

**\*IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on: 15th October, 2012

**Bata India Ltd.**

**..... Plaintiff**

Through: Mr. Neeraj Kishan Kaul, Sr.Advocate  
with Mr. P.R.Sikka, Mr.Amet Sikka,

Mr. S. Kachwaha, Advs.

versus

**A.M. Turaz & Ors.**

**..... Defendants**

Through: Mr. Ameet Naik, Ms.Aparajita Singh,  
Mr. Harshvardhan Jha, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE KAILASH GAMBHIR**

**KAILASH GAMBHIR, J.**

**IA No. 18245/2012 in CS (OS) No. 3010/2012**

1. This order shall dispose of the application filed by the plaintiff under Order 39 Rule 1& 2 r/w Section 151 of the Code of Civil Procedure to restrain the defendants, their servants, employees, agents, partners/ proprietors,

directors, officers, associates or sister concerns, marketing offices, or any person or entity acting on their behalf or under their authority from releasing from releasing , distributing, exhibiting, performing or communicating to the public by any means or technology oral or audio visual performance of the impugned song '*Mehngai*'.

2. It would be pertinent to give a brief conspectus of the facts of the present case to decide the present application. The plaintiff has filed the present suit for permanent injunction restraining infringement of its trademark/name, passing off, defamation, rendition of accounts, damages etc. against the defendants inter-alia on the grounds that the plaintiff is the owner/exclusive licensee of legendary brands including BATA, Marie Claire, Hush Puppies, Scholl, North Star, Power, Bubblegummers, Comfit, Koolkids, Sparx etc., and the said trademark and logo BATA is registered in the name of the plaintiff since 14<sup>th</sup> April, 1969, the same being valid and subsisting up to 2014. It is also the case of the plaintiff that the plaintiff is a globally renowned trade name in the footwear products

and the plaintiff enjoys high reputation for its honest and principled conduct, quality and reliability of their products. The plaintiff claims that its retail outlets serve approximately 1 million customers per day and the plaintiff operates around 1200 retail stores and provides direct and indirect employment to thousands of people in India. The plaintiff also claims to be the recipient of various national and international awards. The main grievance of the plaintiff against the defendants is for the alleged offending song "*Mehngai*" in their forthcoming movie "*Chakravyuh*". As per the plaintiff, the said song is being used to promote the film *Chakravyuh* on YouTube and the said movie is likely to be released in various cinemas very shortly. As per the plaintiff, the following lyrics in the said song are offending so as to cause serious harm to the reputation and goodwill of the plaintiff:-

***"Birla Ho Ya Tata Ambani Ho Ya Bata,  
Apne Apne Chakar Mein Desh Ko Hai Kata  
Birla Ho Ya Tata Ambani Ho Ya Bata  
Apne Apne Chakar Mein Desh Ko Hai Kata"***

***Are humre hi khoon se inka engine chale dhakadhak, Aam admi ki jeb ho gai hai safachat, aam aadmi ki jeb ho gai safachat."***

3. As per the plaintiff' the lyrics used in the said song are *per se* defamatory and the transmission of the same either through promos or in the film or through CDs etc by the defendants for their own commercial and profitable motives will disparage and dilute the goodwill and reputation of the plaintiff amongst the common people. The plaintiff has also averred that under the pretext of condemning corruption, the defendants have publically condemned the plaintiff in order to generate public hatred and contempt towards the plaintiff, purely for the sake of profit, with no other intention and without there being any foundation or basis for the same. Based on these facts, the plaintiff has claimed the grant of an ad interim injunction to restrain the defendants, their employees, servants, agents, etc from releasing, distributing, exhibiting, performing or communicating to the public by any means or technology including but not limited to making available on the internet the words or any aural or

audiovisual performance of the song "***Mehngai***" which would have the effect of defaming the plaintiff or damaging its reputation and goodwill amongst the public at large.

4. Arguing the stay application, Mr. Neeraj K. Kaul, learned Senior Advocate appearing for the plaintiff submitted that the particular lines in the offending song are *per se* defamatory in nature, disparaging the long established reputation of the plaintiff, which is renowned in the global market catering to the needs of both poor and the rich for the last more than 100 years. The counsel also submitted that the plaintiff has a proprietary right over the trademark and logo 'BATA' and the same is registered since 1969. Counsel further submitted that the plaintiff is suffering and stands to suffer irreparable and unquantifiable loss since the plaintiff's entire business depends upon its good name and reputation in the market. The counsel also contended that the goodwill that the plaintiff enjoys both in India and abroad has been built up by over eighty years of hard

work, and the same would be irreparably damaged if the defendants are allowed to use the said trade name in the said song in their upcoming movie. The counsel further submitted that the fundamental right of freedom of expression cannot be abused to malign the reputation of any person/company and the prime duty of the Court is to balance and harmonize the two and then decide in a given case whether the freedom of expression has been transgressed or not. Counsel further submitted that the plaintiff has no quarrel with so far the raising of social and political issues by the defendants in the movie or in the song raising voice against the price rise and other ills plaguing the society is concerned, but certainly, they have no right to calumniate the reputation of the plaintiff, without there being any factual basis. Counsel further submitted that there is a direct imputation by the defendants in the said offending song and it is not a case where something has to be inferred which could have the effect of tarnishing one's reputation. The counsel also stated that the lines that include the plaintiff's trade name

are the centerpiece of the song, repeatedly laying emphasis on the plaintiff's trade name, recklessly boasting and disparaging the reputation that the plaintiff has earned over the years. The counsel further submitted that literally translating the said lines it raises allegations like the plaintiff being in pursuit of profits, has carved up the nation and it is the blood of the general public at large that jaunts their engines and the common man's pocket is cleared out bare just to make the life of the plaintiff endurable, which is completely manipulative and obnoxious. The learned counsel submitted that the defendants have the absolute right to project their Cinematographic skills through critical comments on the society or even using a satire on the social and political system with analytical overtones but certainly the defendants cannot be said to have any right to trample and wantonly denigrate the reputation of the plaintiff. The counsel submitted that it is a totally irresponsible and dishonest act on the part of the defendants and the same appears to be done out of malice as the defendants

have used derogatory expressions in the said song to the extent of suggesting that the plaintiff is one of the blood suckers of the people and has looted the nation; which expression is derogatory on the very face of it. The counsel thus stated that there is no public or societal interest involved, therefore to use such nasty expressions in the said song, that too at the cost of reputation of the plaintiff is against moral and legal ethics. Counsel also submitted that in the facts of such like case, the court can always restrain the defendants from further displaying or viewing the said song as the defendants cannot be heard to say that the grant of damages would afford adequate relief to the plaintiff. Counsel also submitted that the expressions used in the said song cannot be merely referred to as an irksome or unreasonable comment which is common and can be ignored but the same are *per se* defamatory and cannot be bulwarked on the touchstone of right of the defendants to freedom of expression. Counsel further submitted that under Article 19(2) of the Constitution of India, the right of freedom of



expression cannot be abused to the extent of defaming and disparaging the reputation of others. Counsel also submitted that the canvas of Article 19 of the Constitution is wide open for the defendants to express their creativity but one cannot use that freedom for maligning the reputation of others. In support of his arguments, counsel for the plaintiff placed reliance on the definition of defamatory statement given in '***Salmond and Heuston' on the Law of torts, Twentieth Edition***, which states as under:

*" A defamatory statement is one, which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right- thinking members of the society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right- thinking member of society. Hence the test is an objective one, and it is no defense to say that the statement was not intended to be defamatory, or uttered by way of a joke. A tendency to injure or lower the reputation of the plaintiff suffices, for if words are used which impute discreditable conduct of my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue. Hence, it is settled that a statement may be defamatory although no one to whom it is published believes it to be true."*

The counsel for the plaintiff also placed reliance on ***Halsbury's Laws of England***, Fourth Edition, Vol. 28 which also defines the defamatory statement as under:

*" A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling , trade or business."*

To further define defamation, the counsel for the plaintiff placed reliance on the Fifth Edition of ***Carter Ruck on Libel and Slander*** wherein the defamatory is defined as under:

