LL.B. V Term

PAPER - LB –5031
INFORMATION TECHNOLOGY LAW

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Advent of computers, followed by Internet has revolutionized the human existence and their conduct in the society. The information can be accessed, stored, retrieved and distributed speedily and easily. The traditional paper documents are now being replaced by their electronic equivalents. The commercial transactions and individual functioning are more and more driven by the digital technology. This transition has put forth need for a law to facilitate and govern activities in the information society and has thus led to the passing of the Information Technology Act, 2000 (IT Act).

The primary focus of this course will be on studying the information technology law. In addition there will be an insight into the applicability of other laws in the digital environment. The learning outcome of the course will be understanding the provisions of Information Technology laws provided to facilitate electronic commerce - electronic signatures, data protection, cyber security; penalties & offences under the IT Act, dispute resolution, and other contemporary issues.

PART A - The Information Technology Act, 2000 (IT Act)

I INTRODUCTION **4-5 classes**

- Information Technology (use of computers to store, retrieve, transmit and manipulate data); understanding cyberspace (cyberspace is a notional environment in which communication over computer network occurs; borderless environment), scope and regulation; internet, e-mail and world wide web; use – academics, e-commerce (B2B,B2C,C2C), social networking by individuals
- Interface of information technology and law; current challenges – mobiles, cyber security, cloud computing and data privacy, misuse of social media, cyber crimes
- Purpose and Object of Information Technology Act, 2000 (to facilitate e-commerce to remove major hurdles of writing and signature requirement for legal recognition, providing regulatory regime for to supervise certifying authorities and digital signature certificates, to create ,civil and criminal liabilities for contravention of provisions, and consequential amendments in other Acts); applicability(s.1(4); overriding effect (s.81); Definitions– information 2(1)(v), computer s.2(1)(i),

computer network s.2(1)(j), computer resource 2(1)(k), computer system 2(1)(l), communication device 2(1)(ha)

Syed Asifuddin v. State of Andhra Pradesh, 2006 (1) ALD (Cri) 96; 2005 CriLJ 4314(meaning of computer)
Diebold Systems Pvt. Ltd. vs *The Commissioner*, ILR 2005 KAR 2210
(Is ATM a computer – Held the enlarged definition of "computers" in the Information Technology Act cannot be made use of interpreting an Entry under fiscal legislation).

II LEGAL RECOGNITION AND AUTHENTICATION OF ELECTRONIC RECORDS
(a move to facilitate e-commerce**)** **6-7 classes**

- UNCITRAL Model Law on Electronic Commerce, and e-signatures (1996 and 2001);
- Legal Recognition under IT Act(ss,4-5);Authentication of records (s.3) - Digital signature(functional equivalent of paper based signatures)s.2(1)(p); function(confidentiality, authentication, integrity and non-repudiation); Authentication by use of 'asymmetric cryptosystem (s.2(1)(f)', key pair (s.2(1)(x),public key(2(1)(zc), private key(s.2(1)(zd), hash function (s.3), electronic signatures(ss. S.2(1)(ta) and 3A), affixing electronic signature S.2(1)(d); secured electronic record(s.14) and secure electronic signature(s.15); s.85B(2)(a),The Evidence Act, 1872/ss.62 and 63 Bhartiya Sakshya Adhiniyam, 2023 (Presumptions to electronic record and electronic signatures); S.67A and 73A the Evidence Act, 1872 / ss. 66 and 73 Bhartiya Sakshya Adhiniyam, 2023 (Proof as to electronic signature and proof of verification of digital signatures)
- Public key infrastructure and Hierarchy (ss.17-26); Role of certifying authorities, Electronic signature certificates, its suspension and revocation (ss.2(tb), 35-42); publishing false digital signatures and publication of digital signatures for fraudulent purposes are offences under the Act (ss.73, 74)
- Originator, addressee, Attribution, Acknowledgment and Despatch of Electronic Records -ss. 11-13

III CIVIL LIABILITIES **6-7 classes**

Cyber Torts

- Dispute Resolution under IT Act - Adjudicating officer and Appellate tribunal under the Information Technology Act, 2000 (s.46 and s.57)
- Damage to computer and computer system -(s.43) – access/facilitates access, data theft, virus attacks, email bombings, denial of service attack, damage to computer source code

  1. *Vinod Kaushik* v. *Madhvika Joshi,* WP(C) 160/2012, Delhi High Court, order dt. 27/01/2012 available at 1 https://it.maharashtra.gov.in/Site/Upload/ACT/Madhvika%20Vs%20Kaushik-highcourt.PDF

  Amit Dilip Patwardhan v. *Rud India Chains Pvt. Ltd*., Adjudicating Officer, decided on 15/04/2013 complaint no. 1 of 2013 available at https://it.maharashtra.gov.in/Site/Upload/ACT/AmitPatwardhanVsRudIndiaVipinRao%2015Apr%202013%20Rajesh%20Aggarwal.pdf

  State Bank of India v. *Chander Kalani*, 2019 SCC online Del 7031
- Data Protection (ss.43A r/w sensitive personal information rules, 45, 72, 72A) - Privacy issues [The Digital Personal Data Protection Act, 2023(DPDP Act, 2023)] S,67, IT Act (preservation of information by intermediaries)

  2. *Sanjay Dhande* v. *ICICI Bank and Vodafone* decided on 16/01/2014 complaint no. 30 of 26th Sep. 2013 available at 4 https://it.maharashtra.gov.in/Site//ACT/DIT_Adjudication_SanjayDhande_vs_ICICI&Ors-16012014.pdf; *Vodafone Idea Ltd* v. *Sanjay Govind Dhande*, 2020 SCC Online TDSAT 124

  Chander Kalani v. *SBI Bank*, complaint no. 1 of 2014 decided on 12/01/2015 available at https://it.maharashtra.gov.in/Site/Upload/ACT/DIT_Adjudication_Chander%20Kalani_Vs_SBI_Ors-12012015.PDF;

  3. *State Bank of India* v.*Chander Kalani* TDSAT Cyber Appeal No. 13of 2015 decided on July 31,2018 available at tdsat.gov.in 14
- Online defamation

SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra,, suit no. 1201/2001 , New Suit No. 65/14 Delhi district Court decided on Feb 12, 2014 available at: http://indiankanoon.org/doc/31110930/

IV. CRIMINAL LIABILITIES 8 -9 classes

Cyber Crimes- financial frauds (money laundering, credit card frauds, social crimes - cyber stalking, pornography, identity theft, ipr related crimes, cyber terrorism, defamation (s.43 read with s.66; ss. 65-67B)

- ***Tampering*** *with computer source code* (s.65)
  4.*Syed Asifuddin v. State of Andhra Pradesh, 2006 (1) ALD (Cri) 96; 2005 CriLJ 4314* 20
  5. *Sanjay Kumar* v *State of Haryana* P&H CRR No. 66 of 2013 dt 10/01/2013(65, 66) 31
- ***Hacking*** *(s,43(i) read with s.66)*
  6. *State of A.P. through Inspector of Police, Cyber Crimes P.S., CID, Hyderabad* v. *Prabhakar Sampath*, Add. CMM Hyderabad, decided on 31/03/2015, CC 489 0f 2010 available at: www.prashantmali.com/**cyber**-law-cases 36
- ***Identity Theft and cheating by Personation*** (ss.66C and 66D) (phishing, email spoofing, password theft etc.)
  7. *NAASCOM* v. *Ajay Sood*, 119 (2005) DLT 596 (Phishing) 39
- ***Obscenity and Pornography*** (ss.66E, 67, 67A, 67B read with POCSO Act) s.292 IPC/s 294 Bhatiya nyay Samhita, 2023)
  8. *Aveek Sarkar* v. *State of West Bengal* (SC) Criminal Appeal no. 902 of 2004 decided on 3/2/2014 (Obscenity Test) 42
  9. *State of Tamil Nadu* v. *SuhasKatti*,Decided by CMM, Egmore, decided on Nov. 5, 2004available at http://www.prashantmali.com/cyber-law-cases; http://www.legalserviceindia.com/lawforum/index.php?topic=2238.0 51
  Avinash Bajaj v.*State*, Delhi HC decided on 29/05/2008 available at https://indiankanoon.org/doc/309722/
  Air Force Bal Bharti School Case
  10. *The State (Cyber Cell) ...Complainant v. Yogisha @ Yogesh Pandurang Prabhu*, Addl. Chief Metropolitan Magistrate, 37th court, Esplanade, Mumbai C.C. No. 3700686/ps/2009 decided on 3/07/2015 available at:

http://www.cyberlawconsulting.com/Yogesh%20Prabhu%20Vs%20State-%20Cyber%20Stalking.pdf (s.66E. S.67. S. 67A) 55

11. *Maqbool Fida Husain* v.*Raj Kumar Pandey*, Delhi HC decided on 8/5/2008 66

Vaibhav Jain v. *Vice Chancellor Devi Ahilya Vishwavidyalaya,* decided on 3rd Jan 2002 , available at Indian Kanoon - http://indiankanoon.org/doc/521882/

Jus Rights for Children Alliance v. S. Harish e, 2024 SCC Online SC 2611

- **Cyber Stalking** (ss.354D, 509 IPC)
  Ritu Kohli Case (Del)
- **Cyber Terrorism** (s.66F)
  Rakesh v.*Central Bureau,* Delhi District Court, 2011 5 February, 2011(Delhi Blast case -terror e-mail sent by hacking ˇWi Fi in Mumbai)

Admissibility of Electronic Evidence – ss. 65A and 65B, The Evidence Act, 1872/ss 62 63 Bhartiya Sakshya Adhiniyam, 2023

12. *Anvar P.V* v.*P.K.Basheer*, Supreme Court, decided on 18 September, 2014, Civil Appeal No.. 4226 of 2012, available at http://indiankanoon.org/doc/187283766/ 79

- *Arjun Pandit Rao Khotkar* v. *Kailash Kushanrao Gorantyal*, 2020 SCC Online SC 571

V INTERMEDIARY LIABILITY **4 classes**

Intermediary(s.2(1)(w), cyber café (s. 2(1)n(a)), Exemption from liability, due diligence (s.79 r/w the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 as amended in 2026); s.72A

Cases

Shreya Singhal v *U.O.I*, SC decided on 24/03/2015

13.*My Space Inc.* v. *Super Cassettes Industries Ltd*., Delhi (DB), FAO(OS) 540/2011, C.M. APPL.20174/2011, 13919 & 17996/2015 decided on 23 December, 2016 available at http://indiankanoon.org/doc/12972852/ 87

Avinash Bajaj v.*State* Delhi HC decided on 29/05/2008

14. *Google India Pvt Ltd v. M/s Visaka Industries Ltd,* A P High Court Crl P No, 7207 of 2009 dt 19/4/2011 available at http://www.cyberlawconsulting.com/cyber-cases.html 126

Google India Pvt. Ltd. v. *Vishakha Industries*, 2019 SCC Online SC 1587

15. *Vyakti Vikas Kendra, Indian Public Charitable Trust v. Jitendra Bagga*Del HC CS(OS) No. 1340/2012decided on 09/05/2012 129

- *Amway India Enterprises Pvt. Ltd.* v. *1Mg Technologies Pvt. Ltd,* (Del) I.A. 11335/2018CS (OS) 410/2018 decided on July 8, 2019, available at http://indiankanoon.org/doc/145401736/;
- *Amazon Seller Services* v. *Modicare,* Del(DB) decided on 31/01/2020 *available at:* http://indiankanoon.org/doc/43335747/
- *X vs. Union of India And Ors* W.P.(CRL) 1082/2020 decided on 20th April 2021

VI CYBER SECURITY **4 classes**

National Security- Interception, Blocking, Protected System (69-70B), procedure of Blocking and Interception under the rules, and its interface with freedom of speech and privacy, right to be forgotten

16. *Shreya Singhal* v *U.O.I,* SC decided on 24/03/2015(s. 66A) 132

Ratan Tata v Union of India, Writ Petition (Civil)No. 98 of 2010

Sreekanth C. Nair v. *Developer of Web-Site***,** Kerala High Court 28 August 2008, Cr. R.P. No.2900 of 2008 available athttps://indiankanoon.org/doc/1915848/

Justice K S Puttaswamy v. *Union of India,* 2017 SCC Online SC 996

Anuradha Bhasin v. *Union of India,* (2020) 3 SCC 637;2020 SCC Online SC 25

PART B – APPLICABILITY OF OTHER LAWS ON E-COMMERCE

VII. E- CONTRACTS **4 classes**

Kinds of Contracts -email, web contracts, Standard form contracts

Formation of E-contracts - application of The Contract Act, 1872 viz a viz ss.10A,11-13 IT Act

United Nations Convention on the Use of Electronic Communications in International Contract 2005

Trimex International Fze ... v.*Vedanta Aluminium Limited,India* decided on 22 January, 2010 (SC) Arbitration petition no. 10 of 2009 (email exchange between parties regarding mutual obligations constitute a contract)

17. *World Wrestling entertainment* v. *Reshma Collections*, FAO (OS) 506/2013 in CM Nos. 17627/2013, 18606/2013, Del(DB) decided on 15/10/2014 181
P.R. Transport Agency v. *Union of India*, AIR 2006 All 23.

VIII TRADE MARKS AND DOMAIN NAMES 3 classes

Domain names – functions, use as trade mark (infringement/ passing off -reputed marks marks cybersquatting); Dispute resolution under – ICANN Policy-UDRP, INDRP

18. *Satyam Infoway Ltd* v *Sify net solutions Pvt. Ltd*., AIR 2004 SC 3540
Aqua Minerals v. *Pramod Barse*, 2001 PTC 619 (Del) 195

IX JURISDICTION IN CYBERSPACE 4-5 classes

No geographical boundaries, applicability of traditional rules of jurisdiction on internet, rules of private international law; passive/interactive web sites; personal jurisdiction on defendant -Cause of action(s.20 CPC(ss. Criminal jurisdiction (the Code of Criminal Procedure, 1973 - ss. 177-179 , 186,188 and 189); Extraterritorial Jurisdiction under IT Act (s.1(2), s75, s.3 IPC)

Cases:

19. *Banyan Tree Holdings (P) Ltd* v. *A Murali Krishna Reddy*, CS (OS) No. 894/2008, Del(DB), decided on 23/11/2009; 205

- *P.R. Transport Agency* v. *Union of India*, AIR 2006 All 23.
- *Super Cassettes Industries Ltd* v. *Myspace Inc*., IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008(Del) decided on 29/07/2011
- *World Wrestling entertainment* v. *Reshma Collections*, FAO (OS) 506/2013 in CM Nos. 17627/2013, 18606/2013, Del(DB) decided on 15/10/2014
- *Big Tree Entertainment v. Saturday Sunday Media Internet*, CS (COMM) Nos. 53/2015 and 54/2015 (Del) decided on 21/12/2015
- *Impresario Entertainment & Hospitality Pvt. Ltd* v. *S & D Hospitality*, I.A. Nos. 1950/2017 in CS(COMM) 111/2017 (Del) decided on 3/01/2018
- *Maqbool Fida Husain* v. *Raj Kumar Pandey*, Delhi HC decided on 8/5/2008

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- Karnika Seth, *Computers Internet and New Technology Laws* (2016)
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- Aparna Viswanathan, *Cyber Law (Indian & International Perspectives on key topics including Data Security, E-commerce, Cloud Computing and Cyber Crimes)*(2012)
- Prashant Mali, Cyber Law and Cyber Crimes,2nd Ed.(2015)
- Debrati Halder & H Jaishanker, *Cyber Crimes Against Women*, Sage Publications 1st Ed.(2017)
- Vakul Sharma, *Information Technology Law & Practice* 9h Ed. (2025)
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- Ferrera et al, Cyber Law Text and Cases 3rd Ed. (2012)
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- SK Verma and Raman Mittal (Eds.), Legal Dimensions of Cyberspace, (2004)
- Lawrence Lessig, *Code and Other Laws of Cyberspace* 1999, Code version 2.0, Basic Books Publication (2006)

e-Readings

1. Nishith Desai, E-commerce in India – Legal, tax and regulatory analysis available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/E-Commerce_in_India.pdf
2. Hemali Shah and Aashish Srivastavat "Signature Provisions in the Amended Indian Information Technology Act 2000: Legislative Chaos", 43 Comm. L. World Rev. 208 2014 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748441
3. Christopher Reed, "Legally binding electronic documents: Digital Signatures and Authentication 35(1) International Lawyer 89-106 available at http://www.jstor.org/stable/40707597
4. "Cyber Laws of India", www.iibf.org.in/documents/Cyber-Laws-chapter-in-Legal-Aspects-Book.pdf(Book on IT security of IIBF published by Taxmann Publishers
5. Clay Wilson, "Cyber Crimes", in Fraklin D. Kramer, Stuart H. Starr and Lerry K. Wentz (Eds.), Cyberpower and National Security, University of Nebrasaka Press: Potomac Books, available at http://www.jstor.com/stable/j.ctt1djmhj1.23

6. Amlan Mohanty, New Crimes under the Information Technology Amendment Act, 7 Ind. J. L. & Tech. 103 (2011) available at Westlaw India
7. Michael Gisler *et. Al.*, **"**Legal Aspects of Electronic Contracts", available athttp://kavehh.com/my%20Document/Essex/Digital%20signature/legal%20aspect%20of%20Electronic%20Contracts.pdf
8. Mayuri Patel and Subhasis Saha, "Trade Mark in Digital Era", 13 JIPR 118-128 (March 2008) available at http://nopr.niscair.res.in/bitstream/123456789/425/1/JIPR%2013%282%29%20%282008%29%20118-128.pdf
9. Frosio, Giancarlo, Internet Intermediary Liability: WILMap, Theory and Trends (October 16, 2017). 13(1) Indian Journal of Law and Technology (2017) ; Centre for International Intellectual Property Studies, Research Paper No. 2017-10. Available at SSRN: https://ssrn.com/abstract=3053966.
10. Siwal Ashwini, Social Media Platforms Regulations in India – A Special Reference to The Information Technology (Intrermediary Guidelines and Digital Media Ethics Code) Rules, 2021 available at https://www.nomos-elibrary.de/10.5771/9783748929789-215/social-media-platform-regulation-in-india-a-special-reference-to-the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021?page=1

Vinod Kaushik v. Madhvika Joshi

W.P.(C) 160/2012 Delhi HC order dt 27.01.2012

HON'BLE MR. JUSTICE VIPIN SANGHI - This petition has been filed under Article 226 of the Constitution of India to assail the order passed by Sh. Rajesh Aggarwal, the Adjudicating Officer under the Information Technology Act, 2000, Government of Maharashtra in Complaint No. 2/2010 preferred by the petitioners before the said officer. The reason for filing this petition before this Court is that the Cyber Appellate Tribunal, New Delhi, to which an appeal lies against the impugned order, is bereft of the Chairman, and the Tribunal is not in a position to function. Consequently, the jurisdiction of this Court has been invoked.

The petitioners preferred the aforesaid complaint against, inter alia, Ms.Madhvika Joshi, Respondent No.1. Petitioner No. 2 was married to Ms. Madhvika Joshi, whereas petitioner No. 1 is the father-in-law of Ms. Madhvika Joshi. Ms. Madhvika Joshi accessed the e-mail accounts of both the petitioners and printed chat sessions and e-mails from these accounts, which she has used to pursue her case filed against the petitioners under Section 498A IPC. The learned Adjudicating Officer in a well-reasoned order has held that respondent No. 1 is technically guilty of breaching Section 43 of the Information Technology Act (IT Act). However, he observes that respondent No. 1 has utilized the information retrieved by her from the e-mail accounts of the petitioners only for the purpose of pursuing her case against the petitioners, and for no other purpose. She has not used the said information for any other purpose, such as to malign the petitioners or cause any loss to them, and the information retrieved by her has been given only to the police authorities or the Court. On this basis, the Adjudicating Officer has held that the petitioners are not entitled to claim any damages from the respondent No. 1. The Adjudicating Officer has proceeded to impose token fine of Rs.100/- upon respondent No. 1 under Section 66C of the Act.

Section 43 of the IT Act, inter alia, provides that ?If any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network, ?.. ?.. ?.. downloads, copies or extracts any data, computer data base information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;? such person shall be liable to pay damages by way of compensation to the person so affected.

The claim for compensation would not arise merely on account of the breach of Section 43. The claim would have to be established like in Civil Court, by making requisite averments with regard to the damage suffered, and thereafter by leading evidence in support thereof, to show that one or the other prohibited activities enumerated in Section 43 of the IT Act have resulted in the sufferance of damages by the person concerned.

In the present case, the petitioners evidently have not lead any evidence to show as to what damage they have suffered on account of the retrieval of their e-mails and chat sessions by respondent No. 1. These e-mails and chat sessions have been used by respondent No. 1 in her case lodged against the petitioners under Section 498A IPC. Admittedly, this information has not been made public by respondent No. 1 to malign the petitioners or

to hurt their business or reputation. The information has been provided only to the police authorities or to the Court.

The claim for damages and compensation made by the petitioners is worded in the following manner in their written final argument before the Adjudicating Officer: ?38. In this case, accused R-1, R-2 and R-3 had put the victims to huge financial losses to the tune of Rs. 50 lacs; (a) by dragging them into unwanted litigation by registering a false 498A Case (b) by keeping the Complainant?s son in eight days police custody by waving the copies of these illegally hacked, fabricated and created chat sessions (c) by delaying overseas business assignment of the complainant to Hong Kong (d) by blocking the client-site posting of the Complainant?s son Neeraj to USA by way of unauthorized seizure of passport through Police (e) by blocking various business opportunities of the Complainant by way of deleting business mails of the complainant regularly and repeatedly for more than 15 months (f) by damaging reputation in the society.

