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SHOCKING ABUSE OF JUDICIAL POWER

Editorial

The Delhi High Court's action in holding the editor, the publisher, the resident editor, and a cartoonist of *Mid Day* (published from Delhi) guilty of contempt of court for making allegations of gross judicial misconduct against the former Chief Justice of India Y.K. Sabharwal and sentencing them to four months' imprisonment raises several troubling issues. In the first place, it draws pointed attention to the absence of an effective and credible institutional mechanism to deal with allegations of misconduct made against judges of the high courts and the Supreme Court. Secondly, it represents an instance of improper use of the contempt power to bar any attempt to raise the issue of judicial misconduct even at the threshold. Thirdly, and most importantly, it underlines the danger to freedom of expression that the judiciary's virtually untrammelled contempt jurisdiction poses. If the object of the order was to protect the dignity and reputation of the judiciary from unfounded allegations, it has in fact strengthened the impression that the judiciary as an institution has much to hide and thus undermined its credibility in the eyes of the public.

For some time now, leading lawyers and the Campaign for Judicial Accountability and Judicial Reforms have been making two broad allegations against Mr. Sabharwal. One is that his orders on sealing irregular commercial premises in residential areas of Delhi were ultimately to the benefit of two business associates of his sons who were engaged in developing commercial complexes and malls; because of the sealing drive, property values and rents went up in those areas. The second charge is that even as he heard the case relating to the tapes said to contain recorded conversations of the Samajwadi Party General Secretary Amar Singh and passed an interim order staying their broadcast, the Uttar Pradesh government allotted his sons plots of land in Noida at rates that were a fraction of the market prices. Mr. Sabharwal after his retirement, noting that silence was no longer an option, rebutted these charges point by point in a newspaper article. His contention was that his sons had built up a large and diversified garment export business on their own; that they themselves did not benefit in any way from the sealing orders; that they were in the business of developing information technology complexes rather than commercial complexes; and that their business partners were long time friends. As for the land allotments, they were done in the normal course under different chief ministers and at prices charged for similar plots allotted in the area. The truth behind the allegations can be established through an enquiry or through judicial proceedings in a defamation suit, for instance. It is strange that even after Mr. Sabharwal showed he was perfectly willing to defend himself in a public forum, the Delhi High Court took upon itself the task of defending his dignity and that of the Supreme Court. It is stranger still that the court should have chosen to make an example of *Mid Day* through contempt proceedings while the lawyers who made the same charges in public forums were left untouched.

In this case, the journalists pleaded justification by truth as a defence and offered to prove the allegations they had published. The Delhi High Court sidestepped the issue of truth and instead argued that the article had created the impression that "the Supreme Court permitted itself to be led into fulfilling an ulterior motive of one of its members"

and had thereby tarnished the image of the institution as a whole. It was after a long and hard campaign by public-spirited lawyers and the media that the traditional position was overturned and truth came to be allowed as a defence in contempt cases through an amendment to the Contempt of Courts Act in 2006. It is shocking that the principle of fairness embodied in the amended Act was totally ignored.

The *Mid Day* case has served to highlight the threat to freedom of speech from the judiciary, with the courts imposing wholly unreasonable restrictions by invoking what Justice V. R. Krishna Iyer once memorably characterised as their “vague and wandering jurisdiction with uncertain frontiers” in contempt cases. Quite apart from the built-in unfairness in a judge acting in his own cause, serving as prosecutor, judge, jury, and hangman, a great deal of uncertainty marks the offence of “scandalising the court.” If one were to look at past judgments for guidance, one would find liberal sentiments that justice is not a cloistered virtue, that judges are not immune from criticism, and that the shoulders of the judiciary are broad enough to shrug off any insult. Alongside such attitudes, there are some ominous edicts on the majesty of the law, that the contempt power is not meant to protect an individual judge but rather the institution of the judiciary and that public faith in the judiciary ought not to be allowed to be undermined by scurrilous writers. As several high profile cases, including two involving Arundhati Roy have shown, in contempt more than in other areas of law the individual predilections of judges — how liberal or how touchy they are — go to determine guilt. Courts in the United Kingdom have long let the penal provision for the offence of scandalising the court fall into disuse, and it is time Indian courts abandoned it as well. Never justified under any circumstances, its use to silence critics of possible judicial misconduct would seem to be particularly indefensible. In protecting and enlarging the rights of citizens and in guarding against abuse of executive power, the judiciary as an institution has served the country exceedingly well. Overzealous defenders of judicial dignity only serve to erode its credibility.