*" (1) a statement concerning any person which exposes him to hatred, ridicule, or contempt or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, professional or trade.*

*(2) A false statement about a man to his discredit.*

*(3) Would the words tend to lower the plaintiff in the estimation of right thinking members of society generally."*

5. The learned Counsel for the plaintiff also placed reliance on the following judgments:

1. Ram Jethmalani Vs. Subramaniam Swamy,  
126(2006) DLT 535

2. Shilpa S. Shetty V. Magna Publications Co. Ltd.  
and others, AIR 2001 BOMBAY 176.

3. Cadbury (India) Ltd V. Dr. M.C. Saxena,  
83(2000) DLT 592.

6. Mr. Sandeep Sethi, the learned Senior Advocate appearing for defendant nos. 1 to 3 vehemently refuted the contentions raised by the learned Senior counsel for the plaintiff. The learned counsel submitted that the plaintiff has not placed the correct facts before this court with mala fide designs for the purpose of obtaining *ex-parte* interim injunction against the defendants. The learned counsel further submitted that revising committee of the Central Board of Film Certificate (CBFC) vide order dated 1.10.2012 has duly certified the said film "**Chakravyuh**" in which the alleged song has been sung for public exhibition. The counsel further submitted that the promos of the said film were duly certified by the CBFC vide order dated 5.7.2012 and since then the promos of the film, as well as, of the said

song are being displayed on 'YouTube' and other media sites. The counsel also submitted that earlier the CBFC had not approved displaying and picturisation of the said song referring to the names of the industrial houses at the first instance, but the Revising Committee of the CBFC after giving due consideration to the explanation advanced by the defendant no.2 and after the defendant no.2 having agreed to put a disclaimer, has permitted the release of the same for the public. The counsel thus submitted that with 'disclaimer' being added, now the plaintiff cannot take a plea that the reference to their name in the song is disparaging their reputation. The counsel also submitted that reference to these industrial houses in the said song is only illustrative and denominative and not with a view to harm or disparage the reputation of the plaintiff. The counsel also submitted that this court has to examine the entire context in which the said song has been conceptualized as the ire of the Maoists, who are shown to have raised their voice against the capitalists and

industrial houses for their ongoing sufferings. Advancing the arguments further counsel laid emphasis on the contention that the usage of the names of industrial houses in the song is only symbolic but otherwise the same are neither defamatory nor can be treated as any kind of infringement of trade mark of the plaintiff. The counsel further submitted that the Cinematographic Act is a complete Code in itself and referring to Sections 3, 4, 5A, 5B, 6 of the said Act, counsel submitted that the CBFC comprises of experts who have given certification not only after viewing the film but after having gone through each and every aspect of the film including the lyrics of the song in question. The counsel further submitted that the matter was also examined by the revising committee of the Board and it is only after the decision of the revising committee, that the necessary certification of the film and the promos of the film were given a green signal. Counsel also submitted that even otherwise, there is a specific remedy provided under Section 6 of the Act which remedy has not been exhausted by the plaintiff

and the remedy of the plaintiff to file a civil suit is clearly barred. Counsel further submitted that the lines in the song were actually sung by Jan Natya Mandli of tribal and street performances and the same actually reflected the feelings of the Maoists and accordingly the same have been manifested as a result thereof. The counsel further submitted that even earlier in the year 1978, the same kind of expressions were used in a movie called 'Hiralal Pannalal', but the plaintiff never raised any such objections against the said song. The learned counsel thus submitted that it is not for the first time that a reference is being made to the leading industrial houses by the film makers, as earlier also the same names were used in the said movie symbolically. The counsel also placed reliance on Section 5 B of Cinematographic Act, 1952 to support his argument, that the certification to a film is granted by the Board after they are satisfied that the film is suitable for public exploitation and wherever the Board finds that the exhibition of the film or any part thereof is against the interests of the sovereignty and

the integrity of India, the security of State, friendly relations with foreign states, public order, decency or morality or the same involves defamation or contempt of court or, is likely to incite the commission of any offence, then the film will be denied certification for public exhibition. The learned counsel for the defendants further argued that the parameters envisaged under Section 5B are in *para-materia* to the restrictions laid down under Article 19(2) of the Constitution of India. The counsel thus urged that after the said Board has gone into the issue of alleged defamation of the plaintiff in the said song then this court will not sit in appeal to review the decision of an expert body. Counsel also submitted that in any case the plaintiff has not approached the Central Government under Section 6 of the Cinematographic Act 1952 against the alleged offending and defamatory lyrics in the said song. The counsel also submitted that the remedy of revision is available to any individual/institution if aggrieved by the decision of the said Board or its revising authority. The counsel also

submitted that the plaintiff has not challenged the certification of the Board in the present suit and therefore also the plaintiff is not entitled to the grant of any relief. The learned Senior Advocate also invited attention of this court to the guideline (XVIII) in the said Act in support of his argument that before granting certification the Central Board of Film Certification has fully gone into the issue of examining whether the visuals or words used in the movie or in any song therein involves defamation of an individual or a body of individuals, or contempt of court and once the Board has gone into all these aspects and finds no such defamatory material in the movie or in the song, then the views of such expert body cannot be brushed aside. The counsel also argued that the defendants have not travelled beyond the freedom available to them under Article 19 of the Constitution of India and in exercise of the right of 'freedom of expression' in a democratic society such a precious right of the defendants cannot be snatched away by the grant of pre-emptory injunction.



The counsel further submitted that the large parts of the country are infested with the activities of the Maoists and through the said film, the defendants have demonstrated and displayed the views of the Maoists and also the miseries of the common man and such a debate cannot be stultified and rather the same is required to be encouraged. The counsel further argued that at best the remedy available to the plaintiff is to maintain a suit for defamation and not to seek a pre-emptory injunction.

7. The learned counsel further submitted that the said film raises certain social issues laying more emphasis as to how the industrial class and the political system as a whole have failed the downtrodden and the impoverished class. The counsel further submitted that the film is presenting two competing views, and one of the views, is of the protagonists amongst the Maoists who are singing the said song and expressing their anger against the price rise and the way they have been exploited by the business houses. Counsel thus submitted, that it is in this context in which the song has been conceptualized

and picturized which would matter and not merely the lyrics alone. The counsel also submitted that prior to the filing of the present suit, the plaintiff did not issue any notice to the defendants although the promos of the said movie were certified as long back as on 7.9.2012. In support of his arguments, counsel for the defendants placed reliance on the following judgments:

1. Khushwant Singh V. Maneka Gandhi, AIR 2002 Delhi 58
2. Tata sons V. Greenpeace International, 148 (2008) DLT 487
3. R.Rajagopal V. state of Tamilnadu, 1994 SCC(6) 632
4. Union of India V. K.M. Shankarappak, (2000) 7 SCALE 659
5. K.A. Abbas V. The Union Of India & Anr, 1971 AIR 481
6. Prakash Jha Productions V. U.O.I, W.P(C ) No. 345 of 2011
7. Laugh It Off Promotions CC V. South African Breweries International (Finance) B. V. Sabmark International, CCT 42/04
8. In rejoinder arguments, Mr. Kaul, the learned Senior counsel representing the plaintiff argued that the

remedy to file revision is not available to an individual and therefore, the plaintiff could not have approached the Revisioning Authority to challenge the decision of the Central Board of Certification under Section 6 of the Act. Counsel distinguishing the facts of the *Tata case (Supra)* and *Maneka Gandhi case (Supra)*, on which reliance was placed by the counsel for the defendants submitted that these cases are clearly distinguishable as ratio in both the cases was peculiar to the facts of those cases. The counsel further submitted that so far *Tata Sons Case (supra)* is concerned; the decision is already under challenge before the Appellate Court. However distinguishing the said case, the counsel submitted that in the present suit there is a direct attack on the plaintiff to destroy its reputation and image unlike in *Tata's case* where such attack was not only indirect but was just a satire. Counsel further submitted that ordinarily the courts may not grant pre-emptory injunction, but when ex-facie there is something disparaging, then injunction is the only efficacious remedy, like in *Shilpa Shetty's case*

*(Supra)*, wherein the injunction was granted and the defendants were restrained from publishing any defamatory material. The counsel also referred to the song in the movie 'Hiralal Pannalal' and stated that nothing defamatory as alleged existed or could be made out in that particular song.

