson considered to be so significant as to require constitutional protection. Once privacy is held to be an incident of the protection of life, personal liberty and of the liberties guaranteed by the provisions of Part III of the Constitution, the submission that privacy is only a right at Common law misses the wood for the trees. The central theme is that privacy is an

intrinsic part of life, personal liberty and of the freedoms guaranteed by Part III which entitles it to protection as a core of constitutional doctrine. The protection of privacy by the Constitution liberates it, as it were, from the uncertainties of statutory law which, as we have noted, is subject to the range of legislative annulments open to a majoritarian government. Any abridgment must meet the requirements prescribed by Article 21, Article 19 or the relevant freedom. The constitutional right is placed at a pedestal which embodies both a negative and a positive freedom. The negative freedom protects the individual from unwanted intrusion. As a positive freedom, it obliges the State to adopt suitable measures for protecting individual privacy. An apt description of this facet is contained in the *Max Planck Encyclopedia of Comparative Constitutional Law,* in its section on the right to privacy.

> "2. The right to privacy can be both negatively and positively defined. The negative right to privacy entails the individuals are protected from unwanted intrusion by both the State and private actors into their private life, especially features that define their personal identity such as sexuality, religion and political affiliation i. e. the inner core of a person's private life....
>
> The positive right to privacy entails an obligation of States to remove obstacles for an autonomous shaping of individual identities."

R. Essential nature of privacy

297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the

foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state

action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between ones mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

299. Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. This state of flux which represents a constant evolution of individual personhood in the relationship with the rest of society provides the rationale for reserving to the individual a zone of repose. The lives which individuals lead as members of society engender a reasonable expectation of privacy. The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desire to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone. The notion that there must exist a reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other, the exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning regulations. If the building bye-laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by regulations designed to protect the interests of the community in planned spaces. Hence while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation.

322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

Per S.A. Bobde, J.

Privacy's connection to dignity and liberty

407. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilized societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. Privacy is an essential condition for the exercise of most of these freedoms. Ex facie, every right which is integral to the constitutional rights to dignity, life, personal liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.

408. Though he did not use the name of "privacy", it is clear that it is what J.S. Mill took to be indispensable to the

existence of the general reservoir of liberty that democracies are expected to reserve to their citizens. In the introduction to his seminal *On Liberty* (1859), he characterized freedom in the following way:

> *"This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.* The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.
>
> *No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual.* Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.
>
> Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. Society has expended fully as much effort in the attempt (according to its lights) to

compel people to conform to its notions of personal, as of social excellence." (emphasis supplied)

409. The first and natural home for a right of privacy is in Article 21 at the very heart of "personal liberty" and life itself. Liberty and privacy are integrally connected in a way that privacy is often the basic condition necessary for exercise of the right of personal liberty. There are innumerable activities which are virtually incapable of being performed at all and in many cases with dignity unless an individual is left alone or is otherwise empowered to ensure his or her privacy. Birth and death are events when privacy is required for ensuring dignity amongst all civilized people. Privacy is thus one of those rights "instrumentally required if one is to enjoy" rights specified and enumerated in the constitutional text.

410. This Court has endorsed the view that "life" must mean "something more than mere animal existence" on a number of occasions, beginning with the Constitution Bench in *Sunil Batra (1) v. UT of Delhi. Sunil Batra* connected this view of Article 21 to the constitutional value of dignity. In numerous cases, including *Francis Coralie Mullin v. UT of Delhi*, this Court has viewed liberty as closely linked to dignity. Their relationship to the effect of taking into the protection of "life" the protection of "faculties of thinking and feeling", and of temporary and permanent impairments to those faculties. In *Francis Coralie Mullin*, Bhagwati, J. opined as follows: (SCC p. 618, para 7)

> "*7.* Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. In *Kharak Singh v. State of U.P.,* Subba Rao J. quoted with approval the following passage from the judgment of Field J. in *Munn v. Illinois* to emphasize the quality of life covered by Article 21: (Kharak Singh case, AIR p. 1301, para 15)
>
> '*15.* ..... "By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world." '

and this passage was again accepted as laying down the correct

law by the Constitution Bench of this Court in the first *Sunil Batra case. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling.* Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that *any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21."* (emphasis supplied)

Privacy is therefore necessary in both its mental and physical aspects as an enabler of guaranteed freedoms.

411. It is difficult to see how dignity-whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights-can be assured to the individual without privacy. Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right of privacy is an integral part of both life and personal liberty under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III.

Per Nariman, J.

524. "Liberty" in the Preamble to the Constitution, is said to be of thought, expression, belief, faith and worship. This cardinal value can be found strewn all over the fundamental rights chapter. It can be found in Articles 19(1)(a), 20, 21, 25 and 26. As is well known, this cardinal constitutional value has been borrowed from the Declaration of the Rights of Man and of the Citizen of 1789, which defined "liberty" in Article 4 as follows:

> "**4.** Liberty consists in being able to do anything that does not harm others; thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by law."