As such Neeraj and the complainant are entitled for every relief including the iscretionary benefits under the Law inforce and hence entitled for all the due relief/compensation legally under the IT Act 2000 as prayed for with cost of the suit as detailed below:

A. Rs. One Lac three thousand paid towards Court Fee/application money.

B. Rs. 25,000/- towards expenses incurred on lodging and travelling to Pune and Mumbai for pursuing the case at Cyber Crime Cell Pune, before the Hon?ble Adjucating Officer at Mantralaya Mumbai and attending hearing dates.

C. Rs. 50,000/- towards litigation charges paid to the Counsel.

D. Rs. 5000/- towards documentation expenses.

39. Since the complaint is legally tenable and the complainant and Neeraj Kaushik are entitled for the relief as prayed for by imposing heavy exemplary penalty and cost on the Respondents alongwith rigorous imprisonment, so that any such economically well placed employees and the companies could not date to repeat such mal practices and offences which would act as a deterrent for one and for all in future.?

The aforesaid claim has been rejected by the Adjudicating Officer and, in my view, rightly so. The right of the respondent to pursue legal remedies available to her, including under Section 498A IPC, cannot be questioned. The invocation of a right available to a person to ventilate his or her grievances, and to take action against perceived illegalities and criminalities does not give a cause of action to claim damages to those against whom action may be initiated because of such complaints/actions, unless it is eventually found that such complaints/actions was filed maliciously.

The petitioners cannot have any grievance because the respondent No.1 has lead in evidence of the materials collected by her in support of her case by breaching Section 43 of the I.T. Act. All the consequences flowing on account of registration of the case under Section 498A IPC against the petitioners are remote and indirect consequences. In any event,

it is too premature to conclude that respondent No.1 is accountable for the so called damages.

This being the position, I find no merit in this petition so far as the petitioners claim for damages has been rejected. In case it is held by the concerned Court that the proceedings under Section 498A have been maliciously instituted, it shall be open to the petitioners, at that stage, to take appropriate steps to claim damages against the respondent No. 1 for loses or damages directly arising from such conduct of respondent No.1.

So far as the submission with regard to the levy of token fine of Rs.100/- under Section 66C is concerned, I find no merit in the same either. The submission of the petitioners in this respect is that the said fine cannot be imposed by the Adjudicating Officer, who functions like a Civil Court, whereas the fine could be imposed by a Criminal court dealing with the offences made out under the Act. The fine has been imposed under Section 66C against the respondent No. 1. In case respondent No. 1 is aggrieved by the said token fine on the ground that the adjudicating authority did not have jurisdiction to levy the same under Section 66C, it shall be open to her to take appropriate action.

Dismissed.

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SELF LEARNING STIMULATING EXERCISES

1. Suppose the woman in above case not knowing the passwords, hires someone to gain unauthorized access to the accounts of her husband and father in law.
   Can the jurisdiction of Adjudicating officer (AO) be invoked if the act of unauthorised access and download was executed from outside India? Whether AO will have jurisdiction over a person who downloads and transmits copyrighted database.
   (Hint - territorial jurisdiction and subject matter jurisdiction)

2. Whether the "doctrine of forum conveniens" apply to Statutory Second Appeal to High Court under Section 62 of the IT Act 2000? Or would Cause of action and situs of the original jurisdiction of the first forum (as to which High Court is the Adjudicating Officer subordinate) be a relevant factor in determining jurisdiction? Is "Telecom Disputes Settlement & Appellate Tribunal New Delhi" having its seat in Delhi, only subject to jurisdiction of Delhi High Court or is TDSAT subject to jurisdictions of all the High Courts in India?
   (Hint - State Bank Of India vs Mr. Chander Kalani And Anr. (First Appeal Order no. 547/2018, HIGH COURT OF DELHI) Judgment delivered on:14thFebruary, 2019)

3. Whether the cyber contraventions/civil liabilities, mentioned in various clauses of Section 43 require intention to cause damage or intention does not matter at all.

Sh. Sanjay Govind Dhande v. ICICI Bank; Vodafone India

Adjudicating Officer (Mumbai)

Complaint No. 30 of 2013 dated 26th September 2013 decided on 16/01/201

Sh. Rajesh Aggarwal:

1. Brief Facts of the Case as per Complainants are as follows:

I. Complainant 1 and 2 are the Directors of M/S Sango Consultants Pvt. Ltd, Pune which is listed as Complainant No. 3. Complainants hold a Current account bearing No 007305008xxx with ICICI Bank, Aundh Branch, Pune (Respondent No. 1).

II. Complainants state that, between dates 6th to 10th September 2013, many fraudulent fund transfers amounting to about Rupees 19 lacs were done by an Unknown persons from their account.

III. Complainant 2 states that the current account is linked with the mobile number (8552902xxx) which was issued by Respondent No. 2.

IV. Complainant 2 states that, Respondent No. 2 and 3 (Vodafone) have not taken adequate safeguards to protect Complainant's data with them. Respondent No. 2 issued a duplicate SIM Card of Complainant's Mobile Number to Fraudsters without cross-checking the documents submitted by the fraudsters with the Original identity documents which were submitted by the Complainant. Due to this act of Respondent No. 2, fraudsters have managed to commit grave illegal act and has caused great financial loss to the Complainants.

V. Chronological Events:

On 6th September 2013, the Complainants mobile phone stopped functioning in proper manner.

a. On 7th September 2013, Complainants through their family driver contacted Vodafone Shop located in Sanghvi, Pune. The concerned Representative of Respondent No. 2 checked the phone and informed that the Phone instrument is working properly, but, the SIM card needs to be replaced.

b. Complainant states that as September 8th and 9th were holidays, the Complainant contacted Vodafone office (Respondent No. 2) on 10th September 2013. Complainant submitted an application for new SIM Card with all the verification proofs such as copy of PAN Card and photograph etc. and a new SIM card was issued by Respondent No. 2 Complainant states that however, the calls were getting diverted to some other number. Hence the Complainant again contacted Respondent No. 2 office and they corrected the database and the phone number started functioning properly from evening hours of 10th September 2013.

c. Complainant states that during the period when their mobile was non-functional, the fraudulent transactions took place, and amount to the tune of Rupees 19,01,073.16 was fraudulently siphoned off.

d. Complainant states that it is admitted position by Respondent No. 2 that the fake SIM card was indeed issued by Vodafone on 6th September 2013 at their franchisee office in Nagpur. This information was revealed to Complainant when he went to submit a complaint to Vodafone on 16th September 2013.

e. Complainant initiated a police complaint and FIR was registered with Chaturshringi Police Station, Pune bearing CR No. 315/2013 on 14th September 2013, and later the case was transferred to Cyber Crime Cell, Pune for the further investigation.

VI. Complainants have submitted Copy of the Bank account statement, Copy of the FIR registered at Chaturshringi Police Station, Pune, Copy of the correspondence with Dy. Branch Manager, ICICI bank, Aundh Branch, Pune dated 11th September 2013, Copy of the correspondence with Dy. Branch Manager, ICICI bank, Aundh Branch, Pune dated 16th September 2013, and Copy of the correspondence with MD & CEO, ICICI bank, Mumbai, dated 21st September 2013.

Paras 2-6 deleted

7. My analysis of the documents before me, and the arguments made by various parties before me, is as follows:

I. Both ICICI and Vodafone, two big names in Banking and Telecom sector respectively, have badly let their customers down, and are totally nonrepentant about their laxity, bordering on connivance, which has resulted in this crime.

II. Before passing any order in this case, I think it is important to realize that Net banking and mobile banking are increasingly being promoted by the Banks, and used by their customers, to do financial transactions. While the customers are expected to use their discretion to secure their net banking /mobile banking IDs and passwords, the onus of securing customer's data is on the banks. Similar is the case with telecommunication companies that bask in huge revenues due to use of mobile services by their customers.

III. The Government has realized the critical importance of security of the data reposed with banks and telecommunication companies and has enacted laws and issued various guidelines to ensure basic minimum security of consumers' data and money. Section 43 and 43A of the Information Technology Act, 2000 (IT Act) are steps in the same direction. Likewise, the KYC norms issued by the RBI and the guidelines

for issuance of SIM cards issued by TRAI/DOT are also measures that go a long way in protecting the interest of the innocent citizens.

IV. ***First, let me deal with the laxity shown by ICICI Bank, which has resulted in this crime.***

a. ICICI has been treating KYC norms with total impunity. Account of Vinayak Tilotakar turned out bogus. Address of Ravi Kumar Singh was bogus. One Pankaj Jain opened account in false name Ashish Aggarwal in Bangalore. And so on. Police says that their bank manager Ms. Asmita Pangarkar may have been lax in opening many other bogus accounts. Still, the bank is neither cooperating with the police, nor doing any internal investigation.

b. ICICI Bank has not given to the police the CCTV footage of ATM & in person Cheque / Cash withdrawal at Branch.

c. The use of foreign IP addresses and fast withdrawals, totally at variance with the normal transaction activities of the complainants, also did not raise any alerts within the bank's system. This shows that real-time fraud analytics are not in place.

d. Despite this being a case of huge financial loss to the customer, the bank has done no meaningful internal investigations. Their Fraud Investigation Unit (FIU), mandated by RBI guidelines, seems nonexistent.

e. I have carefully gone through the *"Master Circular – Know Your Customer (KYC) norms / Anti-Money Laundering (AML) standards/ Combating of Financing of Terrorism (CFT)/Obligation of banks under PMLA, 2002"* dated 2nd July 2012, and find that ICICI Bank has violated para 2.8 of the circular regarding Money Mule Accounts by not taking sufficient precautions in this regard.

f. I have also carefully gone through the *"Guidelines on Information security, Electronic Banking, Technology risk management and cyber frauds"* issued by RBI on 29/04/2011. It has detailed instructions to Banks on Fraud Risk Management; need of strong KYC norms to prevent cybercrimes; Transaction monitoring; Dedicated email ID and phone number for reporting suspected frauds; Mystery shopping and reviews; reporting of frauds as indicated in the RBI circular, dated July 1, 2010; Filing of police complaints (Banks should readily share data and documents requested by the police even in cases where the bank in question is not the victim of the fraud but has been a receiver of fraudulent monies into its accounts); customer awareness etc. It is very clear that ICICI falls short on many of these counts, which has contributed to its customer getting cheated of his hard earned money. Chapter 6 on Cyber Frauds in the RBI notification dated 29/04/2011 clearly mentions that *"... the response of most of the banks to frauds in these areas needs further improvement, thereby avoiding putting the entire onus on the customer ..."*.

g. I have also gone through the Internet websites indicating protection offered by various banks abroad to their customers who use electronic channels to conduct transactions. Most of the banks in USA and in other developed nations INSURE their customers against online/ATM frauds etc., beyond a liability of 50 dollars. Section 909 of the "Electronic Fund Transfer Act" of USA dealing with Consumer Liability is really loaded in favour of the consumer. It is expected that in India also, the banks will not only educate the customers about precautions to be taken while using Net Banking, or credit/debit/ATM cards, but will also insure the customers against possible frauds. It is quite sad to see the Global Banks operating in India proclaiming very loudly that they are following best international practices, but not giving its Indian customers same level of protection what they offer abroad.

h. Criminals mainly used accounts of ICICI opened on fake papers to defraud the complainant. It is my view that if the KYC norms were strictly followed by the Bank or if the CCTVs had been working, it could have helped the enforcement agencies to trace the fraudsters and the Complainant's money could have been recovered.

i. I also have on record an emotional letter written by complainant Sh. Sanjay Dhande to MD & CEO of ICICI Bank Smt. Chanda Kochar. He says that he has served as Director IIT, Kanpur for 11 years, has received Padmashree Award for his services to the Nation, and is presently a member of National Security Advisory Board. That Smt. Kochar or her office has not even bothered to reply to this letter shows how shabbily they treat their customers, and how their grievance redressal mechanism has totally broken down.

V. ***Now, let me deal with the issue of laxity, almost bordering on connivance, on part of Vodafone, which has resulted in this crime.***

a. There is an undeniable direct nexus between blocking of SIM card of the Complainant, issuance and use of the duplicate SIM card by the fraudster and unauthorized financial transactions from the account of the Complainant. In fact, the Bank transactions happened after the duplicate SIM card was procured and activated by the fraudster.

b. As I understand, it is common practice to register one's mobile number with banks. Banks use this number for any communication regarding the associated bank account with the customer. The mobile number is used by the banks to identify their customer. It could also be used, along with certain other details, in case one wanted to change ones password or create a One Time Password (OTP) for doing a transaction. In this particular case*, ICICI documents show that not only bank transaction alerts, but even OTP was sent to the duplicate SIM card.*

c. It is not farfetched to state that the duplicate SIM card was used by the fraudster to access the password/id of the Complainant. According to me, access by the fraudster

to the Complainant's SIM card has played a major role in accomplishing the unauthorized financial transaction. Further, blocking of the SIM card of the Complainant by Vodafone also disabled the Complainant from getting alerts from his ICICI Bank account.

d. Based on the facts and documents placed before me, it is clear that Vodafone did not check the authenticity of the claim or reason for issuance of a duplicate SIM card. They did not check the picture on the fake license with their database; nor was the sign matched; the online File Net system was down for days. The person took the blank form, and came back in ten minutes, with forged details, a photo of male person on scanned normal paper rather than a proper photo; there is no payment receipt for duplicate card fees; the store manager was not in shop but came next day and backdated his signature on the form – the list of omissions is endless. , They didn't even bother to check if the number was in use and active or not. A mere phone call on the Complainant's mobile number, which is the minimum due diligence one would expect, could have averted the difficulties and agony suffered by the Complainant.

e. Clearly, Vodafone has been negligent in giving duplicate SIM to fake person by not following the procedure laid down by the Government and its own company policy document submitted to me.

f. The apathy of the telecom companies towards observance of norms/regulations/guidelines related to proper and effective subscriber verification has been brought to the fore in the Hon' Supreme Court in Avishek Goenka Vs. Union of India & Anr. case the decision of which was delivered on April 27, 2012. The Supreme Court in that case took note of the fact the SIM cards are provided without any proper verification, which causes serious security threat as well as encourages malpractices in the telecom sector. It appears that the concerns raised in that case have not been given any heed to by Vodafone.

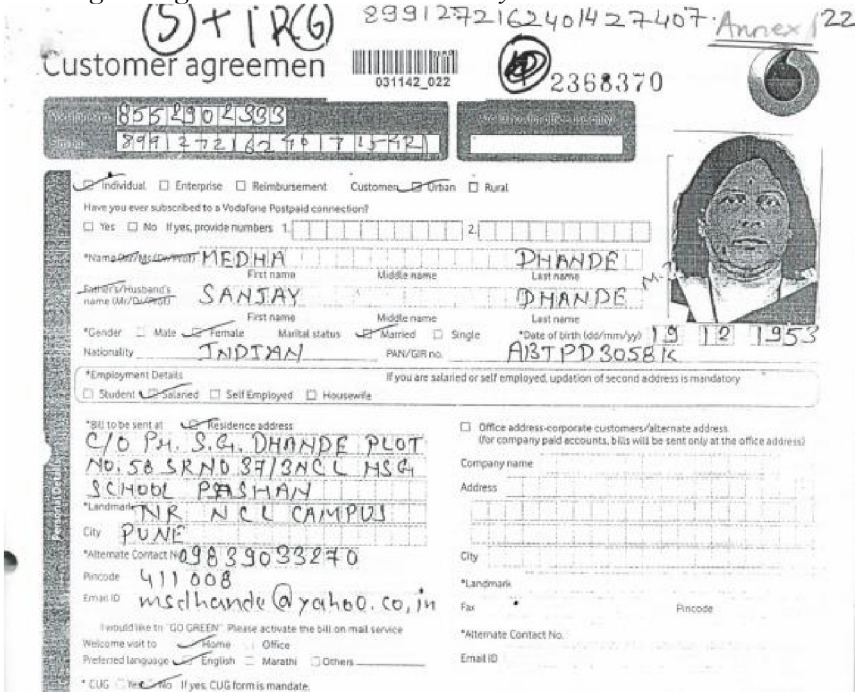
g. When a citizen applies for obtaining a SIM card, he provides a battery of information which is personal and sensitive in nature. He reposes his faith and trust in the company that his details and data would not be shared with third parties. It is not hard to realize that such information, if falling in wrong hands, can be misused. A SIM card is a veritable key to person's sensitive financial and personal information. Realizing this, there are clear guidelines issued by the DOT regarding the issuance of SIM cards. The IT Act also intends to ensure that electronic personal and sensitive data is kept secured and reasonable measures are used to maintain its confidentiality and integrity. It is extremely crucial that Telecom companies actively follow strict security procedures while issuing SIM cards, especially in wake of the fact that mobiles are being increasingly used to undertake financial transactions. In many a

case brought before me, financial frauds have been committed by fraudsters using the registered mobile numbers of the banks' account holders.

h. By not implementing security procedures, Vodafone is jeopardizing the sensitive and personal data of all its customers and in a way abetting in commission of frauds related financial transaction.

i. This is starkly brought out by the following papers from Police investigation:

Original Agreement Form submitted by Smt. Medha Dhande



(5)+1RG) 8991272162401427407 Annex 122

Customer agreemen 031142_022 2368370

8552902393

Individual ☐ Enterprise ☐ Reimbursement Customer ☑ Urban ☐ Rural

Have you ever subscribed to a Vodafone Postpaid connection?

☐ Yes ☐ No If yes, provide numbers 1. 2.

*Name MEDHA (First name) PHANDE (Last name)

Father's/Husband's name SANJAY (First name) DHANDE (Last name)

*Gender ☐ Male ☑ Female Marital status ☑ Married ☐ Single *Date of birth (dd/mm/yy) 19 12 1953

Nationality INDIAN PAN/GIR no. ABTPD3058K

*Employment Details If you are salaried or self employed, updation of second address is mandatory

☐ Student ☑ Salaried ☐ Self Employed ☐ Housewife

*Bill to be sent at ☑ Residence address

C/O PH. S.G. DHANDE PLOT NO. 58 SRND 87/3NCL HSG SCHOOL PASHAN

*Landmark NR NCL CAMPUS

City PUNE

*Alternate Contact No 9839033270

Pincode 411008

Email ID msdhande@yahoo.co.in

I would like to "GO GREEN" Please activate the bill on mail service

Welcome visit to ☑ Home ☐ Office

Preferred language ☑ English ☐ Marathi ☐ Others

* CUG ☐ Yes ☑ No If yes, CUG form is mandate

☐ Office address-corporate customers/alternate address (for company paid accounts, bills will be sent only at the office address)

Company name

Address

City

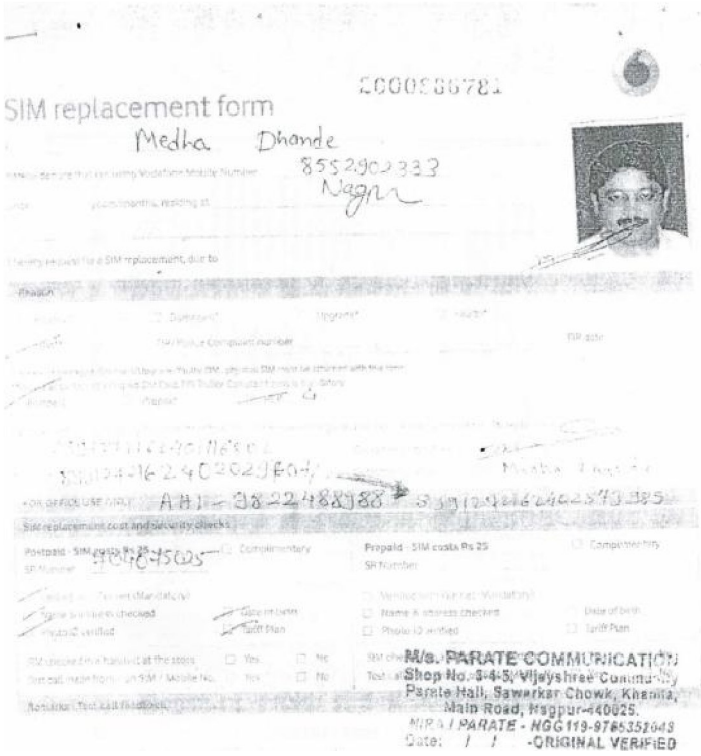
*Landmark

Fax Pincode

*Alternate Contact No.

Email ID

Duplicate SIM Replacement form & forged passport documents submitted by the Fraudster:



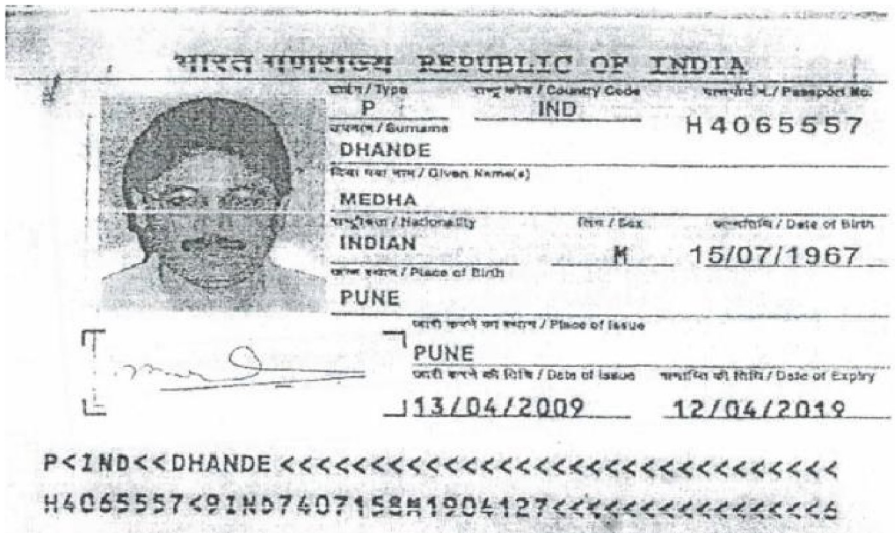
SIM replacement form

Medha Dhande

8552902333

Nagpur

M/s. PARATE COMMUNICATION
Shop No. 3-4-5, Vijayshree Community
Parate Hall, Sawarkar Chowk, Khamla,
Main Road, Nagpur-440025.