9. I have heard the learned counsel for the parties and given my thoughtful consideration to the arguments advanced by them.

10. Since times immemorial, the Indian cinema has not only been a source of entertainment but has also been responsible for bringing to the fore various political, socio-economic issues. Movies play a very significant role in the life of a common man and any issue based movie leaves a great impact on the minds of the viewers and influences their mind set and attitude. Films have the capacity to galvanize a human mind, as the human psyche is vulnerable and due to being star struck the mind of a common man germinates with the ideas shown in the

movies. How the movies motivate our thoughts and actions was elucidated in ***S. Rangarajan vs P. Jagjivan Ram, 1989 SCC (2) 574*** in the following words:-

*"10. Movie doubtless enjoys the guaranty under Article 19(1)(a) but there is one significant difference between the movie and other modes of communication. The movie cannot function in a free market place like the newspaper, magazine or advertisement. Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for everyone who sees it. In view of the scientific improvements in photography and production the present movie is a powerful means of communication. It is said: "as an instrument of education it has unusual power to impart information, to influence specific attitudes towards objects of social value, to affect emotions either in gross or in microscopic proportions, to affect health in a minor degree through sleep disturbance, and to affect profoundly the patterns of conduct of children." (See Reader in Public Opinion and Communication Second Edition by Bernard Betelson and Morris Janowitz p. 390). The authors of this Book have demonstrated (at 391 to 401) by scientific tests the potential of the motion pictures in formation of opinion by spectators and also on their attitudes. These tests have also shown that the effect of motion pictures is cumulative. It is proved that even though one movie relating to a social issue may not significantly affect the attitude of an individual or group, continual exposure to films of a similar character will produce a change. It can, therefore, be said that the movie has unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an*

*equal potential to instil or cultivate violent or good behaviour. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market place just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary."*

The plaintiff has filed the present suit against the defendants for permanent injunction to restrain infringement of trademark, passing off, defamation, rendition of accounts, damages etc. This suit was taken up by this Court on 4<sup>th</sup> October, 2012 and as the plaintiff had filed an application under Order 6 Rule 17 CPC, to seek amendment of the plaint which was not yet listed before the Court, on the request of the counsel for the plaintiff, the matter was accordingly adjourned for 5<sup>th</sup> October, 2012. On 5<sup>th</sup> October, 2012, the said application for amendment was taken up for hearing and the same was accordingly allowed. This Court also directed notice in the suit to the defendants for 8<sup>th</sup> October, 2012. The Court also allowed the impleadment of Censor Board of Film Certification (CBFC) as one of the additional defendants on the oral request of counsel for the plaintiff. On 8<sup>th</sup> October,

2012 , Mr. Sandeep Sethi, learned Senior Advocate entered appearance on behalf of defendant No. 1 to 3, Mr. Prateek Chaddha and Mr. Anirban Sen, Advocates entered appearance on behalf of defendant No. 4 and Mr. Anshu Bhanot, Advocate entered appearance on behalf of defendant No. 5. Counsel for the plaintiff submitted that the plaintiff had served CBFC through e-mail, however, nobody was present on behalf of CBFC. Counsel appearing for the plaintiff, in view of the urgency of the matter laid stress on the hearing of the stay application. Mr. Sandeep Sethi, Sr. Advocate appearing for the defendants No.1 to 3 although prayed for time for filing of the reply, but yet agreed to address the arguments on the stay application even in the absence of the reply and therefore the court decided to proceed with the matter accordingly.

11. The plaintiff in the present application seeks an order of restraint against the defendants, their employees, servants, agents etc. from releasing, distributing, exhibiting, performing or communicating to the public by any means or technology including internet in aural or

audiovisual performance of the song "**Mehngai**" separately or as a part of the film. Before I proceed to examine the contentions raised by the counsel for the parties, it would be appropriate to reproduce the lyrics of the allegedly offending song, which has been picturised in the film "**Chakravyuh**" and promos of which have already been released and the same are as follows:-

*"Bhaiya dekh liya hai bahut teri sardari re  
Ab to humri baari re naa....."*

*Mehngai ki mahamaari ne humara bhatta bitha diya  
Chale hataane gareebi, gareebon ko hata diya  
Sarbat ki tarah desh ko  
Sarbat ki tarah desh ko gatka hai gatagat  
Aam aadmi ki jeb ho gayi hai safachat*

*Bhaiya dekh liya hai bahut teri sardari re  
Ab to hamri baari re naa..  
Bhaiya dekh liya hai bahut teri sardari re  
Ab to hamri baari re naa..*

***Birla ho ya Tata, Ambani ho ya Bata  
Sabne apne chakkar mein des ko hai kata  
Birla ho ya Tata, Ambani ho ya Bata  
Sabne apne chakkar mein des ko hai kata***

***Are humre hi khoon se inka  
Engine chale dhakadhak  
Aam aadmi ki jeb ho gayi hai safachat  
Aam aadmi ki jeb ho gayi hai safachat***

*Ab to nahi chalegi teri ye rangdari re  
Ab to humri baari re na..  
Ab to nahi chalegi teri ye rangdari re  
Ab to humri baari re na..*



*Arey* *re...*  
*Ab to nahi chalegi teri ye rangdari re*  
*Ab to humri baari re naa..”*

12. As per the plaintiff, the said song is being played to publicize the film and after having released the promos of the same on YouTube the defendants are likely to release the said song in different aural and audio visual formats to promote their said film. The plaintiff has taken a strong exception to the lines in the said song, which according to the plaintiff are *per se* defamatory in nature and derogatory to the extent of suggesting that as if the plaintiff is one of the blood suckers of the people and has looted the nation. The plaintiff has also taken a stand that the plaintiff is a renowned and reputed brand and has also claimed to be India's largest footwear retailer, being a recipient of various prestigious awards across the world. The plaintiff also claims to be operating around 1200 retail stores in India itself and its retail presence is spread over 50 countries.

13. As per the case set up by the plaintiff, it enjoys high reputation for its honest and principled conduct, for quality and reliability of its product and for the service which the plaintiff has rendered to the nation by pioneering the organized sector in footwear and related services, and the goodwill it enjoys in the commercial world and the society is its most valuable assets.

14. Article 19(1) (a) of the Constitution guarantees to all citizens right to freedom of speech and expression which means a right to express one's opinion either verbally or in writing, printing, films or any other manner. Under Article 19(2) of the Constitution of India, reasonable restrictions have been placed on the exercise of the said right to freedom of speech and expression, in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. The importance of this freedom cannot be over emphasized as it forms a part of the fundamental rights which are the touchstone of our

democratic setup, and the Apex Court has also time and again reiterated its primacy. In the celebrated pronouncement of ***Indian Express Newspapers(Bombay) vs. Union of India AIR 1986SC872***, the Apex Court held that the freedom of expression is the first condition of liberty and it occupies a preferred position in the hierarchy of liberties giving succour and protection to other liberties. The Apex Court in the case of ***Life Insurance Corporation of India & Union of India vs. Prof Manu Bhai D.Shah & Cinemart Foundation AIR 1993SC 171***, also held that the freedom of speech is a basic human right and held as under:

*"Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feelings to others. Freedom of speech and expression is thus a natural right which a human being acquires on birth. It is, therefore, a basic human right. "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims the Universal Declaration of Human Rights (1948). The People of India declared in the Preamble of the Constitution which they gave unto themselves their resolve to secure to all citizens liberty of thought and expression.*

*8. The words 'freedom of speech and expression' must, therefore, be broadly construed to include the freedom to*

*circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article [19\(2\)](#) of the Constitution."*