Even in this limited sense, privacy begins where liberty ends - when others are harmed, in one sense, issues relating to reputation, restraints on physical locomotion etc. set in. It is, therefore, difficult to accept the argument of Shri Gopal Subramanium that "liberty" and "privacy" are interchangeable concepts. Equally, it is difficult to accept the respondents' submission that there is no concept of "privacy", but only the constitutional concept of "ordered liberty". Arguments of both sides on this score must, therefore, be rejected.

525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual. The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case-to-case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

526. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with

Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said Article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

Per Abhay Manohar Sapre, J.

541. Perusal of the words in the Preamble would go to show that every word used therein was cautiously chosen by the founding fathers and then these words were arranged and accordingly placed in a proper order. Every word incorporated in the Preamble has significance and proper meaning. The most important place of pride was given to the "People of India" by using the expression, WE, THE PEOPLE OF INDIA, in the beginning of the Preamble. The Constitution was accordingly adopted, enacted and then given to ourselves.

542. The keynote of the Preamble was to lay emphasis on two positive aspects - one, "the Unity of the Nation" and the second "Dignity of the individual". The expression "dignity" carried with it moral and spiritual imports. It also implied an obligation on the part of the Union to respect the personality of every citizen and create the conditions in which every citizen would be left free to find himself/herself and attain self-fulfillment.

543. The incorporation of expression *"Dignity of the individual"* in the Preamble was aimed essentially to show explicit repudiation of what people of this country had inherited from the past. Dignity of the individual was, therefore, always considered the prime constituent of the fraternity, which assures the dignity to every individual. Both expressions are interdependent and intertwined.

544. In my view, unity and integrity of the nation cannot survive unless the dignity of every individual citizen is guaranteed. It is inconceivable to think of unity and integration without the assurance to an individual to preserve his dignity. In

other words, regard and respect by every individual for the dignity of the other one brings the unity and integrity of the nation.

545. The expressions "liberty, "equality" and "fraternity" incorporated in the Preamble are not separate entities. They have to be read in juxtaposition while dealing with the rights of the citizens. They, in fact, form a union. If these expressions are divorced from each other, it will defeat the very purpose of democracy.

546. In other words, liberty cannot be divorced from equality so also equality cannot be divorced from liberty and nor can liberty and equality be divorced from fraternity. The meaning assigned to these expressions has to be given due weightage while interpreting articles of Part III of the Constitution.

547. It is, therefore, the duty of the courts and especially this Court as sentinel on the *qui vive* to strike a balance between the changing needs of the Society and the protection of the rights of the citizens as and when the issue relating to the infringement of the rights of the citizen comes up for consideration. Such a balance can be achieved only through securing and protecting liberty, equality and fraternity with social and political justice to all the citizens under rule of law (see S.S. Bola v. B.D. Sardana)

Per Sanjay Kishan Kaul, J.

623. An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives - people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments.

624. There is no justification for making all truthful information available to the public. The public does not have an interest in knowing all information that is true. Which celebrity has had sexual relationships with whom might be of interest to

the public but has no element of public interest and may therefore be a breach of privacy. Thus, truthful information that breaches privacy may also require protection.

625. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent.

646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right.

24. Even prior to the said judgment, the right to protect ones reputation was recognised as forming part of the fundamental right under Art.21 of the Constitution in ***Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni – (1983) 1 SCC 124***. The International Convention on Civil and Political Rights, 1965 also recognises the right to have opinions and the right of freedom of expression subject to the right of reputation of others. The right has also been recognised in ***State of Bihar v. Lal Krishna***

Advani – (2003) 8 SCC 361.

25. It might be worth noting in this connection, as observed by **Granville Austin** in his treatise on our Constitution titled "***The Indian Constitution – Cornerstone of a Nation***", that while under our Constitution, the guarantee of fundamental rights is mostly seen as offering individuals and minority groups protection against arbitrary and prejudicial state action, there are provisions under the Constitution, such as Article 17, which abolishes untouchability, Article 15(2), which lays down that no citizen shall suffer any disability in the use of shops, restaurants, wells, roads and other public places on account of his religion, race, caste, sex or place of birth and Article 23, which prohibits forced labour, that are designed to protect an individual against the actions of other private citizens. On account of its nature as a right that is personal to an individual, I am of the view that the newly recognised fundamental right to privacy, which takes within its fold the right to protection of ones reputation as well, would merit classification as a fundamental right that protects an individual, not only against arbitrary State action, but also against the actions of other private citizens, such as the press or media.