भारत गणराज्य REPUBLIC OF INDIA

प्रकार / Type: P
राष्ट्र कोड / Country Code: IND
पासपोर्ट सं. / Passport No.: H4065557

उपनाम / Surname: DHANDE

दिया गया नाम / Given Name(s): MEDHA

राष्ट्रीयता / Nationality: INDIAN
लिंग / Sex: M
जन्मतिथि / Date of Birth: 15/07/1967

जन्म स्थान / Place of Birth: PUNE

जारी करने का स्थान / Place of Issue: PUNE

जारी करने की तिथि / Date of Issue: 13/04/2009
पासपोर्ट की तिथि / Date of Expiry: 12/04/2019

P<IND<<DHANDE<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<
H4065557<9IND7407158M1904127<<<<<<<<<<<<<<<6

j. In arguments before me, Vodafone has further tied itself in knots. They claim that they are not dealing with, handling or storing the Contents of Voice or Text messages, and hence they are not dealing with Personal Sensitive data. Then they contradict themselves by stating that:

In Services dated 6th November 2011 granted by the Department of Telecom to Respondent No. 3, under the scope of the 'services' the Respondent No. 3 is entitled to provide "collection, carriage, transmission and delivery of voice and/or non-voice messages over the Licensee's network in the designated Service Area".

k. They also state that they do not have any access to the content of the messages (voice or text) being transmitted over its network and it neither stores or possesses nor handles or deals with the content of the messages (voice or text) being transmitted over its network. This is amusing, given that they store SMSes and MMSes, albeit in transit, and provide interception facilities to Police and others. In fact, even the Metadata, i.e. caller and called number logs, locations, duration and time of call etc. are highly sensitive personal data. Who called suicide helpline, or AIDS helpline, who is calling whom frequently at night, which two phones were in close vicinity for how long, all this is undoubtedly highly sensitive, personal data. The content of voice call or SMS or MMS is obviously still more sensitive. Hence, a Telecommunication company saying that they do not "handle" sensitive, personal data, is an argument which has no merit at all.

l. They also state that this is a "high profile case" and they have suspended two employees of the franchise. They also admit that clearly a duplicate SIM card was issued by their Nagpur franchise to an imposter, and their own rules and procedures were violated by the franchisee.

8. In light of the foregoing discussions, in my considered view:

(a) During Police investigations or ICICI Bank's internal investigations, if any, it is not the case that the complainant deliberately or negligent divulged all his details to the criminals. Hence the liability of the loss cannot be passed on to him. Also, the complaint is not a novice in electronic transactions. In fact, the complainant **Sh. Sanjay Dhande has served as Director, Indian Institute of Technology for 11 years, has been awarded Padmashree for his services to the Nation, and is presently a Member of the National Security Advisory Board.**

(b) As Rupees 3.26 lakhs have been reversed out of initial fraud of Rupees 19 lakhs, I assess total fair compensation to complainants at about Rupees 18 lakhs, to cover their loss and legal fees etc. Vodafone must share bigger blame because duplicate SIM card played most critical role in this crime.

(c) ICICI Bank has defaulted on multiple counts as enumerated earlier in my Analysis of this case. Their omissions fall within the ambit of Section 43A of the IT Act. Accordingly, I order Respondent 1, i.e. ICICI Bank to pay damages to the tune of **Rupees 6,00,000** by way of compensation to the Complainant, within a month of this order, failing which compound interest of 12 percent compounded monthly will also be chargeable.

(d) Vodafone i.e. Respondent 3, by not following the reasonable security practices and procedure and the established guidelines before issuing a duplicate SIM card, has led to the access of sensitive personal data and information of the Complainant to an unauthorized person and thereby caused wrongful loss to the Complainant. According to me, this falls within the ambit of Section 43A of the IT Act. Accordingly, I order Respondent 3, i.e. Vodafone to pay damages to the tune of **Rupees 12,00,000** by way of compensation to the Complainant, within a month of this order, failing which compound interest of 12 percent compounded monthly will also be chargeable.

(e) I must also make a few suggestions to Department of Electronics and Information Technology (DeiTY), Govt. of India regarding the Cyber Crimes. The IT Act was passed in 2000. The Police, lawyers, Adjudicating officers, etc. are still not very familiar with nuances of cyber crimes. Workshops of various stakeholders, including Adjudicating Officers should be held, to sensitise and train them. The post of Chairman, Cyber Appellate Tribunal is vacant for more than three years. Perhaps the focus needs to shift from policing the cyber citizens to policing the cyber criminals? Perhaps a telephonic Helpline to help the victims of cybercrimes may be useful. Hence, a copy of this order be also sent to Secretary, DeiTY, Govt. of India, for debate within his Ministry on these issues.

(f) The Department of Telecommunications, Govt. of India, also needs a hard look at the lack of Regulatory compliances by the telecom companies. The omissions on part of Vodafone go beyond simple laxity, and almost border on connivance with the cyber criminals. Hence copies of this order should also be sent to Secretary, DoT, Govt. Of India and Chairman TRAI.

(g) Both the departments, DeiTY and DoT, should note that forged papers with photograph of ex-Union Minister of both these departments, Sh. Dayanidhi Maran have been used to commit this crime.

(h) The role of ICICI in this crime is clearly established. What is sad is the lack of response by their MD to victims of cybercrimes, indicating total apathy and breakdown of grievance redressal mechanisms. I wonder what use are various Guidelines issued from time to time by RBI, on KYC, Money Laundering, Mule accounts, Fraud Investigation Units, use of real time Analytics etc., if banks are flouting them with impunity, and there

is no supervisory mechanism or Third Party Audit mechanism by RBI. A copy of this order be sent to Secretary Banking, Govt. of India, for further necessary action in this regard.

******

SELF LEARNING STIMULATING EXERCISES

1. Section 43A makes corporates liable to pay compensation for failure to protect sensitive personal data and information in any computer resource which it owns, controls or operates. Can a telecommunication company part with mobile phone bills with a third party? If so, under what circumstances can they legally do it?
   (Hint -The *Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 and Information Technology (Intermediaries guidelines) Rules, 2011* read with Section 67C, 72 and 72A of the IT Act, 2000.)

2 Does negligence by a banker in not properly comparing specimen signature on a cheque which leads to wrongful loss to customer make such negligence amenable to the scope of section 43A.
(Hint – *Sanjay Dhande* (TDSAT); *Bank of India* v. *Sandeep*, (cyber appeal no. 3 0f 2018) TDSAT decided on 20/12/2019)

State Bank of India v ***Shri Chander Kalani***

Cyber Appeal No. 13/2015 (TDSAT) decided on July 31, 2018

Shiva Kirti Singh, Chairperson — Aggrieved by order dated 12.01.2015 made by the Adjudicating Officer, Government of Maharashtra (Principal Secretary, IT, Government of Maharashtra) in Complaint No.l of 2014, the appellant, State Bank of India, has preferred this Appeal under Section 57 of the Information Technology Act, 2000 (IT Act). By the impugned order, the learned Adjudicating Officer has dealt with and disposed of a complaint filed by the complainants, Shri Chander Kalani and his wife, Smt. Romi Kalani, in exercise of power under Section 46 of the IT Act. The order discloses the brief facts of the case as per complainants, the documents submitted by the parties including the Police Reports as well as the submissions advanced on behalf of the parties. After analysing the documents and the arguments in the light of facts available on record, the learned Adjudicating Officer has given his final conclusions in Para 6 of the order which is as under:

> "6. In view of the above,
>
> 1. Complainant has been doing transactions with the banks only through emails, which is insecure way of doing things. Mechanisms like alternate email, SMS alerts etc. were not used. Complainant had not informed the bank about his defunct mobile number. Hence, both the Complainant and the Respondent Bank have to share the blame.
> 2. I hold the Respondent No.1(State Bank of India) in violation of Section 43A of the IT Act, and order them to a compensation of Rupees (Rupees Forty Lakhs) to the Complainant to partly cover his loss, within a month of this order, failing which compound interest of 12 percent compounded monthly will also be chargeable."

2. On behalf of the appellant Bank, Mr.Ramji Srinivasan, learned senior counsel has first highlighted some of the facts with a view to substantiate the stand of the appellant Bank that the complainant was not diligent. He highlighted that Mr.Kalani being a Non-Resident Indian (NRI) had used his Email identity in the past for directing the Bank to create fixed deposits out of funds available in his savings bank account. Of course, he had confirmed the same through his talks from registered mobile number also, but at the time of relevant occurrence towards the end of October, 2013, his phone had got defunct and he did not supply any alternative phone/mobile number through which the Bank could recheck or confirm the instructions for transfer of funds from his account to some other accounts as per instructions in the Emails originating in his name from his Email ID. It was also highlighted by learned senior counsel that the complaint of hacking of Email ID of the complainant was made belatedly on 13.12.2013 and thereafter the Bank itself took steps to inform the Police as well as the two other banks where, in total, an amount of 60000 GBP had been transferred and this led to recovery from one of the accounts of 16710 GBP(approx.) which was made available to the complainant.

3. According to learned senior counsel, the loss of approximately 43300 GBP was not on account of any negligence on the part of the appellant Bank and therefore, the award of Rs.40 lakhs which is equivalent to almost the entire loss of 43300 GBP, to the complainant is not just and proper; more so, when the learned Adjudicating Officer himself has held that both, the complainants and the Bank have to share the blame.

4. It has further been argued that how the respondent Bank is liable to share the blame has not been established by supply of reasons. It was urged that even if this finding is found acceptable, the compensation should have been less and not Rs.40 lakhs so as to cover the entire alleged loss to the complainant. It was also submitted that the Adjudicating Officer should have exercised his wide powers to obtain reports from experts as to whether the Email ID of the complainants was actually hacked or not and if so, by whom.

5. Learned senior counsel for the appellant has also raised a plea that in the complaint petition the complainant has also referred to Section 43(a)(b) but those provisions of law are not attracted. According to him, Section 43A under which the claim for compensation has been allowed does not provide for compensation for any wrongful loss etc. to any person from a body corporate unless the facts lead to a conclusion that such body corporate is negligent in implementing and maintaining reasonable security practices and procedures and that such negligence has caused the wrongful loss to the person who has sought damages by way of compensation.

6. So far as relevant and essential facts are concerned, the complaint dated 13.12.2013 filed by the respondents discloses the particulars of an NRI Account which the complainants had in the respondent Bank along with fixed deposits. The complainant stated that he had no bank account in London where the money had been sent. Photocopy of Passport was also enclosed to show that he has not travelled to London. He denied to have authorised termination of his fixed deposits through Emails. He requested for restoring back the entire amount in his fixed deposits accounts. Besides such complaint to the Manager of the Bank, he filed a complaint bearing No. I of 2014 before the Adjudicating Officer on 30.12.2013 giving all the details. In addition to two officials of the Bank, unknown persons were also shown as respondents. In Para 3, the complainant has highlighted the crux of his complaint by stating that the complainants had never sought facilities of any internet banking or phone banking nor had permitted in writing or orally for entertaining any transactions using Email and yet three fixed deposits of the complainants were fraudulently transferred to unknown beneficiaries upon fake Email requests. Complainants alleged negligence on the part of respondent Bank in transferring the funds, approximately amounting to Rs.63 lakhs and in sharing sensitive personal information (account details) with unknown person in course of replying to the fake Emails. The complainants claimed to be senior citizens and Non-Resident Indians(NRIs). They disclosed that while they are residents of Mumbai, they also have business dealings in Lagos, Nigeria and West Africa. They had 6 joint fixed deposits with the Bank having different maturity dates and amounts. On 13.12.2013, when Mr.Kalani visited the Bank for updating the passbook and to collect one original FDR, he was shocked to know that their FDs have been fraudulently broken and money transferred to some account without any authorisation from them. It was alleged in the petition of complaint that the Bank had transferred the amount arbitrarily and without any verification. It was also highlighted that when the complainants had never opted for banking transactions through Email, phone or internet, respondent Bank should have been diligent to cross-check before acting upon the fake Emails. In the petition of complaint it was also highlighted that for transfer in foreign exchange, signature of the account holder on A-2 Form is required and admittedly no signature of the complainants was available on such form. Instead, the Bank acted on a scanned signature on A-2 Form, that also of only one of the joint account holders.

7. In reply to the defence raised on behalf of appellant Bank, learned counsel for the respondents/complainants submitted that the defence raised by the Bank in its pleadings has not been substantiated by any material. There was no correspondence or document raising any doubt in respect of grievances of the complainant. The Bank never doubted this in its complaint to the Police nor the investigation by Police found anything wrong with the case lodged by the complainant. It was submitted that use of Email by the complainant on one occasion was not for taking out fund from the Bank in favour of any other entity but only for creating fixed deposits with the Bank and that also was done after confirmation through registered mobile number. It was also submitted that there was no delay in lodging the complaint of hacking of Email ID and unauthorised transfer of funds from complainant's account. It was disclosed in the complaint to the Bank Manager that the entire fraudulent and illegal transaction came to knowledge of the complainant only when he visited the Bank on 13.12.2013 for updating the passbook and for collecting one original FDR. Even thereafter, the Bank acted on the information and was able to recover a substantial amount of 16710 GBP and the same was given back to the complainant. Had

there been any wrong intention on the part of the complainant, no such amount could have been traced or recovered on action initiated after his complaint.

8. Learned counsel for the respondent/complainant pointed out that the appellant has nowhere denied the case of the complainant on any essential and material facts. There is no denial to the averment in the petition of complaint that the Bank had transferred the amount; that the complainant had never opted for transaction through Email, phone or internet and further that the Bank should have been diligent to cross-check before acting upon the fraudulent Emails. It was also highlighted that while requirement of A-2 Form is signature of the account holder, the joint account from which money was transferred was in the name of husband and wife but the Bank accepted such Form only with scanned signature of only one of them. It was vehemently argued that scanned signature is no signature and when the complainants have not opted for netbanking, phone banking or Email banking, appellant had to seek original signature of the account holders before effecting the transfer. Admittedly, no digital signature of the complainants was used for the fraudulent transaction.

9. Learned counsel for the respondent took us through each of the Emails dated 28.10.2013, 06.11.2013, 12.11.2013 and 25.11.2013 to point out how certain information in respect of FD accounts and their numbers were supplied by the Bank itself and it facilitated the fraud. It has been argued that supply of such information from the computer system of the Bank was unauthorised and clearly a negligent act. Learned counsel referred to Para 26 in the Memo of Appeal to point out that the appellant has acknowledged that the Adjudicating Officer examined the police investigation reports dated 10.03.2014 and 26.08.2014 and that these reports confirmed that the Email ID used by the fraudsters was hacked. Learned counsel pointed out that Section 43(a) and (b) has been mentioned in the claim petition because unknown persons who were beneficiaries of the fraud have also been made parties as unknown. They could also be liable to pay damages by way of compensation to the claimant and hoping that the Police may locate them, the aforesaid provisions were mentioned. He clarified that the liability of the Bank is under Section 43A and that is the finding of the Adjudicating Officer also who has allowed the claim under said provision only.

10. Before adverting to the scope and ambit of Section 43A in the light of submissions advanced on behalf of the appellant, it would be appropriate to conclude the issues of fact by reverting to rejoinder submissions on behalf of the appellant. In reply, learned senior counsel for the appellant submitted that the claimant has not filed any proof of hacking of his Email ID which was necessary because in pleadings the Bank had not admitted hacking. According to him, the jurisdictional facts for applicability of Section 43A have not been proved by the claimant. He also submitted that the Adjudicating Officer ought to have asked the parties to lead evidence and allowed the other parties to crossexamine such evidence before giving findings on disputed facts. In other words, the submission is that the power to adjudicate under Section 46 of the IT Act has not been exercised fairly and in an appropriate manner and that since the Adjudicating Officer has some powers of a civil court and is deemed to be a civil court for certain purposes, it ought to have followed the detailed procedure of holding a fair trial in respect of issues arising from rival cases.

11. In view of last submission it is necessary to notice that under Section 46, the jurisdiction of the Adjudicating Officer is limited to claim not exceeding Rs.5 crore. The rules of natural justice are clearly applicable because subsection (2) of Section 46 requires the Adjudicating Officer to provide a reasonable opportunity to the person alleged to have caused injury or damage, for making representation in the matter and by holding inquiry through this process, if the Adjudicating Officer is satisfied that such person has committed the contravention, he may impose penalty or award such compensation as may be appropriate and in accordance with the provisions of the IT Act. Considering the specific provision of giving reasonable opportunity to make representation and on such inquiry, a finding or satisfaction can be recorded, there is no difficulty in holding that the procedure does not warrant an elaborate trial as is required to be held by a civil court in a suit. No doubt some powers of civil court have been vested in the Adjudicating Officer but these are only to enable the officer to summon or discover relevant materials, whenever necessary for coming to

a proper finding in such inquiry. From the powers, it cannot be concluded that the inquiry should be replaced by an elaborate trial like that of a suit in civil court. Such interpretation would defeat the very purpose of providing a summary procedure of inquiry for adjudicating claims upto Rs.5 crore by the Tribunal under the IT Act.

12. Keeping in view the aforesaid discussion, the procedure adopted by the learned Adjudicating Officer cannot be held to be against the procedure provided by the IT Act.

13. So far as pleadings and requirement of proof of hacking is concerned, it has already been noted that admittedly police report supported the case of the claimant that his Email ID was hacked and no material was produced by the appellant to create any doubt on this issue. The submissions advanced on behalf of the respondent/complainant deserve acceptance. The appellant failed to bring on record any material to rebut the case of the complainant that they had never authorised the Bank to transfer their money to other bank or entities through internet or Emails. Although a submission was advanced that the Bank, as a policy, had extended the facility of banking through Emails to NRI account holders but nothing has been brought on record to support this plea.

14. The Emails disclose that the Bank itself leaked-out certain vital information relating to details and numbers of the Fixed Deposits of the complainants that were becoming due for maturity. The transfer of funds on instructions through Emails and on a scanned signature on A-2 Form leave no manner of doubt that the Bank was negligent in sharing financial information of the complainants which is covered by Rule 3 which defines sensitive personal data or information under "The Information Technology (Reasonable Security

Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (hereinafter referred to as the 'Rules'). Hence it can safely be held that the Bank, a body corporate, while processing, dealing and handling sensitive personal data or information in its computer resource, owned, controlled and operated by it, was negligent in not verifying from the available records that the complainants had never authorised transfer of money or instructions through Email and the act of the Bank in divulging informations relating to complainants' fixed deposits was also a negligent act without implementing "reasonable security practices and procedures". Such negligent acts did cause wrongful loss to the complainant. We find no good reasons or materials to reverse the satisfaction arrived at the inquiry as recorded by the leamed Adjudicating Officer in the impugned order. In the light of such finding on facts, we shall now revert to the legal issue in respect of ambit, scope and applicability of Section 43A of the Act in the present case.

15. As already noted, the submission on behalf of the appellant is that negligence has to be proved not in respect of any banking transaction leading to wrong transfer of funds but only in implementing and maintaining reasonable security practices and procedures and compensation can be allowed only when negligence of such nature relating to security practices and procedures has caused wrongful loss to the claimants.

16. On a careful reading of Section 43A, it is absolutely clear that negligence in implementing and maintaining reasonable security practices and procedures alone creates a liability to pay damages or compensation under Section 43A, if such negligence has caused wrongful loss or wrongful gain to the person affected. Negligence by a banker in not properly comparing specimen signature with a signature on a cheque may also lead to wrongful loss or wrongful gain but such negligence will not be amenable to the scope of Section 43A. For this Section to apply, firstly, the body corporate should be possessing, dealing or handling sensitive personal data or information in a computer resource under its ownership, control or operation. Secondly, it should be found negligent in implementing and maintaining reasonable security practices and procedures and thirdly, by such negligence it caused wrongful loss or wrongful gain to any person.

17. The Explanation appended to Section 43A seeks to define: (i) body corporate, (ii) reasonable security practices and procedures and (iii) sensitive personal data or information. A careful reading of the Explanation reveals that "body corporate" has been given a wide and inclusive definition so as not to be confined only to a company incorporated under the Company Law. "Reasonable Security Practices and Procedures" are all such practices and procedures which are designed to

protect particular kind of information not only from unauthorised access, damage but also from its use, modification, disclosure or impairment as may be specified in an agreement between the parties or in any law in force and in absence of both, such reasonable security practices and procedures, as may be prescribed by the Central Government in the prescribed manner. Clearly, the definition is again very widely worded and includes unauthorised use, disclosure etc. "Sensitive Personal Data or Information" has been assigned a meaning as may be prescribed by the Central Government in consultation with competent bodies or associations.

18. There is no dispute that much before the cause of action arose in the present case, the Central Government had, on 1 1.04.2011 published the Rules in the Gazette of India in exercise of powers conferred under provisions of the IT Act including Section 43A thereof. Since the Rules came into force from

13.04.2011, the definition of sensitive data or personal information came to include, as per Rule 3, financial information such as Bank Account or Credit Card or Debit Card or other payment instrument details. It also includes any details relating to this clause provided to the Bank for providing service or for processing, whether such information is stored or processed under lawful contract or otherwise. For the case at hand, clauses (ii), (vii) and (viii) of Rule 3 are relevant. The Bank through its computer resource was clearly possessing, dealing and handling sensitive personal data and information of the complainants in its computer resource.