Hence, it cannot be gainsaid that the modern mediums of communication are undoubtedly vital for keeping the public debate alive on various issues of national importance, but at the same time the restrictions imposed under Article 19(2) cannot be encroached. This court in the celebrated judgment of in ***Ram Jethmalani vs Subramaniam Swamy 126 (2006) DLT 535*** defined defamation as a public communication which tends to injure the reputation of another. It dwelled upon the balance between the right to reputation and held that law of defamation, by making actionable certain utterances, runs counter to another widely accepted legal tenet-the right to freedom of expression, but the two have been harmonised by judicial process so that an individuals right of privacy and right to protect his honour and reputation is

preserved and at the same time his fundamental right to free speech is also protected. The court also explained the defenses of truth, fair comment and privilege available in a suit for defamation as under:

*"95. Traditional defenses to an action for defamation have now become fairly crystallized and can be compartmentalized in 3 compartments : truth, fair comment and privilege. Truth, or justification, is a complete defense. The standard of proof of truth is not absolute but is limited to establishing that what was spoken was 'substantially correct'. Fair comment offers protection for the expression of opinions. Standard of proof is not that the Court has to agree with the opinion, but is limited to determine whether the views could honestly have been held by a fair-minded person on facts known at the time. Unlike defense of truth, defense based on fair comment can be defeated if the plaintiff proves that the defamer acted with malice. Similar is the situation where the defense is of qualified privilege. Privilege is designed to protect expression made for the public good. Protection of qualified privilege is lost if actual malice is established. In public interest, absolute privilege is a complete defense. Rationale of absolute privilege being restricted to Court proceedings or proceedings before Tribunals which have all the trappings of a Civil Court and Parliamentary proceedings is that if threat of defamation suits loom large over the heads of lawyers, litigants, witnesses, Judges and Parliamentarians it would prohibit them from speaking freely and public interest would suffer."*

15. In the facts of the present case, the core issue involved is whether the defendants have transgressed the right to freedom of expression and speech through the song ***"Mehngai"***. Another important question to be answered by this Court in the present case is whether pre-emptory injunction can be granted by the Court to restrain the

defendant from transmitting and exhibiting the said song "**Mehngai**" or the only remedy is to claim damages after proving such defamation in trial.

16. In **Selvi J. Jayalalithaa and Anr. vs. R.Rajagopal @ R.R.Gopal @ Nakkheerangopal and Anr. AIR 2006 Madras 197**, the Madras High Court observed that the defendants as investigative journalists are entitled to do criticism, but without touching the reputation and without exceeding the limits and bounds made by law, since law would not permit any one to use his freedom of speech or expression as to injure another's reputation or to indulge what may be called character assassination. The relevant paras of the same are reproduced as under:-

*"12. The question as to the nature of the freedom of speech in Article 19(1) of the Constitution is an absolute one came up for consideration before the High Court of Andhra Pradesh in the case of K.V. Ramaniah v. Special Public Prosecutor , wherein the Division Bench has held thus:*

*...Freedom of speech in Article 19(1) cannot be taken to mean absolute freedom to say or write whatever a person chooses recklessly and without regard to any person honour and reputation. The right guaranteed by the Constitution, it must be borne in mind, is to all the citizens alike. The right in one certainly has a corresponding duty to the other and judged in that manner also, the right guaranteed cannot but be a qualified one. Indeed the right has its own natural limitation. Reasonably limited alone, it is an inestimable*

*privilege. Without such limitations it is bound to be a scourge to the Republic.*

*16. Says Professor K. G. Gardinar in his Rule on the Road that "when you walk on the road, you are at liberty to revolve your walking stick so long as it does not touch the nose of the other man". This Court is of the opinion that this analogy can be applied to the present facts of the case. True it is, the defendants as investigative journalists are entitled to make criticism, but without touching the reputation and without exceeding the limits and bounds made by law, since law would not permit any one to use his freedom of speech or expression as to injure another's reputation or to indulge what may be called character assassination."*

In the judgment of the Apex Court in the case of ***R.Rajgopal alias R.R. Gopal and another vs State of T.N. and others , AIR 1995 SC 264(1)*** the Supreme Court laid down broad principles dealing with the right to privacy of a person vis-à-vis freedom of press and free speech and the relevant paras of the same are reproduced as under:

*"28. We may now summarise the broad principles flowing from the above discussion:*

*(1)The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.*

(2)The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2) an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media. (3)There is yet another exception to the rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4)So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5)Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6)There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media."

In the case of ***K.A. Abbas Vs. The Union of India & Anr.***

***1970(2) SCC 780***, the Apex Court held that the prior



restraint on exhibition of motion pictures subject to censorship is within the ambit of 19(2) of the Constitution of India as a reasonable restriction. The court also took a view that the censorship is prevalent the world over in some form or the other and pre censorship also plays a part where the motion pictures are involved, shows the desirability of censorship in this field. The court further took a view that the treatment of motion pictures must be different from that of other form of art and expression as a person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing the motion picture. It would be worthwhile to reproduce the relevant paras of the same as under:

*"19. The first question is whether the films need censorship at all' Pre-censorship is but an aspect of censorship and bears the same relationship in quality to the material as censorship after the motion picture has had a run. The only difference is one of the stage at which the State interposes its regulations between the individual and his freedom. Beyond this there is no vital difference. That censorship is prevalent all the world over in some form or other and pre-censorship also plays a part where motion pictures are involved, shows the desirability of censorship in this field. The Khosla Committee has given a description generally of the regulations for censorship (including pre-censorship) obtaining in other countries and Hunning's book deals with*

*these topics in detail separately for each country. The method changes, the rules are different and censorship is more strict in some places than in others, but censorship is universal. Indeed the petitioner himself pronounced strongly in favour of it in a paper entitled 'Creative Expression' written by him. This is what he said: "But even if we believe that a novelist or a painter or a musician should be free to write, paint and compose music without the interference of the State machinery, I doubt if anyone will advocate the same freedom to be extended to the commercial exploitation of a powerful medium of expression and entertainment like the cinema. One can imagine the results if an unbridled commercial cinema is allowed to cater to the lowest common denominator of popular taste, specially in a country which, after two centuries of political and cultural domination, is still suffering from a confusion and debasement of cultural values.*

*Freedom of expression cannot, and should not, be interpreted as a licence for the cinemagnates to make money by pandering to, and thereby propagating, shoddy and vulgar taste'*

*20. Further it has been almost universally recognised that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its coordination of the visual and aural senses. The art of the cameraman, with trick photography, vistavision and three dimensional representation thrown in, \_ has made the cinema picture more true to life than even the theatre or indeed any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen. Therefore, classification of films into two categories of 'U' films and 'A' films is a reasonable classification. It is also for this reason that motion picture must be regarded differently from other forms of speech and expression. A person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing a motion picture. Therefore the treatment of the latter on a different footing is also a valid classification.*

*41. With this preliminary discussion we say that censorship in India (and precensorship is not different in quality) has full justification in the field of the exhibition of cinema films. We need not generalize about other forms of speech and expression here for each such fundamental right has a different content and importance. The censorship imposed on the making and exhibition of films is in the interests of society. If the regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused. We hold, therefore, that censorship of films including prior restraint is justified under our Constitution."*

17. In the case of ***LIC of India Vs. Cinemart Foundation, AIR 1993 SC 171***, the court took a view that in a democratic set up like ours, the dissemination of news and views for a popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2). The Court also held that such freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of the other citizens or to jeopardize public interest. The relevant para from the said judgment is reproduced as under:

*"20. In the United States prior restraint is generally regarded to be at serious odds with the First Amendment and carries a heavy presumption against its constitutionality and the authorities imposing the same have to discharge a heavy burden on demonstrating its justification (See New York Times Company v. The United States, 403 U.S. 713. Traditionally prior restraints, regardless of their form, are*

frowned upon as threats to freedom of expression since they contain within themselves forces which if released have the potential for imposing arbitrary and at times irrational decisions. Since the function of any Board of Film Censors is to censor it, it immediately conflicts with the Article 19(1) (a) and has to be justified as falling within permissible restraint under Article 19(2) of the Constitution. A similar question came up before this Court in *K.A. Abbas v. The Union of India*, [1971] 2 SCR 446 wherein Chief Justice Hidayatullah exhaustively dealt with the question of prior restraint in the context of the provisions of the Constitution and the Act. The learned Chief Justice after setting out the various provisions to which we have already adverted posed the questions; 'How far can these restrictions go and how are these to be imposed'? The documentary film 'A tale of four cities' made by K.A. Abbas portrayed the contrast between the luxuriant life of the rich and the squalor and poverty of the poor in the four principal cities of the country and included therein shots from the red light district of Bombay showing scantily dressed women soliciting customers by standing near the doors and windows. The Board of Film Censors granted 'A' certificate to the film and refused the 'U' certificate sought by Abbas. This was on the ground that the film dealt with relations between sexes in such a manner as to depict immoral traffic in women and because the film contained incidents unsuitable for young persons. Abbas challenged the Board's decision on the ground (i) that pre-censorship cannot be tolerated as it was in violation of the freedom of speech and expression and (ii) even if it is considered legitimate it must be exercised on well-defined principles leaving no room for arbitrary decisions. This Court held that censorship in India had full justification in the field of exhibition of films since it was in the interest of society and if the legitimate power is abused it can be struck down. While dealing with the grounds on which the 'U' certificate was refused, the learned Chief Justice observed: "The task of the censor is extremely delicate and his duties cannot be the subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary of him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We

*must not look upon such human relationships as banned in toto and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and the line is to be drawn where the average man moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth."*

*In Ramesh v. The union of India, [1988] 1 SCC 668 petition was filed to restrain the screening of the serial 'Tamas' on the ground that it violated Articles 21 and 25 of the Constitution and Section 5B of the Act. Based on the novel of Bhisma Sahni this serial depicted the events that took place in Lahore immediately before the partition of the country. Two Judges of the Bombay High Court saw the serial and rejected the contention that it propagates the cult of violence. This Court after referring to the observations of Hidayatullah, CJ. in K.A. Abbas proceeded to state as under: "It is no doubt true that the motion picture is a powerful instrument with a much stronger impact on the visual and aural sense of the spectators than any other medium of communication; likewise, it is also true that the television, the range of which has vastly developed in our country in the past few years, now reaches out to the remotest corners of the country catering to the not so sophisticated, literary or educated masses of people living in distant villages. But the argument overlooks that the potency of the motion picture is as much for good as for evil. If some scenes of violence, some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interest, scenes depicting mutual respect and tolerance, scenes showing comradeship, help and kindness which transcend the barriers of religion. Unfortunately, modern developments both in the field of cinema as well as in the field of national and international politics have rendered it inevitable for people to face realities of internecine conflicts, inter alia, in the name of religion. Even contemporary news bulletins very often carry scenes of pitched battle or violence. What is necessary sometimes is to penetrate behind the scenes and analyse the causes of such conflicts. The attempt of the author in this*

*film is to draw a lesson from our country's past history, expose the motives of persons who operate behind the scenes to generate and foment conflicts and to emphasise the desire of persons to live in amity and the need for them to rise above religious barriers and treat one another with kindness, sympathy and affection. It is possible only for a motion picture to convey such a message in depth and if it is able to do this, it will be an achievement of great social value." This Court upheld the finding of the Bombay high Court that the serial viewed in its entirety is capable of creating a lasting impression of this message of peace and co-existence and there is no fear of the people being obsessed, overwhelmed or carried away by scenes of violence of fanaticism shown in the film.'*

*Every right has a corresponding duty or obligation and so has the fundamental right of speech and expression. The freedom conferred by*

*22. Article 19(1)(a) is, therefore, not absolute as perhaps in the case of the U.S. First Amendment; it carries with it certain responsibilities towards fellow citizens and society at large. A citizen who exercises this right must remain conscious that his fellow citizen too has a similar right. Therefore, the right must be so exercised as not to come to direct conflict with the right of another citizen. It must, therefore, be so exercised as not to jeopardise the right of another or clash with the paramount interest of the State or the community at large. In India, therefore, our Constitution recognises the need to place reasonable restrictions on grounds specified by Article 19(2) and section 5B of the Act on the exercise of the right of speech and expression. It is for this reason that this Court has recognised the need for prior restraint and our laws have assigned a specific role to the censors as such is the need in a rapidly changing societal structure. But since permissible restrictions, albeit reasonable, are all the same restrictions on the exercise of the fundamental right under Article 19(1)(a), such restrictions are bound to be viewed as anathema, in that, they are in the nature of curbs or limitations on the exercise of right and are, therefore, bound to be viewed with suspicion, thereby throwing a heavy burden on the authorities that seek to impose them. The burden would therefore, heavily lie on the authorities that seek to impose them to show that the restrictions are reasonable are permissible in law."*

18. In a recent judgment in the case of ***Sahara India Real Estate Corpn. Vs. SEBI (Citation)***, the Apex Court was confronted with the most debatable question of issue of pre censorship of any news or discussion in the print or electronic media of the matters which are subjudice in a court including public disclosure of documents forming part of court proceedings, and the court held as under:

*"25. at the outset, it may be stated that the Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control. Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our Constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified*

*and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like right to a fair trial. Further, even Articles 14 and 21 are subject to the test of reasonableness after the judgment of this Court in the case of Maneka Gandhi v. Union of India [(1978) 1 SCC 248].*

*29. At this stage, we wish to clarify that the reliance on the above judgments is only to show that "prior restraint" per se has not been rejected as constitutionally impermissible. At this stage, we may point out that in the present IAs we are dealing with the concept of "prior restraint" per se and not with cases of misuse of powers of pre- censorship which were corrected by the Courts [see Binod Rao v. Minocher Rustom Masani reported in 78 Bom LR 125 and C. Vaidya v. D'Penha decided by Gujarat High Court in Sp. CA 141 of 1976 on 22.03.1976 (unreported)]*

*30. The question of prior restraint arose before this Court in 1988, in the case of Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd. [AIR 1989 SC 190] in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was sub judice in this Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be "based on reasonable grounds for keeping the administration of justice unimpaired" and that, there must be reasonable ground to believe that the danger apprehended is real and imminent. The Court went by the doctrine propounded by Holmes J of "clear and present danger". This Court treated the said doctrine as the basis of balance of convenience test. Later on, the injunction was lifted after subscription to debentures had closed.*

*37. Before examining the provisions of Article 19(1)(a) and Article 21, it may be reiterated, that, the right to freedom of speech and expression, is absolute under the First Amendment in the US Constitution unlike Canada and India where we have the test of justification in the societal interest which saves the law despite infringement of the*



*rights under Article 19(1)(a). In India, we have the test of "reasonable restriction" in Article 19(2). In the case of Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal [(1995) 2 SCC 161] it has been held that "it is true that Article 19(2) does not use the words "national interest", "interest of society" or "public interest" but the several grounds mentioned in Article 19(2) for imposition of restrictions such as security of the State, public order, law in relation to contempt of court, defamation etc. are ultimately referable to societal interest which is another name for public interest" [para 189]. It has been further held that, "the said grounds in Article 19(2) are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully be exercised by the citizens of this country"*

*43. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework."*

19. It would be thus clearly seen that the right to freedom of speech and expression as enshrined in Article 19(1) (a) of the Constitution of India is sacrosanct but not absolute. The restriction as provided in Article 19(2) of the Constitution of India would be the guiding factor to

test whether in the exercise of the said right of freedom of speech and expression, one has not trampled or trampled upon the rights of others without there being any foundation or the basis for the same. In the case of ***Phoolan Devi Vs. Shekhar Kapoor & Ors. 57(1995) DLT 154*** this court took a view that under Article 21 of the Constitution of India, the right of privacy is implicit in the right to life and property and no person has a right to hurt the feelings of a person by depicting her in a film in total disregard to her privacy by showing her being raped, paraded nude etc. The relevant paragraphs of the said judgment are reproduced as under:

*"(30) After hearing learned counsel for both the parties, at the outset, I would like to mention that this Court at this stage is not concerned with the certification granted by Board of Films Censor. The Court is also not concerned with the impact of Cinematographic value, merit or demerit of direction, photography, presentation, editing and narration of the subject. What this Court is concerned on the basis of action maintained by the plaintiff is whether plaintiff has a right to get an injunction on the basis of agreement entered into between the plaintiff and the defendants on various dates and plaintiff could be shown in a manner as has been done by the defendants. The situation had been simpler but for the argument of Mr.Desai that the plaintiff being a public figure defendants had the right to make the film about the plaintiff without any reservation even in the absence of any agreement. To determine this first I have to decide as to whether prima facie the plaintiff is a public figure. If the answer is in the affirmative then the question will have to be*

decided as to whether the defendants or any one has got the absolute right to depict in any manner the private life of such public figure. The term 'public figure' as defined in Black's Law Dictionary is as follows:-

"TERM 'public figure,' for purposes of determining standard to be applied in defamation action, includes artists, athletes, business people, dilettantes, and anyone who is famous or infamous because of who he is or what he has done. *Rosanova v. Playboy Enterprises, Inc.*, D.C.Ga., 411 F.Supp. 440, 444. Public figures, for libel purposes, are those who have assumed roles of special prominence in society; commonly, those classed as public figures have thrust themselves to forefront of particular public controversies in order to influence resolution of issues involved, *Widener v. Pacific Gas & Elec. Co.*, 75 C.A.3d 415, 142 Cal.Rptr. 304, 313. For right of privacy action purposes, includes anyone who has arrived at position where public attention is focussed upon him as a person. *Dietemann v. Time, Inc.*, D.C.Cal., 284 F.Supp. 925, 930."

(42) In view of the observations above, I need not go into other questions raised by learned counsel for the parties and I hold that the defendants, have no right to exhibit the film as produced as has been filed in this Court violating the privacy of plaintiff's body and person. Balance of convenience is also in favor of restraining the defendants from exhibiting the film any further, if defendants are allowed to exhibit the film further it would cause further injury to the plaintiff. No amount of money can compensate the indignities, torture, feeling of guilt and shame which has been ascribed to the plaintiff in the film. Therefore, I restrain the defendants from exhibiting the film in its censored or uncensored version till the final decision of the suit. I.A. stands disposed of. Suit and other I.As. be listed for 14th February, 1995."

20. The Apex Court recently in the case of ***Ramlila Maidan Incident Vs. Home Secretary, UOI & Ors. 2012(2) SCALE 682***, while giving a treatise on the freedom of speech and expression held that it is a bulwark of a democratic government and is essential for the proper

functioning of the democratic process. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. The relevant para of the same is reproduced as under:

*"9. The fundamental right enshrined in the Constitution itself being made subject to reasonable restrictions, the laws so enacted to specify certain restrictions on the right to freedom of speech and expression have to be construed meaningfully and with the constitutional object in mind. For instance, the right to freedom of speech and expression is not violated by a law which requires that name of the printer and publisher and the place of printing and publication should be printed legibly on every book or paper.*

*10. Thus, there is a marked distinction in the language of law, its possible interpretation and application under the Indian and the US laws. It is significant to note that the freedom of speech is the bulwark of democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as human right natural right and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press."*

21. In common law, an injunction against the apprehended legal wrong is known as '*quia timet*' injunction, the purpose of which is to prevent an apprehended legal wrong. Undoubtedly, the power to grant such an injunction can be exercised only in a case where the party approaching the Court strongly makes out a case for the grant of an injunction to prevent irreparable and serious injury to his rights. It goes without saying that the intended words to be used in future or at present are the essence of defamation claim and without knowing the defamatory material, the Court would be helpless to properly appreciate the urgency for the grant of preventive relief. Keeping this principle in mind, the Courts have been reluctant in granting injunction in those cases where the alleged defamatory material has yet to see the light of the day and in all such cases, the Courts have taken a view that trial would be an appropriate remedy. The moot question that would arise would be, whether the statements which are *per se* defamatory, can be allowed to remain in circulation and continue to cause irreparable

harm to the reputation and esteem of an individual or to an institution. The Madhya Pradesh High Court in the case of ***Hari Shankar vs Kailash Narayan and Others, AIR 1982 M.P. 47*** rightly observed that if the reputation of a respectable citizen can be measured in terms of money, then, it will amount to issue of a license against a citizen and asking him to take money as compensation for the injury, he has suffered to his reputation. The relevant extract of the same is quoted below:

*"4. After hearing the arguments on both sides. I am of the view that the order passed by the learned appellate Court should be set aside and that of the learned trial Court should be restored. The reasoning of the appellate Court that the reputation can be compensated by paying him damages in terms of money is not easy to accept. Secondly, if the reputation of a respectable citizen can be measured in terms of money, then, it will amount to issue of a licence against a citizen and asking him to take money as compensation for the injury, he has suffered to his reputation. The Appellate Court itself has found that publishing a defamatory matter gives remedy of two types, one is criminal prosecution for defamation and the other, suit for damages. In my opinion, Article 19, Constitution of India does not give a free hand under the guise of free expression and freedom of press a right to go on publishing defamatory matter, which is a criminal Act.*

In the case of ***K.V. Ramaniah vs Special Public Prosecutor AIR 1961 Andhra Pradesh 190***, cited in the above judgment of Madhya Pradesh High Court, the court

took a view that it is impossible to accept the argument that freedom of speech in Article 19(1) must be taken to mean absolute freedom to say or write whatever a person chooses recklessly and without regard to any person's honour and reputation. It would be relevant to reproduce the relevant paragraphs of the said judgment as under:-

*"10. ".....To the same effect are the observations in Benjamin Gitlow v. People of the State of New York, (1923) 69 Law Ed 1138 at p. 1145 which read thus:-*

*"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom..... Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free Government; without such limitation, it might become a scourge of the republic."*

*In Arnond v. King Emperor, ILR 41 Cal 1023 at p. 1063 : (AIR 1914 PC 116 at p. 124) where the question as to the privileges of the press had arisen, the following are the observations of their Lordships of the Privy Council:*

*"The responsibilities which attach to his (journalist's) power of dissemination of printed matter may and in the case of a conscientious journalist do make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position."*

*In State of Bombay v. R.M.D. Chamarbaugwala, (S)*

*where it was argued that the proper approach of our constitution is to start with absolute freedom and then to permit the State to cut it down if necessary, by restrictions*

which may even extend to total prohibition, their Lordships observed:-

*"On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on a business of hiring out goondas to commit assault or even murder, of house-breaking, of selling obscene pictures, of trafficking in women and so on until the law curbs or stops such activities. This appears to us to be completely unrealistic and incongruous".*

*11. It is therefore impossible to accept the argument of the learned counsel for the revision petitioners that freedom of speech in Article 19(1) must be taken to mean absolute freedom to say or write whatever a person chooses recklessly and without regard to any person's honour and reputation. The right guaranteed by the Constitution, it must be borne in mind, is to all the citizens alike. The right in one certainly has a corresponding duty to the other and judged in that manner also, the right guaranteed cannot but be a qualified one. Indeed the right has its own natural limitation. Reasonably limited alone, it is an inestimable privilege. Without such limitations it is bound to be a scourge to the Republic.*

*The American Jurists and Judges, as already discussed, have long understood the natural limitations and the evils of absolute unbridged freedom of speech and expression, Though the 1st and 14th amendments declare in clear terms that no law shall abridge the freedom of speech or of the press, this right having regard to its natural limitations, has invariably been construed to mean a qualified right and for this purpose the doctrines such as doctrine of danger, present and clear, or of substantial evil sufficient to justify impairment of the right, have been invoked to place that right within limits. Our constitution framers taking benefit of the experience in America have in terms provided the necessary qualifications to this right. Article 19(2) in this behalf contains safeguards of reasonable restrictions on the exercise of the right and it reads thus:-*

*"19(2). Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency*



*or morality, or in relation to contempt of court, defamation or incitement to an offence."*

22. In ***Shilpa S.Shetty's Case (supra)*** the defendants therein were restrained from publishing the articles which were about the personal life of the actor which called her names and were regarded as *per se* defamatory. The relevant paras of the same are reproduced as under:-