26. In the instant case, as a discussion of the letter and its contents was not warranted since it did not form part of the ToR's, as expounded by the Commission itself, the findings and recommendations of the Commission, based on the said letter cannot be legally sustained. That apart, the verbatim reproduction of the letter itself, in not less than four places in the Commission report, which has since been laid before the legislative assembly, makes it vulnerable to a discussion by the public and the media, and a consequent infringement of the fundamental rights of the petitioners under Article 21 of the Constitution, both in relation to privacy as well as his right to a fair trial. While it may be true that the report of the Commission itself is not binding on the Government or the petitioner, one cannot ignore the effect that the report could have on public perception of the findings and recommendations therein. It has to be borne in mind that it was a retired judge of this court that constituted the one man Commission of Inquiry and hence, notwithstanding the legal position with regard to its binding nature, the public could well view the findings as legally sacrosanct. This could, in turn, entail public discussions, including in the media, based on an erroneous belief that the allegations stood proved through the

Inquiry that was held. The fundamental rights of the petitioners, referred to above, cannot be left so vulnerable to attack and it is therefore that steps ought to be put in place to avoid such public discussions.

27. In view of my finding that the sexual allegations contained in the letter dated 19.07.2013 never formed part of the ToR before the Commission and hence could not have formed the subject matter of the Section 8B notice issued to the petitioners, I am of the view that to protect the fundamental rights of the petitioners under Article 21 – both in relation to their right to a protection of their reputation as also their right to a fair trial – the references to the letter dated 19.07.2013, the findings on the allegations therein, and the suggestions/recommendations of the Commission based thereupon, shall stand obliterated from the report of the Commission, as also the press note issued by the Government. Such a course of action is warranted to prevent further infringement of the rights of the petitioners for it cannot be an answer to a citizen complaining of a breach of his privacy right, or his right to a fair trial, that the document in question, the genuineness and contents of which have not been established in legal proceedings, is already in the public

domain.

28. It might be recalled, in this connection, that a gag order was passed in this case to strike a balance between competing rights viz. the right of the people to know the true state of affairs, pertaining to the public life of their leaders, the incidental right of the media to publish/broadcast/disseminate such information and the conflicting rights of the petitioners who were affected through the publication of such information. That the freedom of speech and expression guaranteed under Article 19 (i)(a) of the Constitution takes within its ambit the freedom of Press is already settled through the decision of the Supreme Court in ***Sakal Papers (P) Limited v. Union of India – AIR 1962 SC 305***. While passing the interim order restraining the media from discussing the letter dated 19.07.2013, this court was only exercising its inherent power to prevent a publication of the letter and its contents during the pendency of the *lis*. The inherent power of this Court to pass such orders in the interests of justice has been recognised through the 9-judge bench decision of the Supreme Court in ***Naresh Shridhar Mirajkar & Ors. v. State of Maharashtra & Anr. – AIR 1967 SC 1***. The said decision was followed later by a 5-judge bench of the Supreme Court in ***Sahara India Real Estate***

Corporation Ltd v. SEBI – (2012) 10 SCC 603. On its part, the media has been supportive of the cause of justice by complying with the directions in the interim order of this Court and demonstrating the responsibility and maturity that is expected of it in a democracy. I believe that they will continue to display this maturity through responsible reporting of events that are to follow. In the light of the directions given in this judgment as regards the obliteration of certain parts of the report of the Commission as also the press note issued by the Government, I do not deem it necessary to continue the gag order, since the letter in question has, admittedly, not been subjected to evidentiary scrutiny and cannot now, as a consequence of this judgment, be seen as having any endorsement through the Commission's report. This Court believes that the media will seek guidance from the ethical code that informs responsible journalism and exercise caution with regard to reporting/discussing the contents of the letter, keeping in mind the observations in this judgment as regards the fundamental rights of the petitioners, and thereby live up to the faith and confidence reposed on it by this Court.

These writ petitions are thus disposed as follows:

(i) W.P.(C) No.2949 of 2018 is dismissed;

(ii) W.P.(C) No.40775 of 2017 is partly allowed by directing that the references to the letter dated 19.07.2013, the reproduction thereof, the observations/findings on the sexual allegations therein, and the suggestions and recommendations based thereupon, in the report of the Commission, shall stand expunged therefrom.

(iii) The State Government shall treat the report of the Commission of Inquiry as comprising of only those parts as have not been expunged through this judgment. Consequently, any action taken by the State Government based on the report of the Commission, including any press note issued, shall be reviewed accordingly.

(iv) Taking note of the responsible and mature response of the print and electronic media to the gag order dated 19.12.2017 passed by this court, it is not deemed necessary to continue the said order. The order is therefore vacated with the hope that the media will seek guidance from the ethical code that informs responsible journalism and exercise caution with regard to reporting/discussing the contents of the letter dated 19.07.2013, keeping in mind the observations in this judgment, particularly as regards the fundamental rights of the petitioners.

(v) There will be no order as to costs.

sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

prp/