19. The reasonable security practices and procedures required to be implemented and maintained had to be designed to protect such information from various acts such as unauthorised access and uses. In the present case nothing has been brought on record by the Bank to show that it had implemented and maintained reasonable security practices to protect such information from unauthorised use. Rather the Bank itself used Email received on its computer resource unauthorisedly(without authority from the complainants for such use) for transfer of complainants' money to another bank account. Had there been reasonable security practices and procedures in operation, the concerned personnel could have found out that transfer through Email had not been authorised by the complainants. In fact, no safety or security measure appears to be in place because the transfer was made even without confirmation through registered mobile. The fact that complainant's registered mobile number was not functioning should have worked in his favour because by way of reasonable security practices, the Bank if it had the practice of confirmation through mobile phone of the account holder, ought to have rejected the request for transfer of funds through Email on the valid ground that there was no confirmation available through registered mobile of the account holder. Use of scanned signature on A-2 Form received through Email was another unauthorised and illegal use of a so called signature which cannot have any sanctity either under the general law or under the IT Act.

20. Rule 4 requires a body corporate to have in place a policy for privacy and disclosure of information. In the present case in spite of serious allegations of unauthorised use of data and information relating to the complainants, the Bank has failed to bring on record any material to show that it had in place a policy as required by Rule 4. Rule 8 contains provisions for the purpose of finding out as to when a body corporate shall be considered to have complied with reasonable security practices and procedures. The appellant Bank did not bring on record any material to show that it had complied with the provisions for "reasonable security practices and procedures" in terms of Rule 8.

21. In view of aforesaid discussion, it is found that the Bank was negligent in implementing and maintaining reasonable security practices and procedures at the relevant time at least and thereby it caused wrongful loss to the complainants and hence it is liable to pay damages by way of compensation, as held by the learned Adjudicating Officer. All the ingredients for attracting and applying Section 43A of the Act are made out. Hence, on this account, no interference is required with the impugned order.

22. The last submission on behalf of appellant is that compensation awarded by the learned Adjudicating Officer is excessive because there is a finding in Para 6 of the order that both, the

complainant and the respondent Bank have to share the blame. On that account, as per submission, the compensation awarded should have been lesser and not Rs.40 lakhs which is almost equal to the total loss suffered by the complainants. This submission also does not merit acceptance. The complainants have claimed damages of Rs.l crore. Para I I of the claim petition shows that the first claim is for Rs.63 lakhs with interest @ 18% per annum from the date of fraudulent transfer and the second claim is also for compensation for Rs.37 lakhs under various heads such as Legal Fees and Expenses, Contraventions, Negligence and Failure to protect Complainants' data. In the light of such large claims the learned Adjudicating Officer has not committed any mistake in awarding a compensation of only the actual loss of approximately of Rs.40 lakhs suffered by the complainants. Hence, this plea also is not found acceptable.

23. In the result, we find no merit in the Appeal. It is dismissed accordingly. The amount of compensation awarded to the respondents should be made available to them, if not already made available, within one month from today failing which it shall become payable with interest Q 8% per annum with annual rest, from the date of the order of Adjudicating Officer till the date of realisation. The respondents are also held entitled to Rs.25,000/- as consolidated cost of the Appeal. This shall also be payable along with the compensation awarded.

Syed Asifuddin v. The State of Andhra Pradesh

2006 (1) ALD Cri 96, 2005 CriLJ 4314
decided on 29 July, 2005 (AP High Court)

1. These two petitions are filed by different persons under Section 482 of Code of Criminal Procedure, 1973 (Cr. P. C.) seeking similar relief. Both the matters were admitted on the same day and since then both the matters are being listed together for being disposed of as such, this common order covers both the matters. The petitioners in both the matters seek the relief of quashing F. I. R. No. 20 of 2003 of Criminal Investigation Department (C. I. D.) Police, Hyderabad, registered under Sections 409, 420 and 120B of Indian Penal Code, 1860 (for short, IPC), Section 65 of the Information Technology Act, 2000 (for short, IT Act) and Section 63 of the Copyright Act, 1957 (for short, Copyright Act).

2. The crime was registered against the petitioners on a written complaint given by the Head of Sales and Marketing Wing of M/s. Reliance Infocomm Ltd., Hyderabad, the second respondent herein. In the complaint, it is alleged that certain vested elements of the trade of mobile telephone services began to woo the subscribers of Reliance India Mobile (RIM) into various other schemes promoted by other similar service providers, which would have the impact on the image as well as the revenues of the second respondent. Reliance Infocomm under Dhirubhai Ambani Pioneer Offer launched telephone services named as 'Reliance India Mobile' with a view to make communication affordable to the masses. The same was later modified and the scheme titled 'POBF, which is the most affordable in the market today. Under the said scheme, the subscriber gets a digital handset worth Rs. 10.500/- as well as service bundle for three years with an initial payment of Rs. 3.350/-and monthly outflow of meager Rs. 600/-. The subscriber also gets one year warranty and insurance for three years. The handset given to the subscriber is third generation digital handset with a host of features which are of first of its kind coupled with attractive tariff options. In view of this, the market response in twin cities has been phenomenal. This has an impact on the business of other service providers for the reason that those service providers attempted unethical and illegal practices for weaning away the subscribers of the second respondent.

3. In the complaint, the modus operandi adopted by other mobile service providers is described as follows : The subscribers of the second respondent are attracted by making phone calls impressing upon them that the tariff plans and services provided by others are better than the services of Reliance Infocomm and also advise them that they have an option to shift the service provider by paying an amount of Rs. 3,000/~ towards plan charges and deposits if desired are only Rs. 540/- towards activation fee. Certain unknown persons in Abids, Begumpet, Koti, Himayatnagar and Malak-pet are making the calls to the subscribers of second respondent. Once the subscriber agrees that he can keep a world class handset which is proprietary to Reliance and also enjoy the best tariff plan of the competitor, he is asked to meet any of the business associates of rival service providers. At the rendezvous, the customer is asked to wait for an hour and an usher carries the handset to an undisclosed location in Secunderabad for conversion process, which takes about 45 minutes to an hour and half. During this time, ESN number of Reliance instrument is hacked by reprogramming

and the subscriber is given the handset and instructed to switch off and switch on the handset later in the day and start enjoying the new services.

4. After receiving above written complaint lodged by the second respondent through its Head of Sales and Marketing Wing, the senior executive officer of Criminal Investigation Department, on instructions of the Additional Director General of Police, CID, registered crime No. 20 of 2003 under various provisions of IPC, IT Act and Copyright Act as mentioned hereinabove and took up investigation. The crime was registered on 31-5-2003. Investigation revealed that all the handsets of Reliance India Mobile are being migrated to TATA Indicom network at the behest of TATA Indicome staff members and that same is illegal as there is an agreement between the manufacturers of the Reliance handsets and Reliance India Mobile Limited. In view of the statements given by the witnesses, the investigating officer came to a conclusion that prima facie case is made out against the staff members of TATA Indicom and directed two inspectors to conduct raids at the Head Office of TATA Indicom situated in Khan Lathif Khan Estate, Hyderabad. This was ordered in view of specific information received about tampering of Reliance handsets by the staff members of TATA Indicom. Further on specific information about similar such practices going on at TATA Indicom centre opposite to Harihara Kala Bhavan, Secunderabad, the investigating officer along with two other inspectors and panch witnesses proceeded to LM counter at the above place when one Raj Naren, Officer of TATA Indicom revealed that the General Manager (Marketing), Madhavan and Anil Ambati, Manager (Marketing) of TATA Indicom are accepting the handsets belonging to Reliance Infocomm Limited and re-programming with their network with different tariff packages. At the time of conducting raid in Secunderabad Office of TATA Indicom, the investigating officer also came across one Shaik Mustaffa who stated that he purchased handset from Reliance Infocomm network. Therefore, the investigating officer arrested Raj Naren and Shaik Mustaffa, and seized two mobile telephone handsets, one each from the possession of the two arrested persons. On examination, it was found that the handset recovered from Raj Naren is Samsung N191 co-branded with Reliance with ESN No. 3F7AB 832. The said set was migrated to TATA Indicom with No. 56376361 allotted by TATA Indicom. Its original Reliance India Mobile number was 31086523. The two accused along with mobile sets were brought to the office of C. I. D., and kept under surveillance of C. I. D., staff. The team of inspectors sent to the Office of TATA Indicom at Khan Lathif Khan Estate also arrested Syed Asifuddin, Patlay Navin Kumar and Khaja/Gareed Nawaj (petitioners in Criminal Petition No. 2601 of 2003) and Manoj (petitioner No. 2 in Criminal Petition No. 2602 of 2003). Two Samsung N191 co-branded with Reliance re-programmed handsets with distinct ESN and serial numbers were also seized along with 63 application forms of persons who migrated from Reliance India Limited to TATA Indicom along with the affidavits. After getting the details of the search team, the investigating officer filed remand report before the Court of IX Metropolitan Magistrate, Hyderabad on 3-6-2003. In the remand report, it is further stated as under :

The investigation made so far revealed that the Reliance Infocomm is offering under Dhirubhai Ambani Pioneer Scheme a third generation digital handset costing about Rs. 10.500/- for a mere payment of Rs. 3.350/- with a condition to sail with their network for a period of 3 years with option to exit either by surrendering the handset or paying the cost of

the handset to the company. Investigation also reveals that there is an agreement existing between the Samsung manufacturers and LG manufacturers With Reliance Infocomm regarding their exclusive models Samsung N191 and LG-2030. These model handsets are to be exclusively used by Reliance India Mobile Limited only. In contravention to the above contract the TATA Indicom staff members who are figured as an accused are tampering with pre-programmed CDM-A digital, handsets belonging to Reliance Infocomm and activating with their network with all dubious means which is an offence under Section 65, I.T. Act. Secondly, the customer is not barred from exiting from the Reliance network as such and to quit from that network he has to fulfil the obligations laid down in the terms and conditions of the Reliance company. Till the lock in period of 3 years is over, the handset supplied to the customer by Reliance Infocomm is a joint property of the company and any kind of transaction on the part of the subscriber without fulfilling the obligations laid down in the terms and conditions is clear case of Breach of Trust since the customer has not settled the accounts with the company. Further as the competition between the CDMA service providers blown out of proportions, the TATA Indicom has hatched a conspiracy to hijack the customers of Reliance Infocomm by all fraudulent means and as a part of their Infocomm by all fraudulent means and as a part of their conspiracy trying to woo the customers of Reliance Infocomm with different tariff packages and trying to trap gullible customers and succeeded in their attempt to attract their customers and so far as many as 63 customers belonging to Reliance Infocomm so far migrated to TATA Indicom by illegal means.

5. These two petitions came to be filed on 17-6-2Q03 for quashing crime No. 20 of 2003 by the means of TATA Indicom. While admitting the petitions, this Court passed orders in criminal miscellaneous petition No. 3951 of 2003 staying all further proceedings including investigation of the crime pending disposal of the main petition. The Public Prosecutor filed criminal miscellaneous petition No. 232 of 2005 for vacating the said order. The matters were "finally heard at that stage itself and are being, disposed of finally.

6. The petitioners in both the petitions are employees of Tata Tele Services Limited (TTSL) which provides basic telephone services including Wireless in Local Loop (WLL) services on non-exclusive basis in the service area including State of Andhra Pradesh under the name of Tata Indicom. All of them are alleged to have committed offences punishable under Sections 420, 409 and 120B of IPC, Section 65 of IT Act and Section 63 of Copyright Act. Learned Senior Counsel for the petitioner, Sri C. Padmanabha Reddy, submits that it is always open for the subscriber to change from one service provider to the other service provider and the subscriber who wants to change from Tata Indicom always takes his handset, to BSNL or to Reliance to get service connected and to give up services of TTSL. According to the learned counsel, the CDMA handsets brought to TTSL by subscribers of other service providers are capable of accommodating two separate lines and can be activated on principal assignment mobile (NAM 1 or NAM 2). The mere activation of NAM 1 or NAM 2 by TTSL in relation to a handset brought to it by the subscriber of other service provider does not amount to any crime. According to learned counsel, an offence under Section 409 of IPC is not at all made out even by going through the FIR, as well as remand report. In the absence of dishonest appropriation or conversion to their own use, alleged criminal breach of trust by the petitioners does not arise.

7. The learned Senior Counsel also submits that there was no allegation against the petitioners that they deceived the second respondent fraudulently and dishonestly to deliver the property or to retain the property and therefore the offence of cheating under Section 420 of IPC does not arise: As Section 120B of IPC is relatable only to the offences under Sections 490 and 420 of IPC, the charge under Section 120B of IPC is misconceived. Insofar as the offence under Section 65 of IT Act is concerned, the submission of the learned Senior Counsel is as follows : A telephone handset is not a computer nor a computer system containing a computer programme. Alternatively, in the absence of any law which is in force requiring the maintenance of "computer source code", the allegation that the petitioners concealed, destroyed or altered any computer source code, is devoid of any substance and therefore the offence of hacking is absent. In the absence of any allegation by the second respondent that they have a copyright to the source code of the computer programme in the handsets supplied by second respondent, the infringement of copyright does not arise. He lastly submits that the allegation that TTSL has a subscriber base of 100 thousand (one lakh) customers in Andhra Pradesh and therefore there was no necessity for TTSL to woo the customers/subscribers of second respondent.

8. The learned Additional Public Prosecutor, Sri H. Prahlad Reddy and the learned counsel for the second respondent, Sri D. Seshadri Naidu, submit that when a cognizable offence under various provisions of different statutes is registered and investigation is pending, this Court cannot quash the F. I. R., at the stage of investigation. After conducting appropriate preliminary investigation and examining witnesses the police have come to the conclusion that the petitioners have committed offences involving highly technical aspects, and therefore unless and until proper evidence is let in before the criminal Court, on mere assertions of the accused a crime cannot be quashed. They would contend that the cell phone handsets with CDMA technology supplied by the second respondent to its subscribers are dedicated to Reliance Indicomm Limited and by interfering with the computer programme and converting the handsets to be responsive to the technology adopted by TTSL is itself an offence and therefore these petitions are not maintainable.

9. The submission of the learned Senior Counsel that even if the allegations in F. I. R., are taken to be true, an offence under Sections 409, 420 and 120B of IPC, is not made put has force. Admittedly, a subscriber of second respondent is given a mobile phone instrument and connection with an understanding that the subscriber has exclusive right to use the phone. If the accused allegedly induced the subscriber of the second respondent to opt for the services provided by TTSL, an offence under Section 409 of IPC., cannot be said to have made out. Section 405 of IPC, defines 'criminal breach of trust The offence of criminal breach of trust requires entrustment with property and dishonest use or disposal of the property by the person to whom the property is entrusted. Both these things are absent. There is no allegation that the property in respect of which the second respondent has right was entrusted to TTSL or its employees who are the petitioners herein. Similarly, an offence of cheating as defined under Section 415 of IPC., is not at all made out because a subscriber of second respondent was never induced to deliver the property to TTSL nor there was dishonest or fraudulent inducement by the petitioners of the second respondent or its subscribers to deliver the property. Indeed the delivery of the property as such is not present in the case. In so far as

offence of Section 120B of IPC, is concerned, the same is made in relation to alleged offence under Sections 409, 420 and 120B of IPC., and therefore the petitioners cannot be prosecuted for offences under Sections 409, 420 and 120B of IPC. Insofar as these alleged offences are concerned, if any criminal trial is conducted, the same Would result in miscarriage of justice for as held by the Supreme Court in State of West Bengal v. Swapan Kumar, and State of Haryana v. Bhajan Lal, , when the F.I.R., does not disclose commission of cognizable offence, the police have no power to investigate such offence. In such a case, this Court would be justified in quashing investigation on the basis of information laid with the police.

10. The petitioners are also alleged to have committed offences under Section 63 of Copyright Act and Section 65 of IT Act. In the considered opinion of this Court, it would be necessary first to deal with the allegations separately and then deal with the case of the prosecution on the basis of prima facie conclusions. Before doing so, it is necessary to briefly mention about computer and computer source code.

11. The I.T. Act defines computer in clause (i) of Section 2(1) of the Act. According to the definition, 'computer' means any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network. 'Computer system' is defined in clause (1) of Section 2(1) of I.T. Act, as to mean a device or collection of devices, including input and Output support devices which are programmable, capable of being used in conjunction with external files which contain computer programmes, electronic instructions, data storage and retrieval and communication control. The I.T. Act also defines 'computer network' in clause (j) of Section 2(1) of the Act, which reads as under :

(j) computer network' means the interconnection of one or more computer through-

(i) the use of satellite, microwave, terrestrial line or other communication media; and

(ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained;

12. A reading of clauses (i), (j) and (1) of Section 2(1) of the I.T. Act would show that any electronic, magnetic or optical device used for storage of information received through satellite, microwave or other communication media and the devices which are programmable and capable of retrieving any information by manipulations of electronic, magnetic or optical impulses is a computer which can be used as computer system in a computer network.

13. A computer has to be appropriately instructed so as to make it work as per its specifications. The instructions issued .to the computer consists of a series of Os and is in different permutations and combinations. This machine language can be in different form in different manner, which is called computer language. The communicator as well as the computer understand "a language" and mutually respond with each other. When specified or particular instructions are given, having regard to the capacity of the computer it performs certain specified functions. The instructions or programme given to computer in a language known to the computer are not seen by the users of the computer/consumers of computer

functions. Known as source code in computer parlance, the programme written in whatever computer language by the person who assembled the programme are not seen by the users. A source code is thus a programme as written by the programmer. Every computer functions as a separate programme and thus a separate source code.

14. Computer source code or source code, or just source or code may be defined as a series of statements written in some human readable computer programming language constituting several text files but the source code may be printed in a book or recorded on a tape without a file system, and this source code is a piece of computer software. The same is used to produce object code. But a programme to be run by interpreter is not carried out on object code but on source code and then converted again. [Diane Rowland and Elizabeth Macdonald : Information Technology Law; Canandish Publishing Limited; (1997). p. 17] Thus, source code is always closely guarded by the computer companies, which develop different function specific computer programmes capable of handling various types of functions depending on the need. The law as we presently see is developing in the direction of recognizing a copyright in the source code developed by a programmer. If source code is copied, it would certainly violate copyright of developer. With this brief background in relation to computer source code, we may now consider in brief the technological aspects of a cell phone and how it works. This is necessary to understand the controversy involved in this case.

15. Alexander Graham Bell invented telephone in 1876. This enabled two persons at two different destinations to communicate with each other through a network of wires and transmitters. In this, the sound signals are converted into electrical impulses and again re-converted into sound signals after reaching the destination. The radio communication was invented by Nikolai Tesla in 1880, which was formerly presented by Guglielmo Marconi in 1894. A combination of telephone technology and radio technology resulted in radio telephone, which became very popular as technology advanced. Two persons can communicate with each other through radio telephone without there being any intervention of network of wires and other infrastructure. The radio signals travel through atmosphere medium and remain uninterrupted as long as the frequency at which radio signals travel is not disturbed. The science realized that the radio telephone communication required heavy equipment by way of powerful transmitter and that it can facilitate only 25 people to use the system. The problem was solved by communication technology by dividing a large area like a city into small cells and any two persons connected to a cell system - at a time receive 800 frequencies and crores of people can simultaneously communicate with each other at the same time. That is the reason why the term 'cell mobile phone or cell phone'.

16. In the cell technology, a person using a phone in one cell of the division will be plugged to the central transmitter, which will receive the signals and then divert the signals to the other phone to which the same are intended. When the person moves from one cell to other cell in the same city, the system i.e., Mobile Telephone Switching Office (MTSO) automatically transfers signals from tower to tower when the telephone user moves from one division to another. [How Cell Phones Work? See website - ttp: //electronics, howstuffworks. com. Much of the information on technological aspects of Cell Phones is taken from this. cell phone, it looks the database and diverts the call to that cell phone by picking up frequency pair that is used by the receiver cell phone.] Another advantage in a cell phone compared with radio

phone is that when the radio phone is used, one person can talk at a time as both the persons can communicate simultaneously and also receive sound signals simultaneously.

17. All cell phone service providers like Tata Indicom and Reliance India Mobile have special codes dedicated to them and these are intended to identify the phone, the phone's owner and the service provider. To understand how the cell phone works, we need to know certain terms in cell phone parlance. System Identification Code (SID) is a unique 5-digit number that is assigned to each carrier by the licensor. Electronic Serial Number (ESN) is a unique 32-bit number programmed into the phone when it is manufactured by the instrument manufacturer. Mobile Identification Number (MIN) is a 10-digit number derived from cell phone number given to a subscriber. When the cell phone is switched on, it listens for a SID on the control channel, which is a special frequency used by the phone and base station to talk to one another about things like call set-up and channel changing. If the phone cannot find any control channels to listen to, the cell phone displays "no service" message as it is out of range. When cell phone receives SID, it compares it to the SID programmed into the phone and if these code numbers match, cell knows that it is communicating with its home system. Along with the SID, the phone also transmits registration request and MTSO which keeps track of the phone's location in a database, knows which cell phone you are using and gives a ring. When MTSO gets a call intended to one

18. The essential functions in the use of cell phone, which are performed by the MTSO, is the central antenna/central transmitter and other transmitters in other areas well coordinated with the cell phone functions in a fraction of a second. All this is made possible only by a computer, which simultaneously receives, analyses and distributes data by way of sending and receiving radio/electrical signals.