*"7. I have heard both the learned Counsel at length and considered the submissions canvassed by them. No doubt, it is true that the plaintiff did write her article or gave interview first against another actor and. therefore, the journal cannot be criticized for printing the reaction of the concerned actor to her interview. The question is whether the defendants were entitled to write anything thereafter particularly about her personal life as to whether she was having a relationship with a third actor or whether she was having a relationship with a married man and then to call her a 'maniser' in the manner in which men are called 'womanisers'. The answer will have to be in the negative. The articles are not on plaintiff performance as an artist and cannot be defended as a part of film journalism on that count also. The articles bring down the reputation of the plaintiff and have the impact on her personal life and show her in an undesirable manner to the world at large. The authority relied upon by Mr. Tulzapurkar in the case of Woodward v. Hutchins (supra) is in a situation where a Pop Group itself had appointed a Public Relation Officer and that officer has subsequently gone to the Press and printed the articles. It is in that context that the House of Lord has observed that "In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth" and then it is observed that "The reason is because the interest of the public in knowing the truth outweighs the interest of a plaintiff in maintaining his reputation" and further that "These Courts rarely, if ever, grant an injunction when a defendant says he is*

*going to Justify." In the present case, the plaintiff having given an interview herself, she exposed herself to reaction by the concerned actor. To that limited extent the submission of Mr. Tulzapurkar is right and the plaintiff cannot make a grievance on that. Question is whether some others like the defendants, who are third parties, have a right to write further articles and dwell upon the private life of the plaintiff and as to whether she has relationship with some others including another married man. Here again, what one has to see is whether it is in public interest in the sense that whether it is the interest of society that such articles ought to be printed about the private life. The answer will have to be in the negative. The three articles are per-se defamatory as claimed by the plaintiff and the defendants cannot be permitted to go ahead to print any further articles of the like nature.*

*8. Mr. Tulzapurkar submitted that the prayer made in the present Motion is a wide one and it will have to be curtailed. The submission of Mr. Tulzapurkar in this behalf is well taken, but at the same time, the tenor of the articles has to be seen, what is indicated in those articles has to be noted and it cannot be ignored that the prayer has been sought in that context. The injunction sought by the plaintiff will therefore be granted in a modified form. Therefore, as directed In the case of Indian Express Newspapers (supra), a modified injunction is hereby granted restraining the defendants from republishing the three articles and/or from writing and publishing any defamatory article in the nature of the three articles (which are disputed in the present suit) alleging that the plaintiff is having relationship with other actors or a married man, which will operate till the disposal of the suit. It is for the defendants to justify these articles when the suit is heard and decided but in the meanwhile, the above-referred injunction will continue to operate."*

23. In the case of ***Cadbury (India) Ltd.(supra)*** this Court also restrained the defendant from publishing or republishing or making any oral or written statement or giving any interview containing any allegations or defamatory statements with regard to Nickel contents in

chocolates manufactured by the plaintiff. The Court took a view that in case of *per se* defamatory imputations being repeatedly published with ulterior motives without any justification, injunction should follow to protect fair reputation of the person concerned. Relevant paragraph of the same is reproduced as under:-

*"8. While granting a prior restraint on defamatory imputations being published by defendants with regard to the Nickel content of chocolates manufactured by the plaintiff, the Bench is conscious that prior restraint which would impinge upon the right to freedom of expression is normally not granted. However, in case of per se defamatory imputations being repeatedly published, mala fide or with ulterior motives or for which no justification or defense is offered, an injunction should follow to protect the fair reputation of the person concerned."*

24. This court also had the occasion to deal with a similar issue where the freedom of speech and expression vis-à-vis an individual's right to dignity and reputation were pitted against each other. In the case of ***Nirmaljit Singh Narula Vs. Sh. Yashwant Singh & Ors.***, (Citation) this court while taking a view that freedom of speech and expression is amenable to reasonable restrictions as per Article 19(2) which includes defamation held that nothing can be dearer to a

person than his own reputation and goodwill and to intentionally injure and attack it in the garb of freedom of speech and expression is the most unpropitious blow to this freedom. The court also held that what has to be achieved is the balance between the right of freedom of speech and the right to one's reputation and not to sacrifice any of the two to keep our vibrant democracy alive. The court held that nobody has any right, not even the media or website operators to disparage, defame, disrepute or malign the reputation of any person unless they are in possession of sufficient material or unbiased information clearly pointing out to any kind of illegal or other nefarious activities of such persons. Undoubtedly, the media or any such modes of communication have to be very careful when the question comes of reputation or esteem of any person or the institution involved as any irresponsible or reckless campaign by media or these sites can play havoc with the esteem, prestige, reputation and goodwill of any person. The relevant paragraphs of the said judgment are reproduced as under:

*"25. The court in Rajan Bihari (supra) held that every individual has a right to protect his reputation and goodwill and even a journalist has no unfettered right to make defamatory statement about a person to a third person or persons without lawful and justifiable basis. This right of an individual was recognized by the Supreme Court in the matter of State of Bihar v. Lal Krishna Advani AIR 2003 SC 3357 wherein it was observed that reputation is an integral and important aspect of dignity of every individual. The right to preserve one's reputation is acknowledged as a right in rem i.e. a right against the entire world. The court however eloquently gauged the dilemma holding the law of defamation as a*

*culmination of conflict between the right of the individual and the right of the society to be informed. It further held and it is pertinent to reproduce the relevant para as under:*

*(vi) "On the one hand, there is a fundamental right of freedom of speech and expression guaranteed under the Constitution of India and on the other hand, it is the right of individual to his reputation and goodwill. The question arises as to how to bring about a balance between the two rights' How far can the right of freedom of speech and expression extend and when does it become necessary for the law to step in to safeguard the right of the individual to preserve his reputation and dignity' The law of defamation seeks to attain a balance between the above two competing rights."*

*26. Hence, what has to be achieved is the balance between the right of freedom of speech and the right to one's reputation and not to sacrifice any of the two to keep our vibrant democracy alive. In the present case as well this court is faced with the situation where the defendants have levelled allegations against the plaintiff who claims himself to be a spiritual guru and a revered saint and as the defendants did not appear before the court despite the knowledge of the present proceedings the court is thus left to till and toil to examine prima facie the veracity of the allegations imputed."*

25. Applying the above enunciated principles, in my considered view in the present case in the song in

question, the defendants have used expressions that are offensive towards the plaintiff. The tenor of such expressions suggests that the engines of the industries of the plaintiff are run by the blood of the common public. Such expressions undoubtedly have the propensity to cause lasting damage to the well established reputation of the plaintiff and in my view the use of the said expression would certainly harm and jeopardize the credibility and reputation of the plaintiff in the estimation of the common public. This Court also cannot find any justification for the use of such derogatory expressions in the song and such expressions prima facie cannot stand the test of either fair comment or based on truth or in the public or societal interest.

26. In the backdrop of the aforesaid legal position, let me deal with the contentions raised by the counsel for the defendant nos. 1 to 3. Mr. Sandeep Sethi, learned Senior Advocate laid strong emphasis on the fact that the film "***Chakravayuh***" along with the promos has been duly certified by the Board of Film Certification in terms of

Section 5A of the Cinematographic Act 1952 vide their order dated 1.10.2012 and since then the promos of the film as well as the song in question are being displayed on 'Youtube' and other media sites. Counsel also took a stand that even the Revising Committee of the CBFC has cleared the said song after the defendant no.2 had agreed to insert a disclaimer clarifying that the appearance of the names of the industrial houses in the song are merely symbolic and denominative. Counsel also submitted that the Cinematographic Act, 1952 is a complete code in itself and the remedy to the plaintiff was available under Section 6 of the Cinematographic Act which deals with revisional power of the Central Government to revise the decision of the Board either suo motu or on being approached by any individual to challenge the decision of the Board. The contention raised by the counsel for the defendant was that the remedy of the plaintiff to file a civil suit is barred, in the light of the remedy provided under the said special statute for the redressal of any grievance of any

individual against the decision of the Board of Film Certification. Counsel also argued that the Members of the Board of Film Certification are experts and this court will not sit over the decision taken by the expert body. Counsel also submitted that the defendants have not travelled beyond the freedom guaranteed to them under Article 19 of the Constitution of India and their right to freely express their views through the medium of cinema cannot be snatched away by the grant of preemptory injunction. Counsel also submitted that the defendants in the said movie have demonstrated and displayed the views of Maoists on one hand and the common man suffering from the price rise and their exploitation at the hands of the industrial houses on the other and it is with a view to express the feelings of the common man there is a mentioning of the name of the plaintiff which is only symbolic, denominative and not with a view to disrepute or disparage the reputation of the plaintiff. The counsel also took a stand that the plaintiff has not challenged the decision of the CBFC in the present suit and therefore, in



the absence of any such challenge the decision of the Board cannot be set aside by this court. The counsel also placed strong reliance on the guideline (xviii) laid down in the Cinematographic Act to support his contention that before granting certification, the CBFC has fully gone into all the aspects including the lyrics of the said song. In my considered view, none of the above contentions raised by the counsel for the defendants could justify the act of the defendants in using the name of the plaintiff with such a disparagement to the extent of attributing that the plaintiff has looted the country and that they are running their industry by the blood of the people. This is no doubt a serious attack on the reputation and goodwill of the plaintiff and with the use of such defamatory expressions the defendants cannot take shelter by using the same with a disclaimer. Even otherwise it is inconceivable that the use of a disclaimer in any way can help so far transmitting of the said song on You-Tube, through CDs or other media sites is concerned as the disclaimer will

confine to the viewers of the film and not to all those who will merely listen the song.

27. This court also does not find any merit in the contention raised by the counsel for the defendant that the remedy of the plaintiff to file a civil suit is barred due to the remedy available to the plaintiff under Section 6 of the Cinematographic Act 1952. There is no provision in the Cinematographic Act 1952 which excludes the jurisdiction of the civil court to try and entertain a civil suit. It is a settled legal position that a provision of law ousting the jurisdiction of the civil court must be strictly construed and exclusion of the jurisdiction cannot be easily inferred unless such exclusion is either explicitly expressed or clearly implied. This court also does not find any specific provision in the Cinematographic Act which can grant an urgent and immediate relief to the grievance of an individual in a case like the present where the grievance of the individual pertains to intending loss of its reputation and goodwill. The entire scope of Cinematographic Act is to regulate the exhibition of films

for evolving and entertaining the society through the film makers, exhibitors and the connected team with such activities and define the role of the Central Board of Film Certification and of the Central Government. The Act does not specifically provide for any remedy or grant any such relief to redress the grievances of the individuals or private citizens and institutions etc. against screening of any film or objectionable scene in the films. In the absence of any peculiar provision in the said Act, this court has no hesitation in taking a view that the present suit filed by the plaintiff being a civil suit is maintainable under Section 9 of the Code of Civil Procedure. Ordinarily, the courts do not interfere with the decision taken by expert bodies, but that would not imply that the citizen whose fundamental rights are violated is left remediless and that the recourse to approach the court to challenge the decision of the expert body is not available. The court also does not find any merit in the contention of the defendants that the defendants have taken the lyrics of the said song from the Jan Natya Mandali of tribal for the street

performances and the same actually reflect the feeling of the Maoists, as ultimately the responsibility lies with the filmmakers so as to what to exhibit keeping in view the various parameters laid down in the Cinematographic Act 1952, and at the same time, not to impinge upon the fundamental rights of the citizens guaranteed under the Constitution.

28. This court also does not find any merit in the contention of the counsel for the defendants that reference to the name of the plaintiff in the lyrics is only symbolic or denominative. As already discussed above, it is not merely use of names in the said song but the damaging and offending expressions which are put forth, leveling serious attributions against the plaintiff which are *per se* defamatory in nature and therefore, the defendants cannot be permitted to use the name of the plaintiff in order to disparage its reputation by holding them guilty of looting the nation and running their engine by the blood of the general public. Various judgments were cited by the counsel for the defendants to support their case, but none

of the judgments relied upon by the defendants aptly brace in the facts of the present case.

29. In ***Khushwant Singh (Supra)*** on which reliance has been placed by the counsel for the defendants, the court was dealing with an autobiography of a well-known author Khushwant Singh, which was yet to be published wherein references were made to personal lives of public figures, wherein the court took a view that an autobiography deals not only with the individual by whom it is written but about the people whom he claims to have interacted with and this is a matter between the author and the people who want to read it and fetters cannot be put on to what an author should or should not write. The court also took a view that the book has not yet been published and therefore the court felt that it was not a matter where the author should be restrained from publishing the same when he is willing to take the consequences of any civil action for damages and is standing by what he has written. In the present case, admittedly, the promos of the song are already on

YouTube and the use of the offending lyrics cannot stand the test of Article 19 (2) of the Constitution of India, the same being per se defamatory. Another case on which reliance has been placed by the defendants of ***Tata Sons (Supra)***, also stands on an entirely different footing as in the facts of the said case Greenpeace India which was engaged in protecting and conserving the environment and was known for raising environmental issues devised a game turtle versus Tata to focus public attention to the potential environmental dangers posed by the project launched by the group companies of Tata and the game in question depicting the challenges that Olive Ridley turtles would have to overcome in order to survive in spite of the project. It is in the background of those facts that the court took a view that injunction would freeze the entire public debate on the effect of the port project on the habitat of Olive Ridley turtles and therefore the same would not be in the public interest. The other judgments cited by the counsel for the defendants are also distinguishable and would not be attracted to the case at

hand as it is a settled legal position that the ratio of any decision must be understood in the backdrop of that particular case and the ratio of any judgment is not to be applied like '*Elucid theorem*' to the facts of the case in hand. A case is only an authority for what it actually decides or not what logically flows from it.

30. At omega, this court would like to observe that cinema is not only an entertainment industry but also a potent weapon for social change. From a six to a sixty year old, everyone derives and takes home something from a movie and it has the power to evoke emotions and shape the outlook of the common man towards various issues like none other. The film makers have since yore mirrored social ills plaguing the society which movement continues till date with igniting the minds and being responsible for various social movements leading to monumental changes in the social setup. However with this responsibility to bring to the public domain the realities of our diverse nation, there comes a duty to act cautiously not to make

inroads in the lives and dignity of people and institutions alike in the garb of being the messiahs of social change. Thus the film makers have no unbridled right to tarnish the image and reputation of any individual or institution, that too in the absence of any foundation for the same. One cannot be oblivious of the fact that the main stay of the film industry is not only entertainment but also commercial gains and in this pursuit to earn huge profits the cinema makers have no right to trample upon, disrepute or disparage the reputation of others. To cull out a passage from the famous Othello which states; A good name is worth more than good riches. (Shakespear's Othello, Act-II, Scene III, pp.167):- *Good name in man and woman, dear my Lord Is the immediate jewel of their souls; Who steals my purse, steals trash; Its something nothing; T'was mine, t'is, and has been slave to thousands; But he that filches from me my good name, Robs me of that which not enriches him And makes me poor indeed.* Thus as rightly said, reputation is the only jewel that cannot be



bought and is built over the years and a person who is robbed of it is no less than a destitute.

31. Hence, in the light of the above discussion, this court is of the considered view that the plaintiff has qualified the tripartite test of prima facie view, balance of convenience and irreparable loss and injury for the grant of ad interim injunction in its favour. The defendants, their employees, servants, agents, partners/ proprietors, directors, officers, associates, sister concerns, marketing offices, or any person or entity acting on their behalf or under their authority are accordingly restrained from releasing, transmitting, distributing, exhibiting, performing or communicating to the public by any means or technology, aural or audio visual performance of the impugned song '**Mehngai**' using the name of the plaintiff therein till final disposal of the suit.

32. Any observations made herein would not tantamount to have any bearing on the merits of the case.

33. The application stands disposed of in terms thereof.

**KAILASH GAMBHIR, J**

**October 15, 2012**