19. So as to match with the system of the cell phone provider, every cell phone contains a circuit board, which is the brain of the phone. It is a combination of several computer chips programmed to convert analog to digital [Analog - Anything analogous to something else.

Analog computer - A computing machine so designed and constructed as to provide information in terms of physical quantities analogous to those in which the problems are formulated.

Digital - 1. Of, pertaining to, or like the fingers or digits 2. Digitate. 3. Showing information, such as numerals, by means of electronics : digital watches.

Digital computer - An electronic computing machine which receives problems and processes the answers in numerical form, especially one using the binary system.

(See "The New International Webster's Comprehensive Dictionary of the English Language", Encyclopedic Edition, 2003 edn., pp. 52 and 358).] and digital to analog conversion and translation of the outgoing audio signals and incoming signals. This is a micro processor similar to the one generally used in the compact disk of a DeskTop computer. Without the circuit board, cell phone instrument cannot function. Therefore, it is not possible to accept the submission that a cell phone is not a computer. Even by the very definition of the computer and computer network as defined in IT Act, a cell phone is a computer which is programmed

to do among others the function of receiving digital audio signals, convert it into analog audio signal and also send analog audio signals in a digital form externally by wireless technology.

20. The main allegation against the petitioners is that the MIN of Reliance phone is irreversibly integrated with ESN and the petitioners hacked ESN so as to wean away RIM customers to TATA Indicom service. The question is whether the manipulation of this electronic 32-bit number (ESN) programmed into Samsung N191 and LG-2030 cell phone instrument exclusively franchised to second respondent amounts to altering source code used by these computer handsets i.e., cell phone instruments. In the background facts, a question would also arise whether such alteration amounts to hacking with computer system? If the query answered in the affirmative, it is always open to the police to alter the F. I. R., or it is always open to the criminal Court to frame a charge specifically with regard to hacking with computer system, which is an offence under Section 66 of the IT Act. At this stage, we may read Sections 65 and 66 of the IT Act.

65. Tampering with computer source documents :- Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

Explanation.- For the purposes of this, "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

66. Hacking with Computer System :- (1) Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking.

(2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

21. The offence of tampering with computer source documents under Section 65 of the IT Act is made out when a person,

(i) intentionally conceals, destroys or alters a computer source code used for a computer, computer programme, computer system or computer network;

(ii) intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network; and

(iii) (a) However, the offence is made out only when computer source code is required to be kept or

(b) when computer source code is maintained by law for the time being in force.

22. The punishment prescribed by law for the above offence is imprisonment up to three years or a fine of Rs. 2,00,000/- or both.

23. What is a computer source code is also defined in the Explanation to Section 65 of IT Act, which reads as under :

Explanation : For the purposes of this, "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

24. By the very definition of 'computer source code,' a) list of programmes; b) computer commands; (c) design and layout and d) programme analysis of computer resource in any form, is a 'computer source code' for the purpose of Section 65 of I.-T. Act. Going by the definition, ESN of Samsung N191 model cell phone handset or ESN of LG-2030 model cell phone handset exclusively used by the second respondent as well as SID of second respondent come within the definition of computer source code. Every cell phone operator is required to obtain SID from the licensor i.e., Government of India. Further, ESN is a permanent part of the phone whereas MIN and SID are programmed into phone when one purchases a service plan and have the phone activity. When a customer of second respondent opts for its services, the MIN and SID are programmed into the handset. If some one manipulates and alters ESN, as per the case of second respondent, Samsung/LG handsets which are exclusively used by them become usable by other service providers like TATA Indicom. Therefore, prima facie, when the ESN is altered, the offence under Section 65 of I.T. Act is attracted because every service provider like second respondent has to maintain its own SID code and also gives a customer specific number to each instrument used to avail the services provided. The submission that as there is no law which requires a computer source code to be maintained, an offence cannot be made out, is devoid of any merit. The disjunctive word "or" is used by the Legislature between the phrases "when the computer source code is required to be kept" and the other phrase "maintained by law for the time being in force" and, therefore, both the situations are different. This Court, however, hastens to add that whether a cell phone operator is maintaining computer source code, is a matter of evidence. So far as this question is concerned, going by the allegations in the complaint, it becomes clear that the second respondent is in fact maintaining the computer source code. If there is allegation against any person including the petitioners, certainly an offence under Section 65 of I.-T. Act is made out. Therefore, the crime registered against the petitioners cannot be quashed with regard to Section 65 of the I.-T. Act.

25. That takes me to the allegation that the petitioners violated Section 63 of Copyright Act, 1957. So as to keep pace with the advancement in science and technology especially in the field of communication and data processing, Parliament has amended Copyright Act, 1957 in 1995 bringing within its fold computer programme also as literary work to be protected by Copyright Act.

26. Section 2(ffb), (fie) and 2(o) of Copy-right Act read as under.

2(ffb) "computer" includes any electronic or similar device having information processing capabilities;

2(ffc) "computer programme" means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result;

2(o) "literary work" includes computer programmes, tables and compilations including computer databases;

27. Section 14 defines the copyright as exclusive right subject to provisions of the Copyright Act, to do or authorise the doing of any of the Acts enumerated in respect of the work or substantial part thereof. Section 14(b) of the Copyright Act reads as under :

14. Meaning of copyright.- For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely :-

(a) omitted.

(b) in the case of a computer programme,-

(i) to do any of the acts specified in Clause (a); (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme :

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental;

(c) and (d) omitted.

28. Therefore, reading Section 2(o), (ffc) and Sections 13 and 14 together, it becomes clear that a computer programme is by very definition original literary work and, therefore, the law protects such copyright. Under Section 63 of the Copyright Act, any infringement of the copyright in a computer programme/source code is punishable. Therefore, prima facie, if a person alters computer programme of another person or another computer company, the same would be infringement of the copyright. Again the entire issue in this regard is subject to the evidence that may be led by the complainant at the time of trial. This Court, however, examined the submission of the learned senior counsel for the petitioners in the background of the provisions of the Copyright Act and observations made herein are not intended to decide the question one way or the other. The trial Court has to deal with these aspects.

29. As noticed hereinabove, unless and until investigation by the Police into a complaint is shown to be illegal or would result in miscarriage of justice, ordinarily the criminal investigation cannot be quashed. This principle is well settled and is not necessary to burden this judgment with the precedents except making a reference to R.P. Kapoor v. State of Punjab, ; State of Haryana v. Bhajan Lal, 1992 Cri LJ 527 (SC) (supra) and State of Tamil Nadu v. Thirukkural Permal, .

30. In the result, for the above reasons, Crime No. 20 of 2003 insofar as it is under Sections 409, 420 and 120-B of Indian Penal Code, 1860 is quashed and insofar as the crimes under Section 65 of the Information Technology Act, 2000 and Section 63 of the Copyright Act, 1957, the criminal petitions are dismissed. The C.I.D. Police, which registered Crime No. 20 of 2003, is directed to complete investigation and file a final report before the Metropolitan

Magistrate competent to take cognizance of the case within a period of three months from the date of receipt of this order.

31. The criminal petitions are accordingly dismissed.

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Sanjay Kumar v. State of Haryana

P & H High Court decided on 10/01/2013
CRM No.1353 of 2013 ;CRR No.66 of 2013 (O&M)

Paramjeet Singh, J. -CRM No.1353 of 2013 For the reasons recorded in the Criminal Misc. Application, the same is allowed. Delay of 50 days in filing the criminal revision is condoned.

CRR No. 66 of 2013 Present criminal revision has been preferred by the petitioner against judgment dated 21.08.2012 passed by the learned Sessions Judge, Faridabad, whereby an appeal preferred by the petitioner has been dismissed and judgment of conviction dated 01.09.2011 and order of sentence dated 03.09.2011 passed by learned Judicial Magistrate First CRR No.66 of 2013 (O&M) 2Class, Faridabad, has been upheld, vide which the petitioner has been convicted for offences punishable under Sections 420, 467, 468, 471 of the Indian Penal Code and Sections 65 and 66 of the Information & Technology Act, 2000 and sentenced to undergo rigorous imprisonment as follows:-

Under Section	Period	Fine
420 IPC	Two years	Rs.1,000/-
467 IPC	Three years	Rs.2,000/-
468 IPC	Two years	Rs.1,000/-
471 IPC	Two years	Rs.1,000/-
65 I.T. Act	Two years	Rs.1,000/-
66 I.T. Act	Two years	Rs.1000/-

In default of payment of fine, the petitioner shall further undergo simple imprisonment for a period of two months. All the sentences were ordered to run concurrently.

Brief facts of the prosecution case are that the Senior Branch Manager, Vijay Bank, NIT, Faridabad moved a complaint dated 11.02.2003 before the Police stating that the petitioner was deputed by M/s Virmati Software and Telecommunication Ltd. to maintain the Software System supplied by them to the bank. He was also looking Software System of certain other banks. In connection with rendering such services, the petitioner was having access to their accounting system which was computerized and was also in a position to enter into ledgers and various other accounts. While reconciling the accounts, certain discrepancies were pointed out by the officials of the bank and in that process, it was revealed that the accused-petitioner, who was having SB Account No. 21499 in his CRR No.66 of 2013 (O&M) 3personal name in their bank, manipulated the entries by forging and fabricating certain entries from one account to another, from the computer system by handling the software and got the

entries pertaining to the amount of the the bank and withdrew the amounts from the bank on various dates by issuing cheques in his own favour and withdrew the amount from the cash counter of the bank as well as through transfer/clearing transactions. As per enquiry, it has been revealed that the accused by carrying out forgery, fabricating the entries in the computer system of the bank, illegally and wrongfully, withdrew Rs.17,67,409/- from the bank and thus, caused wrongful gain to himself and wrongful loss to the bank. The said Bank came to know regarding the fraud committed by the accused on 07.02.2003. thereafter, the accused was called to the bank and he was confronted with the details of the fraud but he gave evasive replies as only admitted having embezzled a sum of Rs. 17 lacs without giving further information or revealing the exact amount of fruad or the modus operandi of the same and also assured to pay back the amount to the bank. On receipt of the complaint, a case bearing FIR No. 165 dated 11.02.2003, under Sections 406, 420, 467, 468, 469, 471 of the Indian Penal Code and Sections 65, 66 and 72 of the Information and Technology Act, 2000 was registered against the petitioner. After completion of investigation, challan against the accused-petitioner was presented in the Court. Thereafter, charge was framed against the accused- petitioner to which he pleaded not guilty and claimed trial.

The prosecution, in order to prove its case, examined PW1 A. CRR No.66 of 2013 (O&M) 4Siridhar, PW2 Girish Kumar Verma, PW3 Maheshwar Rath, PW4 Ramesh Kumar Malik and PW5 Dalip Singh, DSP.

Thereafter, statement of the accused was recorded under Section 313 Cr.P.C. All the incriminating circumstances were put to the accused. He denied the same and pleaded innocence.

The learned trial Court, after appreciation of the evidence, convicted and sentenced the petitioner as aforesaid vide judgment and order dated 01.09.2011 and 03.09.2011 respectively. Thereafter, the petitioner preferred an appeal, which was dismissed by the learned Sessions Judge, Faridabad vide judgment dated 21.08.2012. Hence, this criminal revision.

I have heard learned counsel for the petitioner and perused the record.

Learned counsel for the petitioner contends that the petitioner has been falsely implicated in this case as the complainant and eye witness were inimical to the petitioner as they were having a dispute about 15/16 years prior to the occurrence. Learned counsel further contends that there is no direct evidence to connect the petitioner with the alleged offence in question, therefore, no prima facie case has been made out against the petitioner I have considered the contentions of the learned counsel for the petitioner.

From perusal of the judgments of both the Courts below, it transpires that the allegations against the petitioner are that the petitioner CRR No.66 of 2013 (O&M) 5has manipulated the computerized Bank account i.e. the interest entries and thereby cheated the complainant bank by forging electronic record in order to cause wrongful loss to the bank and wrongful gain to himself to the tune of Rs.17,67,409/-. It has come in the documentary evidence on record that the petitioner has forged the entries in the bank record and had thereby withdrawn a sum of Rs.17,67,409/-.

The learned Trial Court, after appreciating the evidence on record, observed as under:-

"9. All the prosecution witnesses have supported the prosecution case. The complainant PW-1 A. Siridhar and PW-2 Girraj Parshad Sharma have stated that the accused Sanjay Kumar Bhatia was the employee of M/s Virmati Software and Telecommunication Ltd. and have been appointed in their branch for the purpose of maintenance of Software Sytem supplied by them to the bank. This fact stand corroborated by document Ex.P36 wherein in Team No. 7 the name of Sanjay has been mentioned along with his residence number and Pager number. Sanjay Kumar Bhatia has also opened an A/c No. 21499 in their bank as evident from the account opening form of the accused Sanjay Bhatia placed on record as Ex.P37 along with specimen signature Card Ex.P38 and the cheque book issued register Ex.P39. Further, from the bank statement of account no. 21499, Ex.P8, on 1.8.2001, Rs.2,00,000/- was deposited by clearing and Rs.1/- as interest. However, nothing is mentioned as to what is the basis of clearing. In this regard, PW-3 Maheshwar Rath stated that during his inquiry he could not find any supporting document or CRR No.66 of 2013 (O&M) 6 voucher. The accused has also not produced any evidence in this regard. Rather, Ex.PW1/D shows that even the amount of Rs.2,00,000/- has been transferred from interest account on 1.8.2001. This fact stand corroborated by the report Ex.P34 wherein it is mentioned that the accused has increased interest portion in his own account through first time creation to the extent of Rs.2,00,000/- and then applied interest along with other SB accounts and to mislead the Branch employees, the accused has splitted the transaction into 2 parts, one entry is shown as "by interest credit" as Rs.1.00 and the other by clearing as Rs.2,00,000/- and, therefore, the amount of Rs.2,00,000/- is reflected in account statement as `by clearing'.

10. Similarly, using the same modus operandi, accused forged the interest entries on 1.8.2002 and 2.8.2000 and got deposited Rs.3,00,000/- and Rs.4,20,000/- respectively in his account.

11. Further, the accused used the fixed deposit account of Sardar Jeet Singh. The account of Jeet Singh was opened on 8.3.2002 in which Rs.1,05,00,000/- was deposited on that day as evidence from Ex.P3. The statement of account of Sardar Jeet Singh Ex.P3 shows that an interest of Rs.8,46,489/- was deposited on 29.4.2002.

However, the said interest calculated was an inflated one, calculated by forging entries to the effect as it the account of Jeet Singh was opened on a prior date. Thereafter, on 30.4.2002, accused transferred the amount of Rs.8,46,489/- to the account of Anil Kumar Sharma having A/c No. 22618 which had already been closed on 1.9.2001,as evident from Ex.P5, by forging the CRR No.66 of 2013 (O&M) 7 entries to the effect that it was changed in bank records form closed to o pen and on 8.5.2002, 13.5.2002 and 18.5.2002, accused transferred the amount of Rs.2,50,000/-, Rs. 2,50,000/- and Rs.3,47,409/- respectively from the account of Sh. Anil Kumar to his account as evident from Ex.P5 and Ex.P8 to Ex.P12. Further, PW-3 Sh. Maheshwar Rath has stated as also evident from his report Ex.P34 that the transaction rooted through the account of Jeet Singh and Anil Kumar has been deleted by accused using SRF files which were later recovered during Audit.

12. Moreover, Ex.P15 to Ex.P24 show that accused has withdrawn the said amount through cheques.

13. In this manner, the accused was dishonestly forged the bank records to cause wrongful loss to the bank and thereby cheated the concerned bank by depositing Rs.17,67,409/- in his account and thereafter withdrawing the same. Further, the accused has admitted his guilt vide letter Ex.P44. The signature of accused on the letter Ex.P44 are similar to the specimen signatures of accused on bank opening account card Ex.P38 as well as on the bank opening Account form Ex.P37. Furthermore, form the bare perusal of the confessional statement Ex.P44, it clearly emanates that the manner in which the word `Sanjay' has been written is similar to the manner word `Sanjay' has been written by accused below his signatures by accused as he even returned in his statement under Section 313 Cr.P.C. Moreover, Ex.P47 and Ex.P48 show that accused has tendered Rs.3,50,000/- to the bank in respect of the amount fraudulently withdrawn by him which shows the CRR No.66 of 2013 (O&M) 8 admission of guilt as evident from Ex.P47 and Ex.P48.

14. On the other hand, the learned counsel for the accused during the course of arguments has argued that no specific password was allotted to Sanjay. However, no doubt password is givne to an employee but it has surfaced in the testimonies of the prosecution witnesses that for the purpose of maintaining the software and in this manner had assess to all those files to which only the employee of the bank could have. Moreover, as the amount was deposited in the account of accused and he has withdrawn it, there is no force in said argument.

15. In this manner, the accused had cheated the bank and forged the electronic record to cause wrongful loss to bank and wrongful gain to himself. The prosecution has been able to prove beyond reasonable doubts, the ingredients of Sections 420, 467, 468 and 471 IPC.

16. Furthermore, clearly the accused has tampered with the computer source document and he has also altered in the information which resided in the computer resource and by doing so he committed the offences under Sections 65 and 66 of the Information & Technology Act, 2000. At the same time, it is pertinent to mention that although accused was having secured assess to electrical record of the bank and he forged the entries and cheated to cause wrongful gain to himself but there is no such breach of confidentiality by disclosing the information to any other person and as such he is acquitted of offence under Section 72 of the Information & Technology Act, 2000."

The learned Trial Court was wholly justified in convicting the accused-petitioner and the learned Appellate court, as can be clearly seen, CRR No.66 of 2013 (O&M) 9had not committed any error in upholding the conviction of the accused petitioner. Learned counsel for the petitioner failed to point out any misreading or non-reading of any evidence and could not point out any infirmity in the judgments of the Courts below. The findings of guilt, reached against the accused-petitioner does not, thus, suffer from any infirmity, legal or factual and does not therefore, warrant interference by this Court in exercise of this Court's revisional jurisdiction.

In view of the above, there is no merit in the contentions raised by the learned counsel for the petitioner.

Dismissed in limine.

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State of A.P. v.. Prabhakar Sampath

VI Addl.Chief Metropolitan Magistrate, Hyderabad.

CC. 489 of 2010

31st day of March, 2015

Available at:http://www.prashantmali.com/cyber-law-cases

Sri P. BHASKARA RAO, Addl. CMM -

The Inspector of Police, Cyber Crimes Police Station, C.I.D., Hyderabad laid charge sheet against accused in Cr.No.18/2008 to prosecute the accused for the offence under Sections 66 of Information

Technology Act, 2000.

1. Case of the prosecution in brief is that, PW.1 Arcot K. Balraj, Chief Manager, Administrative affairs of M/s. SIS Infotech Private Limited situated in Lakshmi Cyber Centre, Road No.12, Banjara Hills, Hyderabad lodged Ex.P1 complaint on 23-12-2008 in Cyber Crimes P.S. CID, Hyderabad stating that the complainant company by name M/s. SIS Infotech Pvt. Ltd., is one of the largest market research firms head quartered in USA with substantial operations at Hyderabad having 300 employees in

the office has been carrying in the business of research station and support to its parent company in the USA viz., M/s. Global Industry Analysts Inc., Made available by Advocate Prashant Mali,Cyber Law

(GIA). In the process of their day to day operations, the company did research for its various clients of GIA and in the process, the company created substantial huge data and content which is hosted on its Adobe Content Server of M/s. Global Industry Analysts Inc., (GIA) and can be accessed only by registered users who have access with permissions. The data is in the form analysed documents called as "Research Reports" which carries high pecuniary value of which complainant company holds

proprietary Copy Right.

2. It is alleged that the content, i.e. Research reports was hacked by somebody successfully by hacking their server www.strategyR.com and downloaded several e-Reports through some free public sites. PW.1 furnished possible information of the hacker having worked out from their server as Prabhakar.sampath@gmail.com and IP address is 61.95.152.145 and requested the police to take necessary action. Basing on the report, LW.11 M. Ganapathi Rao, Dy Superintendent of Police, Cyber Crimes P.S. Hyderabad registered the complaint as a case in Cr.18/2008 u/Sec.66 of Information Technology Act, 2000 and took up investigation. He secured PW.1, PW.2 examined them and recorded their detailed statements and came to know that accused hacked

the content web server of complainant's company through IP address 61.95.152.145 provided by Bharathi Airtel Ltd., on that LW.11 DSP addressed a letter to its Manager to furnish the end user details of IP address i.e. 61.95.152.145, who on verification gave the information that the said IP address was allotted to M/s. Frost & Sullivan Private Limited 101, Santhome High Road, Foreshore Estate, Chennai, Tamilnadu State and gave the contact details of Mr. M. Kirbakaram email ID Kripakaran@frost.com Mobile No.978993031 on the information given by Bharthi Airtel, LW.11 DSP obtained search warrant from the court and conducted search at the residence of accused situated at house bearing No.35A, Magazine Road, St. Thomos Mount, Chennai in the presence of mediators PW.7 and LW.9 Jakhir Hussain and seized one pen drive which contains six files in .pdf format viz.,

1) Anticoagulatns.pdf,
2) Bulk_Paclitaxel.pdf,
3) CNS_Therapeutics.pdf,
4) Human_Vaccines.pdf,
5) Microplate_instrumentation_Supplies.pdf,
6) Therapeutic_Aphersis.pdf which are downloaded by accused from the website i.e. WWW.StrategyR.com of the complainant company by using the computer system installed at his office i.e. M/s. Frost & Sullivan Pvt. Ltd., Chennai. Later, LW.11 DSP arrested the accused on 29-12-2008 at 2.00 PM and recorded his confessional statement and on his information he seized one computer system S605 which was allotted to the accused in his company which contains the said six downloaded documents in the system. Later, LW.11 DSP examined PW.3 to PW.5, Lw.6 Kirthi Thimmanagoudar who are working in M/s. Frost & Sullivan Pvt. Ltd., LW.11 DSP forwarded material objects i.e. Pen drive and CPU to APFSL, Hyderabad for analysis and report. PW.9 Inspector of Police, Cyber Crimes P.S. CID, Hyderabad collected the FSL report from PW.8 Computer Forensic Expert, APFSL, Hyderabad who analysed the material objects and issued opinion stating that pen drive contains six files viz.,

1. Anticoagulants.pdf,
2. Bulk_Paclitaxel.pdf,
3. CNS_therapeutics.pdf,
4. Human_Vaccines.pdf,
5. Micrplate_Instrumentation_supplies.pdf,

6. Therapeutic_Aphersis.pdf and hard disk of CPU contains six files and data pertaining to IP address and after completion of entire investigation, PW.9 Inspector of Police, Cyber Crimes, CID filed Charge sheet against the accused u/Sec.66 of Information Technology Act, 2000 for hacking content server of complainants company.

4. The case was taken on file for the offences punishable u/Sec.66 of Information Technology Act, 2000 against accused.

5. After appearance of the accused, copies of all the documents on which the prosecution proposed to place reliance were furnished to him under Section 207 Cr.P.C. Accused was examined under Section 239 Cr.P.C. He denied the accusations. Charges u/Sec.66 of Information and Technology Act were framed, read over and explained to the accused. He pleaded not guilty and claimed to be tried.

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SELF LEARNING STIMULATING EXERCISE

1. Does "Hacking" continue to be a criminal offence under IT Act 2000. Is it possible to claim damages for hacking.

National Association of Software v. Ajay Sood and ors.

119 (2005) DLT 596, 2005 (30) PTC 437 Del

Pradeep Nandrajog, J. 1. Plaintiff has filed the present suit inter alia praying for a decree of permanent injunction restraining the defendants or any person acting under their authority from circulating fraudulent E-mails purportedly originating from the plaintiff of using the trade mark 'NASSCOM' or any other mark confusingly similar in relation to goods or services. Prayer for rendition of accounts as well as damages has been made in the plaintiff.

2. Application being IA. 2351/2005 has been filed by the parties under Order 23 Rule 3 CPC. Application is signed on behalf of defendant No. 1 in person. On behalf of defendant No. 4, Mr. Shiv Agrawal a Director of defendant No. 4 has appended his signatures. Application is supported with the affidavits of Mr. Ajay Sood and Mr. Shiv Agrawal. On behalf of plaintiff application has been signed by Mr. Mohan Khanna. His affidavit has been enclosed Along with the application. There are 4 defendants to the suit. Defendants 2 and 3 being Ms. Shweta Ganguli and Mr. Preeti Malotra. As per averments made in the plaint said two defendants were the authors of the offending E-mails which came to the notice of the plaintiff.

As per the application filed under Order 23 Rule 3 CPC it is stated that defendants 1 and 4, through the medium of the present suit learnt about the offending acts and identified one Ms. Tithpoorna Ganguli as the person who was responsible for the offending acts. It is stated that defendants 2 and 3 were fictitious identities created by said Ms. Tithypoorna Ganguli.

3. As per the compromise application, defendants 1 and 4 have agreed to suffer a decree in terms of paras 35 'a', 'b' and 'g' of the plaint. Defendants have further agreed that the hard disc seized from the office of the defendants by the local Commissioner appointed by this Court could be delivered up to the plaintiff. Needless to state application records that since defendants 2 and 3 are fictitious identities created by Titypoorna Ganguli said defendants be deleted from the array of parties.

4. Mr. Ajay Sood and Mr. Shiv Agrawal are present in court. They affirmed the Settlement. Their statements have been recorded.

5. IA. 2351/2005 brings on record a settlement which in the opinion of the court is a bona-fide settlement and does not suffer from any illegality. Settlement is taken on record and is accepted.

6. IA stands disposed of. CS (OS) No. 285/2005

1. Normally where a suit is compromised and terms of compromise are brought on record, a short cryptic order is required to be passed decreeing the suit in terms of the compromise, but the fact as have emanated in the present case require this Court to pass a reasoned order.

2. The plaint sets out the following case:--

(i) NASSCOM is India's premiere software association representing 850 members of which nearly 150 are global companies. NASSCOM is a well known name in India and has a wide range of activities detailed in paras 13 and 15 of the plaint.

(ii) Masquerading as NASSCOM, defendants, in order to obtain personal data from various addresses, which they could then use for head-hunting, went on the website as if they were a premiere selection and recruitment firm.

3. That from the office of defendants No. 1 and 4, offending e-mails were transmitted is not in dispute as defendants 1 and 4 have suffered a consent decree. On 2nd March, 2005, I have granted an ex-parte ad-interim injunction against the defendants restraining them from using the trade name NASSCOM or any other name deceptively similar thereto. Defendants were further restrained from holding themselves out as being associates or a part of NASSCOM. I had also directed execution of a commission to visit the premises of the defendants and take into custody the hard disc as it was reasonably to be expected that the fraudulent e-mails sent by the defendants to various parties would be located on the hard-disc. Commission was executed on 2.3.2005 itself. Two hard discs were recovered on which offending e-mails were found. One e-mail dated 10.1.2003 written by defendant No. 3 (a fictitious person), another e-mail dated 11.1.2005 (another fictitious person) were down-loaded from the hard-disc.

4. As per the compromise application filed, it transpired that a lady, Tithypoorna Ganguli, an employee of defendant No. 4 created fictitious e-mail, Ids in the name of defendants No. 2 and 3 and sent the e-mails in the name of NASSCOM to third parties with a view to extract personal data. In other words, head hunting was on. May be, head hunting was on behalf of defendant No. 4 but the truth would never surface in the present case for the reason parties have entered into a compromise.

5. Internet has spawned novel and interesting methods to defraud individuals and companies, 'Phishing' is a form of internet fraud. In a case of 'Phishing', a person pretending to be a legitimate association such as a bank or an insurance company in order to extract personal data from a user such as access codes, passwords etc. which are then used to his own advantage, misrepresents on the identity of the legitimate party. Typically 'Phishing' scams involve persons who pretend to represent online banks and siphon cash from e-banking accounts after conning consumers into handing over confidential banking details.

6. The internet these days is full of scams. E-mail that form the basis of phishing attacks and pose as a security cheek. These messages trick users into handing over their account details and passwords. The quoted details are subsequently used for fraudulent transfers. It was only towards the end of 2003 that phishing e-mails were spotted. Unfortunately, these are becoming increasingly sophisticated. It appears that the expression 'phishing' comes from the word fishing whereby a bate is set in the hope that someone will bite. Article titled "Plugging the Phishing Hole": Legislation v. Technology by Robert Louis B Stevenson dated 17th March, 2005 talks about the Act in the following terms:

"The Act, if passed will add two crimes to the current federal law; It would criminalize the act of sending a phishing email regardless of whether any recipients of the email suffered any actual damages. It would criminalize the act of creating a phishing website regardless of whether any visitors to the website suffered any actual damages. Senator Leahy described the effects of the Act in this way; The Act protects the integrity of the Internet in two ways. First, it criminalize the bait. It makes it illegal to knowingly send out spoofed email that links to sham websites, with the intention of committing a crime, Second, it criminalize the sham

websites that are the true scene of the crime. The Act is also notable for what it does not contain. The bail provides no guidance or allocation of additional resources for its enforcement. This is in contrast with a recently proposed bill in the House of Representatives aimed primarily at "spyware," While the House bill adds no law related to phishing, it does provide for the appropriation of "the sum of $ 10,000,000 to the Attorney General for prosecuting needed to discourage the use of spyware and... phishing." Because the House bill adds no new law directed at phishing, this Brief does not further discuss or analyze. It is noted here only for the purpose of pointing out a possible deficiency in the Act."

7. I find no legislation in India on 'phishing'. An act which amounts to phishing, under the Indian law would be a mis-representation made in the course of trade leading to confusion as to the source and origin of the e-mail causing immense harm not only to the consumer but even the person whose name, identity or password is misused. It would also be an act of passing off as is affecting or tarnishing the image of the plaintiff, if an action is brought by the aggrieved party.

8. Whether law should develop on the lines suggested by Robert Louis B Stevenson in his article noted above is left by this Court for future development in an appropriate case.

9. As far as the present case is concerned, defendants 1 and 4 have acknowledged their employees' illegal action as being violative of plaintiffs right and have recognized the plaintiffs in sum of Rs. 16,00,000. They have also consented to suffer a decree as recorded in the application under Order 23 Rule 3 CPC.

10. Suit would stand decreed in terms of the compromise effected between the parties and as contained in IA No. 2351/2005. Said application shall form part of the decree to be drawn.

11. Hard-discs seized for the defendant's premises by the Local Commissioner on 2.3.2005 are hereby ordered to be turned over to the plaintiff who would be the owner of the hard-discs. Defendants 1 and 4, their servants and agents would be injuncted from circulating fraudulent e-mails purportedly originating from the plaintiff or using the trade name NASSCOM or any other name/mark and address of the plaintiff amounting to passing off and tarnishment.

12. No costs.

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Aveek Sarkar v. State Of West Bengal (SC)

CRIMINAL APPEAL NO.902 OF 2004 decided on **3 February, 2014**

K. S. RADHAKRISHNAN, J. -

1. A German magazine by name "STERN" having worldwide circulation published an article with a picture of Boris Becker, a world renowned Tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, which was photographed by none other than her father. The article states that, in an interview, both Boris Becker and Barbaba Feltus spoke freely about their engagement, their lives and future plans and the message they wanted to convey to the people at large, for posing to such a photograph. Article picturises Boris Becker as a strident protester of the pernicious practice of "Apartheid". Further, it was stated that the purpose of the photograph was also to signify that love champions over hatred.

2. "Sports World", a widely circulated magazine published in India reproduced the article and the photograph as cover story in its Issue 15 dated 05.05.1993 with the caption "Posing nude dropping out of tournaments, battling Racism in Germany. Boris Becker explains his recent approach to life" – Boris Becker Unmasked.

3. Anandabazar Patrika, a newspaper having wide circulation in Kolkata, also published in the second page of the newspaper the above-mentioned photograph as well as the article on 06.05.1993, as appeared in the Sports World.

4. A lawyer practicing at Alipore Judge's Court, Kolkata, claimed to be a regular reader of Sports World as well as Anandabazar Patrika filed a complaint under Section 292 of the Indian Penal Code against the Appellants herein, the Editor and the Publisher and Printer of the newspaper as well as against the Editor of the Sports World, former Captain of Indian Cricket Team, late Mansoor Ali Khan of Pataudi, before the Sub-Divisional Magistrate at Alipore. Complaint stated that as an experienced Advocate and an elderly person, he could vouchsafe that the nude photograph appeared in the Anandabazar Patrika, as well as in the Sports World, would corrupt young minds, both children and youth of this country, and is against the cultural and moral values of our society. The complainant stated that unless such types of obscene photographs are censured and banned and accused persons are punished, the dignity and honour of our womanhood would be in jeopardy. The complainant also deposed before the Court on 10.5.1993, inter alia, as follows :

"……That the Accused No.1 and the Accused No.2 both the editors of Ananda Bazar Patrika and Sports World respectively intentionally and deliberately with the help of the Accused No.3 for the purpose of their business, particularly for sale of their papers and magazines published, printed and publicly exhibited and circulated and also sold their papers and magazines namely, Anand Bazar Patrika and Sports World dated 6.5.1993 wherein the photograph of world class Lawn Tennis player namely, Boris Becker and his girl friend German Film Actress Miss Barbara have been published in a manner in an inter-twined manner wherein Boris Becker placed the hand upon the breast of Miss Barbara which have annexed in my petition with a caption 'Boris Backer Un- masked' which is absolutely obscene and lascivious in nature and which is a criminal offence. The obscene and about nude

photographs show published by the accused persons in the mind of myself as well as society of different age group have a very bad impact……..”

5. The learned Magistrate on 10.5.1993 passed the following order in Criminal Case Ref. Case No.C.796 of 1993 :

‘Complainant is present. He is examined and discharged. No other PWs are present. It appears that a prima facie case is made out against the accused persons under Section 292 IPC. Issue summons against all the accused persons fixing 17.6.1993 for S.P. and appearance. Requisite at one.”

6. Complainant also urged that the accused persons should not only be prosecuted under Section 292 IPC, but also be prosecuted under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986, since the photograph prima facie gives a sexual titillation and its impact is moral degradation and would also encourage the people to commit sexual offences. The accused persons on 5.3.1993 filed an application before the Court for dropping the proceedings stating that there was no illegality in reproducing in the Sports World as well as in the Anandabazar Patrika of the news item and photograph appeared in a magazine ‘STERN” published in Germany. Further, it was pointed out that the said magazine was never banned entry into India and was never considered as ‘obscene’, especially when Section 79 of Indian Penal Code states that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

7. The Court after seeing the photographs and hearing the arguments on either side, held as follows :-

“Moreover, until evidence comes in it will not be proper to give any opinion as to the responsibility of the accused persons. But I feel it pertinent to mention that though the Section 292 does not define word ‘obscene’, but my rids of precedents have clustered round on this point and being satisfied with the materials on record, pernicious effect of picture in depraving and debauching the mind of the persons into whose hands it may come and also for other sufficient reasons to proceed further this Court was pleased to issue process against the accused persons under Section 292 I.P.C. At present having regard to the facts of the case, I find the matter merits interference by not dropping the proceedings as prayed for. It is too early to say that the accused persons are entitled to get benefit of Section 79 I.P.C.”

8. The Magistrate after holding so, held the accused persons to be examined under Section 251 Cr.P.C. and ordered that they would be put to face the trial for the offence punishable under Section 292 IPC alternatively under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

9. The Appellants herein preferred Criminal Revision No.1591 of 1994 before the High Court of Calcutta under Section 482 Cr.P.C. for quashing the proceedings in Case No.C.796 of 1993 (corresponding to T.R. No.35 of 1994) pending before the learned Judicial Magistrate Court, Alipore. Before the High Court, it was pointed out that the Magistrate had not properly appreciated the fact that there was no ban in importing the German sports magazine ‘STERN” into India. Consequently, reproduction of any picture would fall within the general exception

contained in Section 79 IPC. Reference was also made to letter dated 20th July, 1993 addressed by the Assistant Editor, Sports World to the Collector, Calcutta Customs and a copy of the letter dated 4.10.1993 sent by the Deputy Collector, Calcutta Customs to the Assistant Editor, Sports World. Referring to the picture, it was pointed out that the picture only demonstrates the protest lodged by Boris Becker as well as his fiancée against 'apartheid" and those facts were not properly appreciated by the learned Magistrate. Further, it was also pointed out that the offending picture could not be termed as obscene inasmuch as nudity per se was not obscene and the picture was neither suggestive nor provocative in any manner and would have no affect on the minds of the youth or the public in general. Further, it was also pointed out that the learned Magistrate should not have issued summons without application of mind. The High Court, however, did not appreciate all those contentions and declined to quash the proceedings under Section 483 Cr.P.C., against which this appeal has been preferred.

10. Shri Pradeep Ghosh, learned senior counsel, appearing for the Appellants, submitted that the publication in question as well as the photograph taken, as a whole and in the background of facts and circumstances, cannot be said to be per se "obscene" within the meaning of Section 291(1) IPC so as to remand a trial of the Appellants in respect of the alleged offence under Section 292(1) IPC. The learned counsel pointed out that obscenity has to be judged in the context of contemporary social mores, current socio-moral attitude of the community and the prevalent norms of acceptability/ susceptibility of the community, in relation to matters in issue. In support of this contention, reliance was placed on the Constitution Bench judgment of this Court in Ranjit D. Udeshi v. State of Maharashtra AIR 1965 SC 881. Reference was also made to the judgment of this Court in Chandrakant Kalyandas Kakodar v. State of Maharashtra 1969 (2) SCC 687. Few other judgments were also referred to in support of his contention. Learned senior counsel also pointed out that the learned Magistrate as well as the High Court have completely overlooked the context in which the photograph was published and the message it had given to the public at large. Learned senior counsel also pointed out that the photograph is in no way vulgar or lascivious. Learned senior counsel also pointed out that the Courts below have not properly appreciated the scope of Section 79 IPC and that the Appellants are justified in law in publishing the photograph and the article which was borrowed from the German magazine. Learned senior counsel also pointed out that such a publication was never found to be obscene even by the State authorities and no FIR was ever lodged against the Appellants and a private complaint of such a nature should not have been entertained by the learned Magistrate without appreciating the facts as well as the law on the point. Learned senior counsel pointed out that the High Court ought to have exercised jurisdiction under Section 482 Cr.P.C.

11. Shri Mohit Paul, learned counsel, appearing for the Respondents, submitted that the Courts below were justified in holding that it would not be proper to give an opinion as to the culpability of the accused persons unless they are put to trial and the evidence is adduced. Learned counsel pointed out that the question whether the publication of the photograph is justified or not and was made in good faith requires to be proved by the Appellants since good faith and public good are questions of fact and matters for evidence. Learned counsel pointed

out that the learned Magistrate as well as the High Court was justified in not quashing the complaint and ordering the Appellants to face the trial.

TEST OF OBSCENITY AND COMMUNITY STANDARDS

12. Constitution Bench of this Court in the year 1965 in Ranjit D. Udeshi (supra) indicated that the concept of obscenity would change with the passage of time and what might have been "obscene" at one point of time would not be considered as obscene at a later period. Judgment refers to several examples of changing notion of obscenity and ultimately the Court observed as follows :-

"…. The world, is now able to tolerate much more than formerly, having coming indurate by literature of different sorts. The attitude is not yet settled….." This is what this Court has said in the year 1965.

13. Again in the year 1969, in Chandrakant Kalyandas Kakodar (supra), this Court reiterated the principle as follows:-

"The standards of contemporary society in India are also fast changing. "

14. Above mentioned principle has been reiterated in Samaresh Bose v. Amal Mitra (1985) 4 SCC 289 by laying emphasis on contemporary social values and general attitude of ordinary reader. Again in 2010, the principle of contemporary community standards and social values have been reiterated in S. Khushboo V. Kanniammal (2010) 5 SCC 600.

15. This Court in Ranjit D. Udeshi (supra) highlighted the delicate task to be discharged by the Courts in judging whether the word, picture, painting, etc. would pass the test of obscenity under Section 292 of the Code and the Court held as follows :

"The Penal Code does not define the word obscene and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by the Supreme Court. The test must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invites the court to reach a decision on a constitutional issue of a most far reaching character and it must beware that it may not lean too far away from the guaranteed freedom."

16. Applying the above test, to the book "Lady Chatterley's Lover", this Court in Ranjit D. Udeshi (supra) held that in treating with sex the impugned portions viewed separately and also in the setting of the whole book passed the permissible limits judged of from our community standards and there was no social gain to the public which could be said to preponderate the book must be held to satisfy the test of obscenity.

17. The novel "Lady Chatterley's Lover" which came to be condemned as obscene by this Court was held to be not obscene in England by Central Criminal Court. In England, the

question of obscenity is left to the Jury. Byrne, J., learned Judge who presided over the Central Criminal Court in R. v. Penguin Books Ltd. (1961 Crl. Law Review 176) observed as follows :-

"In summing up his lordship instructed the jury that: They must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was: was the book obscene? Was its effect taken as a whole to tend to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to pervert, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interest of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison with other books. If it was obscene then if the defendant has established the probability that the merits of the book as a novel were so high that they outbalanced the obscenity so that the publication was the public good, the jury should acquit."

18. Later, this Court in Samaresh Bose (supra), referring to the Bengali novel "Prajapati" written by Samaresh Bose, observed as follows :-

"35. ..... We are not satisfied on reading the book that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity....." We have already indicated, this was the contemporary standard in the year 1985.

19. We are, in this case, concerned with a situation of the year 1994, but we are in 2014 and while judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons.

HICKLIN TEST:

20. In the United Kingdom, way back in 1868, the Court laid down the Hicklin test in Regina v. Hicklin (1868 L.R. 2 Q.B.

360), and held as follows :-

"The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

21. Hicklin test postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. United States, however, made a marked departure. Of late, it felt that the Hicklin test is not correct test to apply to judge what is obscenity. In Roth v. United States 354 U.S. 476 (1957), the Supreme Court of United States directly dealt with the issue of obscenity as an exception to freedom of speech and expression. The Court held that the rejection of "obscenity" was implicit in the First Amendment. Noticing that sex and obscenity were held not to be synonymous with each other, the Court held that only those sex-related materials which had the tendency of "exciting lustful thoughts" were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards.

22. In Canada also, the majority held in Brodie v. The Queen (1962 SCR

681) that D.H. Lawrence's novel "Lady Chatterley's Lover" was not obscene within the meaning of the Canadian Criminal Code

23. The Supreme Court of Canada in Regina v. Butler (1992) 1 SCR 452, held that the dominant test is the "community standards problems test". The Court held that explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in the Canadian society and will not qualify as the undue exploitation of sex unless it employs children in its production. The Court held, in order for the work or material to qualify as 'obscene', the exploitation of sex must not only be a dominant characteristic, but such exploitation must be "undue". Earlier in Towne Cinema Theatres Ltd. v. The Queen (1985) 1 SCR 494, the Canadian Court applied the community standard test and not Hicklin test.

COMMUNITY STANDARD TEST:

24. We are also of the view that Hicklin test is not the correct test to be applied to determine "what is obscenity". Section 292 of the Indian Penal Code, of course, uses the expression 'lascivious and prurient interests' or its effect. Later, it has also been indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter

contained or embodied in it. We have, therefore, to apply the "community standard test" rather than "Hicklin test" to determine what is "obscenity". A bare reading of Sub-section (1) of Section 292 , makes clear that a picture or article shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

MESSAGE AND CONTEXT

25. We have to examine the question of obscenity in the context in which the photograph appears and the message it wants to convey. In Bobby Art International & Ors. v. Om Pal Singh Hoon (1996) 4 SCC 1, this Court while dealing with the question of obscenity in the context of film called Bandit Queen pointed out that the so-called objectionable scenes in the film have to be considered in the context of the message that the film was seeking to transmit in respect of social menace of torture and violence against a helpless female child which transformed her into a dreaded dacoit. The Court expressed the following view :-

"First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film "Schindler's List" was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow- feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. "Bandit Queen" tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her." [Emphasis Supplied]

26. In Ajay Goswami v. Union of India (2007) 1 SCC 143, while examining the scope of Section 292 IPC and Sections 3, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, this Court held that the commitment to freedom of expression

demands that it cannot be suppressed, unless the situations created by it allowing the freedom are pressing and the community interest is endangered.

27. We have to examine whether the photograph of Boris Becker with his fiancée Barbara Fultus, a dark-skinned lady standing close to each other bare bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292 IPC. Applying the community tolerance test, we are not prepared to say such a photograph is suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Breast of Barbara Fultus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph, in our view, has no tendency to deprave or corrupt the minds of people in whose hands the magazine Sports World or Anandabazar Patrika would fall.

28. We may also indicate that the said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The cover story of the Magazine carries the title, posing nude, dropping of harassment, battling racism in Germany. Boris Becker himself in the article published in the German magazine, speaks of the racial discrimination prevalent in Germany and the article highlights Boris Becker's protests against racism in Germany. Boris Becker himself puts it, as quoted in the said article:

"the nude photos were supposed to shock, no doubt about it..... What I am saying with these photos is that an inter-racial relationship is okay."

29. The message, the photograph wants to convey is that the colour of skin matters little and love champions over colour. Picture promotes love affair, leading to a marriage, between a white-skinned man and a black skinned woman.

30. We should, therefore, appreciate the photograph and the article in the light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white skinned man and a black skinned woman. When viewed in that angle, we are not prepared to say that the picture or the article which was reproduced by Sports World and the Anandabazar Patrika be said to be objectionable so as to initiate proceedings under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

31. We have found that no offence has been committed under Section 292 IPC and then the question whether it falls in the first part of Section 79 IPC has become academic. We are sorry to note that the learned Magistrate, without proper application of mind or appreciation of background in which the photograph has been shown, proposed to initiate prosecution proceedings against the Appellants. Learned Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of which he would not have ordered the Appellants to face the trial. The High Court, in our view, should have exercised powers under Section 482 Cr.P.C. to secure the ends of justice.

32. We are, therefore, inclined to allow this appeal and set aside the criminal proceedings initiated against the Appellants. The Appeal is allowed as above.

SELF LEARNING STIMULATING EXERCISES

1. Obscenity involves within its ambit many other social connotations like decency, morality, etc. which makes it a rather complex issue. Courts have from time and again introduced test/ standard which have evolved from society to society. Do you think time has come to give definite meaning to word obscenity. Does section 67, 67A and 67B should satisfy the test laid down in *Aveek Sarkar* (Hint - This question becomes particularly relevant in the absence of any proper definition of the word obscenity and sexually explicit under the IT Act).

2. Can a person maintaining a commercial website featuring sexually explicit content be said to be publishing obscene material which is punishable under the Act.

   (Hint -The word publication has not been defined under the IT Act. Refer to the case of R v. Grahan Waddon (2000 WL 491456)

State of Tamil Nadu v. Suhas Katti

(decided on 5-11-2004)

ADDL. CMM EGMORE, , C.C.NO.4680/2004

Source :http://www.prashantmali.com/cyber-law-cases

SHRI ARUL RAJ, ADDL CMM -

Assistant Commissioner of Police, Cyber Crime Cell, C.C.B.Egmore, Chennai.8 has filed Final Report against the accused, that on 7.2.04, evening at Cyber Café Hello World Centre, Sion, Mumbai having an I.P.61.11.10.99, the accused with intention of harming the reputation of the Complainant Ms. R, created user id in the name of her and composed an obscene message intending that such document shall be used for posting in different obscene Yahoo Group, with the intention to make others to believe that the document was made by her, so that the persons seeing the obscene message would send offending calls to her,in harming her reputation and by insulting her modesty by the words exhibited in the email and in the course of same transaction, on 7.2.04, evening at Cyber Café Hello World Centre, Sion, Mumbai, having an IP 61.11.10.99 the Accused posted obscene message which are lascivious and also have the effect to corrupt persons who are likely to read and see such obscene messages and caused to the published in different obscene Yahoo goups and in the course of same transaction, that on 9.2.04, morning, at Cyber Café Heighten Advertising, Mahim, Mumbai, having an IP 202.88.165.53 the accused with intention of harming the reputation of the complainant Ms. R entered user id. which was created by him in the name of the complainant and composed an obscene message intending that such document shall be used for posting in different obscene Yahoo groups, with the intention to make others to believe that the document was made by her, so that the persons seeing the obscene message would send offending calls to her, in harming her reputation and by insulting her modesty by the words exhibited in the email and that in the course of same transaction, that on 9.2.04, morning at cyber café Heighten Advertising, Mahim, Mumbai, having an IP 202.88.165.53, the accused posted obscene messages which are lascivious and also have the effect to corrupt person who are likely to read and see such obscene messages and caused to be published in different obscene Yahoo goups and thereby the accused have committed offences u/s 469 IPC, 67 I.T Act. 469 &509 IPC, and 67 of I.T. Act.

P.W. 1 is the only daughter of P.W.2 and P.W.3.P.W.2 is the father, P.W.3 is the mother. Presently, P.W.1 is working as a senior Executive (H.R.) in a multinational Company at Chennai. She studied her MBA Course in Mumbai in the year 1997, the accused studied with P.W.1 and she was his classmate is Mumbai. Accused belongs to Mumbai. On 9.2.04, She opened her Rediff e-mail and noticed the receipt of two obscene messages which were posted on 7.2.04 and 9.2.04. She took computer output of the obscene message posted on 7.2.04, Ex P.1 is the obscene message. The obscene message carried her Office phone numbers and her e-mail I.D. The house Phone number was wrongly

given. The said obscene messages have been sent through Yahoo website to 5 sex groups. The computer printout obscene message posted in @ Radha lovers group is EX.P.2. On seeing the said messages, several persons sent the responsive message and many persons tried to contact her over phone. Ex P3 series is the responsive messages. Several Phone calls came to her office. P.W.1 informed the said matter to her parents. The messages were likely to harm the reputation and morale of P.W.1.

P.W. 1 had married Jaichand Prajapathi of Uttar Pradesh in the year 2001. The family life was not happy and she obtained divorce through court in the year 2003. The Accused was citied as witness in the divorce petition. P.W.1 recollected one incident and suspected in the involvement of the Accused. During college days in the year 1997, the accused used to travel with P.W.1 in train at Mumbai. On one such occasion, Accused pointed out an obscene scribbling with phone number in the train and told P.W.1 that on seeing the phone number, many persons would try to contact the phone number and this is the best way to spoil the reputation of a woman. The Accused even expressed his desire to marry P.W.1, after the engagement of P.W.1 with Jaichand Prajapati was over. P.W.1 turned down his proposal. In the year 2003, the Accused stayed in the house of the P.W.1 for about 10 days stating that he has to attend an interview at Banglalore. At that time also, Accused offered to marry P.W.1 for which P.W.1 and her parents refused the alliance. Thereafter, P.W.1 after his return to Mumbai was in the habit of making Phone calls, sending S.M.S. Messages and sending E-mail to P.W.1 frequently. Hence P.W.1 blocked the e-mail I.D. of the Accused. Ex.P5 is the Computer output for blocking the e-mail I.D. of the Accused.

On seeing the obscene message, P.W.1 discussed the matter with P.W.2 and P.W.3 and sought the help of the Accused over phone. P.W.1 and her parents issued a warning message in the name of PW 2 and PW 3 by creating an email ID viz, parant2003@yahoo.co.in and transmitted same to the yahoo groups. She sent warning messages to the persons, who sent responsive message in ExP.6 series. A copy of warning message was also sent to the Accused.

P.W.1 lodged a complaint on 14/2/2004 along with Ex.P1 at Cyber Crime Police. The complaint is Ex. P.4 P.W.12 who received the complaint directed P.W.4 to obtain header details and other particulars to find out the origination of the messages. P.W.4 went to Cyber Café at Kennath Lane, Egmore along with P.W. 1 she down loaded the message took print out by using the e-mail I.D. Parant2003@Yahoo.Co.in Ex.P.9-Ex.P.12. She extracted and stored the messages in Mo.2 floppies. Thereafter P.W.12 gave a requisition to the Hathway Cable and Data Com. Pvt. Ltd; under Ex.P.13, for which it gave a reply in Ex. P.14. P.W.12 also gave a requisition to Dishnet D.S.L. in Ex.P.13 and the reply given by Dishnet D.S.L is Ex.P.15. P.W.5 speaks about Ex.P.13 and Ex.P.14. P.W.6 speaks about Ex.P.15.P.W.12 also examined P.W.11 and obtained particulars in Ex. P.29 series

and confirmed that the messages were originated from Mumbai. P.W.12- Investigation Officer registered F.I.R. Ex.P.34 on 20.2.04.

Thereafter, P.W.12 proceeded to Mumbai on 24.2.04, and arrested the Accused at Mumbai on 25.2.04. He seized Mo.1 Cell Phone from the Accused under Mahazar Ex.P.8 P.W.8 and P.W.9 who are running browsing Centre at Mumbai, identified the Accused in the presence of P.W.12. He seized Ex.P.23, 24 registers from them. P.W.8 speaks about the Accused and the seizure of Ex.P.22 and the remarks made by P.W.12 in Ex.P.23, P.W. 9 speaks about the Accused that he came to the browsing centre and signed in the Register Ex.P24 as R. Ex.P.25 is the word written by the Accused.

P. W. 12, brought the Accused to Chennai on 28.2.04, after producing the Accused before a Mumbai Court. The Accused gave a confession statement in the presence of P.W. 10 and he gave the password "an rose". The said word is Ex.P.27.

The particulars stored in the SIM Card were taken print out in Ex.P. 28 series through S.M.S. Reader. P.W.12 went to the office of P.W.7 and took computer print out by using the password "an rose". He issued the certificate in Ex.P.21. The computer print outs are Ex. P 16-P.20. P.W.12 completed investigation and laid charge sheet against the Accused of offences u/s 67 of I T Act and u/s 469,509 of IPC.

Final Order

…this court is not inclined to accept the theory projected by the Accused that the obscene messages would have been created by P.W.1, P.W.2 and P.W.3 or by Jaichand Prajapathi. It is clear that the Accused himself has composed and posted the obscene messages from the browsing centre of P.W.8 and P.W.9. This Court holds that the prosecution has proved its charges against the accused beyond all reasonable doubt and hence the Accused is liable to be punished.

The Accused was heard regarding the question of sentence u/s 248 (2) Cr.P.C. The Accused pleaded for admonition. The Accused is not a lay man. He is educated and studied upto M.B.A. P.W.1 is holding a responsible post in a multinational Company at Chennai. The Accused has chosen to post the obscene message for the simple reason that she refused to marry him. He did not behave like an educated man. Only a family woman can realise the mental sufferings and pain if unknown persons contacted her through phone and e-mail and invited her to bed. The mental sufferings and humiliation undergone by the P.W.1 cannot be compensated in terms of money or by solacial words. It cannot be stated that the Accused had acted in a heat of passion. Two days repeatedly he had sent the obscene message—Computer system and browsing centre are meant for learning things and updating knowledge in various fields. The Accused has misused the same to take revenge on a sophisticated lady. Therefore, the Accused does not deserve leniency and is liable to be punished.

In the result, the Accused is found guilty of offences u/s 469,509 IPC, and u/s 67 of I.T. Act. and the Accused is convicted and is sentenced to undergo Rigorous imprisonment for 2 years u/s 469 IPC, and to pay a fine Rs.500/- i/d, to undergo simple imprisonment for 1 month and for the offence u/s 509 IPC, sentenced to undergo 1 year simple Imprisonment and to pay a fine of Rs.500/- i/d to undergo simple imprisonment for 1 month and for the offence u/s 67 of Information Technology Act 2000 to undergo Rigorous Imprisonment for 2 years and to pay a fine of Rs.4,000/- i/d to undergo S.I. for 6 months. All sentences to run concurrently. The period undergone by the Accused will be set off u/s 428 Cr.P.C.

*****

SELF LEARNING STIMULATING EXERCISE

1. The minor boys make a social networking group and post morphed pictures of minor girls with obscene comments. The incidents raises serious concerns about the protection of young and adolescent children online. In such kind of groups generally three kind of members exists : Active members, Passive members and those who never wanted to be a part of such group but under peer pressure join these groups? How do you feel such kind of situations are to be handled? Does our IT law provide some provisions to deal with situations like these and is there a way out to differentiate between active and passive members or they should be treated alike?

   (Hint - Bois Locker Room incident , POCSO Act and, Juvenile Justice Act)

The State (Cyber Cell v. Yogisha @ Yogesh Pandurang Prabhu

ADDL. CHIEF METROPOLITAN MAGISTRATE, 37TH COURT, ESPLANADE, MUMBAI

C.C. NO. 3700686/PS/2009

(Delivered on 3rd July, 2015)

JUDGMENT - Shri M. R. Natu (Add. CMM)

Prosecution case in brief is as under:

1. One Sonali Asoka Sawai lodged a report in Cyber Cell, Mumbai. Reporter was working in the Debold Systems Private Limited, since February 2009. Company provided her laptop, data cards. Prior to 2009, she was working in Mahindra and Mahindra Company. She is having email id sawaisonali@gmail.com. She is also having profile orkut. She come in contact of accused Yogesha Prabhu through this site, they become friend. Then they meet facetoface, but later period, reporter did not like nature of this Yogesha and she unfriend him.

2. On 03/03/2009 she opened her email account referred above, and found that she received one mail from email id so198021@gmail.com, which was unknown. When she opened this email, which was received about 00:00:18 a.m., she found flimsy and vulgar comment on her, but she neglected to the same. When she come back and opened her email account as usual at about 11 p.m. found same style email. She received such emails having vulgar comment on her on 5/03/2009, 06/03/2009, 08/03/2009. The emails were displaying nude photographs, pornographic postures, So she took out prints of all these emails and reported this fact to cyber cell on 9/4/09. She further reported that when enquiry of her application was made, it was found that the emails were received from 15 IP addresses of Airtel and Reliance company. Physical address of first 12 IP addresses was M/s. Wam Bombay Bulk Handling Equipment Industry Private Limited, Plot No. C– 39, B and C, TTC MIDC Turbhe Mahape Road, New Mumbai and House No. 397, sector 40 Gurgaon , Haryana 122001. She reported that accused works in above referred company and also visits at Haryana for company work. She complained that this accused Yogesha outrage her modesty.

3. On this formed report, crime number 110/2009 was registered in Shivaji Park P.S. for offence under section 509 of Indian Penal Code and 67 and 67A of Information Technology Act.

4. From perusal of papers, it reveals that investigating officer made enquiry about the IP address then got physical address from the service provider and reached to the accused. He seized laptop provided to accused, got it examined through the expert and obtained its report. He also recorded disclosure statement of accused, wherein he agreed it to open disputed email id wherefrom offending emails were sent accordingly, he opened the email id by using password known to him and offending material was found in outbox of the email id so opened. Printouts of these emails were obtained by IO, and accordingly panchnama was carried out. He also recorded statements of witnesses and come on conclusion that accused Yogesh is author of crime, and accordingly submitted chargesheet in court.

5. My learned predecessor vide Exhibit3 pleased to frame charge for offence punishable under section 509 of Indian Penal Code and 67 and 67(a) of Information Technology Act. Plea of accused is placed at exhibit4. Accused denied charge and claimed innocence and trial.

6. From the charge following point arise for determination. My finding thereon follows for the reasons discussed below.

Sr No POINTS

1 Does prosecution prove that between 3/3/09 to 9/3/09 at about 22.5, five hours from 101/5, second floor tulips house, road number three Shivaji Park Dadar West, Mumbai. Accused intending to insult the modesty of complainant's end of scene emails containing obscene message and photographs of pornic postures on email ID of reporter Sonali, intending that she shall see it and thereby committed an offence punishable under section 509 of Indian penal code?

Findings Affirmative.

2 Does prosecution prove that in between above period accused sent obscene and pornographic emails on reporter email id sawaisonali @gmail.com by preparing bogus email id so198021@gmail.com through web and thereby committed an offence punishable under sections 67 and 67A of information technology act?

Findings - Charge under section 67 & 67A not established for want of proof of publishing but offence under section 66E is established.

3 Whether any other offence is established?

Findings - As per final order.

R E A S O N S

7. To establish its case prosecution examined, Sonali Sawai (P.W.1) at Exhibit4.She brought printouts of offending emails which are placed at Articles A to H. She also brought her reports on record vide Exhibits 5, 6 and 7. Second witness is panch, Krishna Purohit (Exhibit 8). He turned hostile. Third witness is Amit popatwala (Exhibit 9). He brought panchnama Exhibit10 on record. Kundan Raut (P.W.4) at Exhibit 10. He also turned hostile. Anil Vishnu Mandoskar (P.W.5) at Exhibhit11 is employer of accused. So as Ashutosh Singh (P.W.6) at Exhibit12 was though, is colleague of accused. Sonali Mistry (P.W.7) at Exhibit 14, is a Scientific officer of Forensic Lab. She brought her report Exhibit15 on record. She also identified laptop, hard disk and allied material vide Articles I and J. Mukund Gopal Pawar (P.W.8) at Exhibit19, is police officer who investigated this matter. Statement of accused is recorded separately at Exhibit27.

8. Heard both sides at length. Gone through the case laws referred by defence.

9. At the outset it is required to be noted that this is not offence which took place in face to face presence. It took place through web, in that way there is no eye witness of the offence, but, it entirely dependent on circumstantial evidence as rightly pointed out both the parties. While touching to the evidence on record here it will not to out of place to see ratio relied by defence reported in **1991EQ(SC)O210; Jaharlaldas v/s. State of Orissa**. In this case

Hon'ble Supreme Court spelled on circumstantial evidence and it's appreciation following in quote:

"It is well settled that circumstantial evidence in order to sustain the conviction must satisfy three conditions:

1) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; 2) those circumstances should be of a definite tendency unerringly pointed out towards the guilt of accused; 3) the circumstances taken cumulatively should firm a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and it should be also to incapable of explanation on any other hypothesis than that of the the guilt of the accused".

10. The judgment also quoted caution as given in **Hanumant v/s. State of Madhya Pradesh, 1952 SCR 1091**, quoted "in dealing with circumstantial evidence there is always the danger that conjecture or suspicion may take place of legal proof. It is therefore, right to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency.....

Same is the observation in **State of Uttar Pradesh v/s. Ashokkumar Srivastava, 1992 SCR (1) 37**, so needs no reiteration.

11. In light of above law position as to circumstantial evidence, now I will turn to the evidence available on record. From evidence of Kum Sonali Sawai (P.W.1) and defence as well, it come in admitted category that Kum. Sonali Sawai, the reporter and accused were well acquainted with each other. They come across through face book. They become friend on orkut and the relation reached upto the stage,the accused proposed her for marriage knowing that reporter is elder than him i.e. at that time accused was of 31 years aged so as reporter was of 34 years. So here on face identity of accused at personal level of this reporter and accused is not disputed.

12. Further, if we see the evidence of reporter Sonali Sawai (P.W.1), it reveals that since 03/03/2009 she started receiving obscene emails. The further dates are 05/03/2009, 06/03/2009, 08/03/2009 and 09/03/2009 of the emails were sent from email id so198021@ gmail.com. The emails which are placed at Articles A to H. If these emails, on face are seen there is no need of giving any special reason to say that these are vulgar contents wherein alleged sexy look of the reporter is displayed by referring organs, I do not find it necessary to quote the contents of this emails. .....

13. The points which are required to be noted from these emails are that who is the sender appearing on these emails and it described as Su jaz <so198021@gmail.com> and these are sent to email id sawaisonali@gmail.com. As far as receiver email is concerned, it is of reporter Sonali Sawai. She brought it on record through her oral evidence and it is also not disputed by defence. By the way here, how the sender described himself is relevant to this matter Article A described

name Sooraj and who is residing near house of reporter since last one year. Admittedly, it is not case of reporter that accused Yogeesha, is known as Sooraj or like alias name.

14. According to evidence of Sonali Sawai as she started receiving vulgar messages, she took out prints of these emails and lodged report/application in Cyber Cell. She deposed that she also found that her profile is created by accused and messages like Articles A to H were spread over net and she started receiving calls from Taxi Drivers, Rickshaw Drivers on her mobile number and they were asking for sex in view of emails received by them. She deposed that accused created profile by giving name Sana Jazz and put her mobile number on said profile and all these facts relied in investigation made by Cyber Cell. According to her, police detected the fact that accused himself created obscene profile and executed offending acts. In her turn, she claims that

obscene emails and pictures were sent from same IP address through the laptop of accused which was provided to him by company. She brings on record Exh.5 and Exh.6. On face of reading of this Exh.5, it reveals that this Sonali has lodged these report after the facts were detected by Cyber Cell.

15. As already stated the articles which are placed on record i.e. A to H are nothing but vulgar and can be definitely termed as insulting the modesty of woman. The fact that the reporter received these emails, the sender sent these emails with intention to open it and seen by receiver, the aspect like showing words which are of in vulgar nature to intrudes upon the privacy of such woman are complying.

16. Now vital question in this matter is whether the evidence brought on record connect the accused as author of crime and for that purpose scrutiny of relevant evidence needs to be made. Let us do this, effort in up coming discussion.

17. In series, the evidence of police Mukund Gopal Pawar (P.W.8), Investigating Officer comes first. According to him he is having training in Cyber Law, Computer Forensic and in Ethical hacker. He attended various seminar in India as well as in America. These facts are brought on record by way of cross examination and by this facet of cross examination it can be safely stated that the Investigating Officer is having ample knowledge in respect of cases and its investigation.

18. According to his evidence, he carried out all technical investigation and it revealed that the offending emails are generated from email id s0198021@gmail.com and forwarded to email i.d. sawaisonali@gmail.com and this fact has been already pointed out at the time of discussing the contents of Articles A to H, so needs no more discussion. Mukund Pawar (P.W.8) deposed that he issued request email to gmail Server in USA and asked details of disputed email id so198021@gmail.com (herein after mentioned as disputed emails for the purpose of brevity and email id sawaisonali@gmail.com is referred as reporter's email). He brings on record Exh.20 and 21 in respect of this communication made with gmail Server which is made from the official email id officer@cybercellmumbai.com to lisapac@ google.com wherein it is clear that such email was sent by this Investigating Officer and he received letter from server which is placed at Exh.21. This being a extract of computer and as received by Investigating Officer can be very well read in discussion. Further, if we see the cross examination in respect of communication with gmail server, this aspect defence is silent

and so I have no hesitation to accept the fact that Investigating Officer made effort to collect information from google search/engine and Exh. 20 and Exh.21 can be very well relied.

19. Investigating Officer Mukund Pawar further deposed that the google search forwarded details of the disputed emails wherein IP addresses were mentioned. 12 IP addresses were belonging to Airtel and 2 IP addresses were belonging to TATA Communication. The data provided by google search is from February, 2009 to March 2009 of various dates and described 12 IP addresses and 2 IP addresses of different service providers i.e. Airtel and TATA Communication. He deposed that after receiving communication, he found 12 IP addresses and then he took search of these IP addresses of google search engine, those are Airtel and TATA Communication. He deposed that after finding out these two service providers he issued email to both these service providers vide Exh. 22 and Exh.23. There is also no dispute about issuance of these letters/emails in entire cross examination. Exh, 22 and Exh,. 23 shows that this Investigating Officer by using official email id of Cyber Cell issued email to M. Patil@Airtel.in and the service provider, provided physical address of this IP addresses. Exh. 24 and Exh. 25 are also same communication with service provider and in reply the service provider gave 2 physical IP addresses 1) Wam Bombay Bulk Handling Equipment Industry Pvt. Ltd., Plot No. C39, B & C, TTC MIDC, Turbhe Mhape Road, Pawane, Navi Mumbai given by TATA Communication and 2) physical address is house no. 397, sector 40, Gurgaon, Haryana provided by Airtel. 20. He deposed that after getting/collecting this information, he called reporter Sonali Sawai and asked whether she know any person working on above addresses more particularly Wam Bombay and she disclosed that accused Yogesh @ Yogisha Prabhu is working in Wam Bombay and he travel through out India in relation to company's work, and that all other fact of reaching upto the proposal of marriage and then breakup between them. He deposed that he disclosed to Sonali Sawai, reporter about the finding of offender and asked her whether she want to proceed further and on consent given by this reporter, the report Exh. 5 and Exh.6 was lodged and crime was registered at Shivaji Park Police Station on her report.

21. He deposed that after registration of crime, he himself carried out further investigation, he visited office of Wam Bombay, made inquiry with Anil Manduskar, called Yogesh Prabhu there, and in inquiry accused confessed his guilt. Technically, though his confession is not admissible on

record as it is made to police, it clears the line of investigation of crime. The witness brings on record that then he seized harddisk of the laptop which was allotted to accused vide Exh. 10, recorded statement of Manduskar as well, arrest accused vide Exh. 26. As far as arrest of accused and seizure of laptop is concerned, it reveals that accused himself in his statement u/s 313 of Criminal Procedure Code do not dispute this fact. He admits his arrest as well as the fact that laptop was seized by police with rider, that because of threats he handed over laptop as it was in office.

22. By taking pause here and discussing further evidence of Mukund Pawar, I will advert my attention towards testimony of witness whose references have been made by this Makund Pawar i.e. Manager Anil Manduskar. The testimony of Anil halfhearted. Though, he confirmed that accused is his employee, he travel for the work of company, laptop and mobile was provided him for the purpose of his job alongwith internet connection. He denied to

corroborate the seizure of hard disk of laptop provided to accused. Though he was declared hostile and nothing fruitful come on record and the two lines cross examination of this witness by accused brings on record that the laptop given to accused was used by his group mates in company also and that they all used to avail internet facility.

23. So far as panch on seizure panchanama is concerned, who is Kundan Mahendra Raut (P.W. 4), he deposed that one hard disk was with police and it was seized in conference room of office of Wam Bombay vide Exh. 10. But, he denied to corroborate the fact that the hard disk was given by accused and then it was seized by police. He is also halfhearted, first he identified harddisk (ArticleA) when asked by prosecution and denied to identify firmly when it was asked by accused. If we see the tendency of these witnesses of halfheartedness, it reveals that these two witnesses are winover against prosecution and they did not support prosecution on technical aspect of seizure.

24. Now, I will proceed further to discussed evidence of Mukund Pawar and the investigation carried out by him after seizure of the harddisk. According to him on 18/04/2009 accused gave disclosure statement Exh. 27 and showed readiness to open the disputed email i.d. by using password known to him and he brought Exh. 27 on record accordingly. He, alas, the panch witness Krishna Verdhaji Purohit does not corroborate the fact that accused facing trial showed readiness to open the disputed email i.d. by using password known to him. To attract provision of section 27 of Indian Evidence Act as the word “password” come in category of fact which was only within knowledge of accused who was in custody. This Krishna Verdhaji Purohit simply claims that at Shivaji Park Police Station his two signatures were obtained and nothing like incident of giving statement by accused, opening of disputed email i.d. by using password known to him alone, and extract printouts from the disputed email id at the office of police.

25. In this connection, if we proceed further with evidence of Mukund Pawar, he claims that the accused opened disputed email id by using password known to him, then inbox and sentbox of email id were searched and in sent box email dated 03/03/2009, 05/03/2009, 09/03/2009 were found which were sent to the reporter's id alongwith the obscene attachments. He deposed that all of these emails, print outs were obtained by using computer and printer provided at office of Crime Branch and he accordingly brought on record Exh.29A to 29F. These are printouts of screen shots of disputed email id which shows window like crime 110/09, 9 mails, inbox 30198 and documents, screen shot of sent box which discloses the relevant dates mentioned above and 6 attachments thereto of vulgar photographs and disputed vulgar messages of which mentioned, has been made at the time of discussion of Articles A to H. It is pertinent to note that all these extracts and panchanamas bear signature of accused as well that is to say Exh.27 to Exh.29F. In this respect testimony of Investigating Officer is challenged. It is required to be noted down the suggestion put to witness that “it is not true to say that even though the accused opened email i.d. as disclosed in his disclosure statement, it cannot be said that he did not sent objectionable emails to other end”. If this particular suggestion is read by literal way it does not dispute that accused did give disclosure statement and he opened i.d. If this aspect is seen, hostility of the panch witness on this aspect is washed away. In view of the suggestion what it is suggested that though,

accused opened email id, it cannot be said that offending emails are sent by him.

26. In backdrop of above factual aspect brought on record, here, I will like to note that email id are having unique password and it can be known to only profile user or gmail user. If entire tone of cross examination is seen what is suggested is that the laptop and internet might have been used by other colleagues of accused. It is not case of defence that this particular/disputed email id was used by office staff for carrying out its official work. The disputed email id is not general email id of the office by which it can be expected that its password was available to each of the office member. Besides this, the emails are sent to reporter particularly, it is not case of the prosecution as well as defence that the reporter was working in the Wam Bombay office with accused to have acquaintance with other workers/employees therein who would have been presumed that they know the email address of reporter. Here, the acquaintance of reporter and accused strongly suggested that accused is the only person who was knowing email id of reporter and he is having only knowledge about her. If we see the testimony of hostile colleague of the accused in his office, it is not suggested as well to them that the reporter was having any nexus with official staff excluding accused nor it is case of defence that reporter was working in establishment of accused. If all these aspects are clubbed together those, strongly suggested that the accused can be only person who had sent these disputed emails.

27. Now I will turn to the legal aspect of disclosure statement as envisaged in section 27 of Indian Evidence Act. It contemplate that confessional statement leading discovery that to distinct are admissible in evidence. The mischief of section 27 of Indian Evidence Act says that the fact is within exclusive knowledge of the accused and at his instance discovery took place. If we see the unique feature of email id that it is having unique password known only to its user it can be very well said that opening of email id by accused by using unique password known to him alone, satisfy the mischief described in section 27 of Indian Evidence Act. Here, what is the property? Herein case, the property is disputed emails which are placed on articles A to H received by reporter. Considering the entire working pattern of web and email, if the accused would have not sent these disputed emails, there was no reason to find its presences in the disputed id. As already pointed out the disputed property, emails received by reporter i.e. Email matches with the discovery i.e. getting print outs from the disputed email id on opening it by accused, those are Exh. 29A to 29F and here, the identity of property as envisaged in section 27 of Indian Evidence Act, get complied. The web data cannot accessed, which is of personal nature and that to when it has been sent from particular email id or profile. This aspect justify that accused was having control over the disputed email id and contents therein. From the discussion made above, I have no hesitation to conclude that the testimony given by Mukund Gopal Pawar on aspect of disclosure statement by accused, and thereafter recovery of printouts from disputed email id, is reliable.

28. As mark of caution, here I will like to quote that the evidence in relation to section 27 of Indian Evidence Act is a weak piece of evidence, so it is necessary to find out whether there is more evidence which will fortify the prosecution case, and for this purpose the technical aspect described by another witness Sonali Mistri (Expert) become relevant.

29. Sonali Mistri brought on record procedure which she carried out with this examination. After receipt of property i.e. Hard Disk from Shivaji Park Police Station, she prepared mirror

copy, thereafter calculated hash value of original hard disk and the mirror copy. Both hash value were same. Then she carried out process of reading mirror copy and again hash value was calculated for verification and it again matched with original. In my humble opinion, all these process is required for securing the genuineness of the process and she had complied it.

30. In next segment she brings on record that she recovered deleted files, found out internet access history, calculated hash value of each recovered files and then started process of finding out key words. What of this key words can be found in the report sent by Investigating Officer which is placed at Exh. 15. Exh. 15 discloses that traces of disputed email id were found in unallocated cluster which was pointing out that this machine/hard disk, the disputed email was accessed. She has also in tabular manner mentioned the physical sector, logical sector, cluster sector, sector offset and file offset, which she found present by analysis of data made by her. Beside this, the witness also found traces of reporter's email id in same manner, in unallocated cluster, which are also mentioned in tabular form.

31. Most important aspect here in case is that finding of traces of orkut profile in the name of Sonali Sawai with reference to Exh. 2 forwarded to her and Exh. 2 is nothing but, the profile which is disclosing phone number of the reporter. In my humble opinion, there was no reason to find out traces of this orkut profile in the laptop allotted to accused. The report in categorical manner brings out on record that the disputed emails were found in unallocated cluster of the laptop allotted to accused alongwith obscene photographs of pornic postures which are the disputed emails received by reporter Sonali Sawai. It is pertinent to note that the factor like creation of messages and dates of sending those, are also matching. It will not be out of place to see when the files are created and when reporter received these images. Column no. 8 describes the dates of 3 pictures images. The files are created on 03/03/2009 at 10:42:46 p.m., 10:41:58 p.m. and 00:00:00. After these dates are tallied with the dates of emails received by the reporter those also confirmed that those are same and which undoubtedly tend to show the allegations made by prosecution. To be more specifically, I will attract my attention towards Article H, it gives date 09/03/2009 which is disputed date found in the forensic examination.

32. One more circumstance which here needs referrence which is related to Gurgaon. As already observed the colleagues of accused have been winover, the relevant evidence which is found reliable can very well be utilised for the purpose of conclusion. If we see evidence of Ashutosh Srivastav (P.W. 6), he do not deny that accused never come at Gurgaon office. His throughout statement is that he do not remember this fact. In my humble opinion, there is no need of giving special reason how he faded the memory of the visit of police officer which is not normal in day to day life that too, in relation of commission of offence. In this backdrop, it will not be out of place to see the statement of accused. He do not dispute that he was having occasion to visit Gurgaon office for his official work. In this back drop, the statement of Investigating Officer Mukund Pawar (P.W.8) becomes important and as well reliable that police machinery that dugged out this fact that accused visited Gurgaon office, of which IP address is found in the communication made by gmail server.

33. Now I will turn to facet which have been highlighted by defence in cross examination as well as at the time of argument one by one. The important witnesses are reporter, Investigating Officer and Forensic Expert. The discussion as to relationship between accused

and this reporter has been already made, so needs no reiteration. She strongly denied that she is having any friend by name SuJazz on orkut. She also denied that because of breakup she lodged report and that accused did not commit offence. She categorically explains that in application she did not give any name of any person though, she was knowing email i.d. of accused as admitted that she did not make any reference that she is having any complaint against accused. If we see this aspect, the cross examination does not bring the prosecution case in category of reasonable doubt. If we turn to the common question to Investigating Officer and Forensic Expert, in relation to identity of accused they admit that technology cannot point out accused that at particular time, this particular person would have used internet or accessed web. In my humble opinion, technology is creation of human mind to assist to come on conclusion and the inferences are required to be drawn by human by applying reason and so the submission of Ld. Advocate for defence that this admission washed out technical report and create doubt about the authorship of crime are not appealing to my mind. The technology help us to find out the circumstances and the human as to apply reason to it and has to draw inferences and come on conclusion and that is the only part of the technology which can be utilised in judicial proceeding.

34. Another objection raised by defence is that because of breakup accused is implicated in case. Defence submitted that this enmity cannot be ruled out and of this fact benefit goes to accused. For this purpose defence relied on verdict of Hon'ble Patna High Court in **Cri. Misc. Appln. No. 550/09 Gladdy Jousa v/s. State of Bihar;** wherein on the basis of enmity submitted before Hon'ble High Court, Hon'ble High Court has quashed the proceeding. First of all, I will like to note that this court is not having inherent jurisdiction to quash the complaint. Further, the facts in referred case, are related to initial stage of filing complaint and now this court is dealing with the matter after fullfledged trial that is to say the court is appreciating entire material given on record by prosecution and its witnesses. The relevant part of this judgment which are utilised here in only whether enmity or breakup between the reporter and the accused can be the reason to file this complaint.

35. For this purpose the initial stage of filing application will be helping to come on conclusion. For this purpose I will attract my attention towards the first approach of reporter to police vide Exhibit7 and the evidence laid down by Investigating Officer as well. The reporter Sonali Sawai nowhere claims that she initial stage itself filed report against accused facing trial. What she claims that after filing application, the cyber cell investigated the matter and reached upto the end of accused and then formal report Exh. 5 and 6 were lodged by her. In my humble opinion, if the reporter was having any reason to grind vengeance against accused because of alleged breakup at initial stage itself she would have named this accused facing trial and not after the dugging out roots of mater of Cyber Cell and this fact has been well corroborated by Investigating Officer Mukund Gopal Pawar. The police also did not book the accused directly, they have made efforts to reach upto the proper end by making technical investigation, making communication with service provider and then he again call the reporter and at this juncture she disclosed relation with

accused who was working at Wam Bombay at which end the police officer reached, and then the reporter consented for prosecuting accused. This facet rules out, the fact of enmity raised by defence that only because of breakup the accused has been implicated in this case.

36. From the discussion of facts and circumstances coming on record, the entire episode of this incident can be summarized as under:

37. The reporter and accused were having friendly relationship and then relationship breakup which reached upto the marriage proposal and then the disputed episode started. The reporter received emails on the given dates, the reporter approached investigating machinery, investigating

machinery after making inquiries and technical investigation reached to the end of accused, the Investigating Officer further carried out technical investigation, forwarded investigation like seizure of hard disk, where from the disputed emails were sent, got it the confirmed that traces of disputed emails are found out in it. In this course, the disclosure statement given by accused, opening the disputed email having unique password which can be only within knowledge of accused, the investigating officer discovered fact that the disputed emails were sent from this email id and its traces were found in sent box of the email id open by the accused which he was having exclusive control. If all these circumstances are considered together, I find that it is created unbreaked chain of circumstances which is pointing out towards guilt of accused while committing the offence punishable under section 509 of Indian Penal Code, by use of web and technology related to it.

38. Here, it can be gathered from evidence that accused intentionally and knowingly intervened privacy of reporter which attracts provisions of section 66E of Information Technology Act. As far as charge under section 67 and 67A is concerned, I find that evidence as to publishing open sexual desire is short in present case to lead any other person than reporter so I hold that offence under section 67 and 67A is not established beyond reasonable doubt but it attracts 66E as referred above. Though charge under section 66E is not framed specifically, I find that offence under section 66E being having less punishment than punishment in sections 67 and 67A, accused can be dealt for said charge. Here I find that by charge of section 509 of Indian Penal Code, accused was having knowledge about his defence and so by holding him guilty for offence under section 66E, no prejudice will cause to defence. Hence, I answer point no. 1 in affirmative and point no. 2, as offence under section 67 and 67A is not proved but offence under section 66E of Information Technology Act is established. So I hold that prosecution has established offence punishable under section 509 of Indian Penal Code and section 66 (E) of Information Technology Act, I hold accused in guilt of above said offences and convict him.

41. Heard accused on the point of sentence. He submitted that he is the only earning member in his family. His family i.e. his wife, mother and father are dependent on him, so leniency may be shown to him. Ld. Advocate for accused submitted that accused is Engineer by conviction his life will be spoiled and by taking lenient view, accused may be punished imposing fine only. Ld. APP submitted that the offence has been committed by use of web, cyber crimes are increasing and so to curb out tendency of committing offence by using the technology, deterrent punishment is necessary.

42. Upon hearing either parties on point of sentence and looking in the peculiar circumstances of this case, that privacy of woman has been intruded by the accused here required some substantial sentence. But, if we see the mitigating circumstance as to fact that there were

relationship between reporter and accused which reached upto the extent of giving proposal of marriage and the fact that now both are leading independent marital life, the accused being Engineer and bread winner of his family, in my humble opinion following sentence will suffice purpose of justice. In result, I proceed to pass the following order:

O R D E R

1. Accused Yogisha @ Yogesh Pandurang Prabhu is convicted for offence punishable under section 509 of Indian Penal Code and section 66(E) of Information Technology Act, vide section 248(2) of Code of Criminal Procedure.

2. Accused is sentenced to suffer simple imprisonment for 1 (one) month for offence punishable under section 509 of Indian Penal Code and to pay fine of Rs. 5,000/(Rs. Five Thousand only) in default to suffer simple imprisonment for one (1) month.

3. Accused is sentenced to suffer simple imprisonment for 3 (three) months for offence punishable under section 66(E) of Information Technology Act and to pay fine of Rs.10,000/ (Rupees Ten Thousand only) in default to suffer simple imprisonment for 2 (two) months.

4. Both the substantive sentences shall run concurrently. 5. Accused shall surrender his bail bond in court.

6. Property hard disk shall be returned to the Anil Vishnu Mandoskar who is the Managing Director of Wam Bombay. Order as to disposal of property shall operate after appeal period is over.

7. Copy of this judgment be provided to accused free of cost.

8. Pronounced in open court.

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SELF LEARNING STIMULATING EXERCISE

1. In above case if the objectionable material has been sent to the minor what will be your decision. (Hint section 67B , IT Act, POCSO Act)

Maqbool Fida Husain v. Raj Kumar Pandey

Delhi High Court, CRL. REVISION PETITION NO.114/2007
Decided on 8 May, 2008

Sanjay Kishan Kaul, J. - 5. The present petitions seeking to challenge the summoning orders against the petitioner arise from such a contemporary painting celebrating nudity made by an accomplished painter/petitioner. The said painting depicts India in an abstract and graphical representation of a woman in nude with her hair flowing in the form of Himalayas displaying her agony. It is stated that the said painting was sold to a private collector in the year 2004 and that the petitioner did not deal with the same in any manner whatsoever after sale. Subsequently in the year 2006, the said painting entitled "Bharat Mata" was advertised as part of an on-line auction for charity for Kashmir earthquake victims organized by a non-governmental organisation with which the petitioner claims to have no involvement. It is stated that the petitioner at no point in time had given a title to the said painting. The advertisement of the said painting led to large scale protests for which the petitioner also had to tender an apology.

6. It is in this background that there were private complaints filed at various parts of the country being Pandharpur, Maharashtra; Rajkot, Gujarat; Indore and Bhopal, Madhya Pradesh alleging various offences against the petitioner on account of the aforesaid painting consequent whereto summons and warrants of arrest were issued against the petitioner. The petitioner approached the Supreme Court seeking consolidation of the matter. The Supreme Court acceded to the request and in pursuance to the directions passed vide order dated 04-12-2006, the said complaint cases pending consideration were consolidated and transferred to the court of the Ld. ACMM, Delhi by way of transfer petitions filed by the petitioner being T.P. (Cri.) No. 129/2006, T.P. (Cri.) No. 182/2006 and T.P. (Cri.) No. 224/2006. The Ld. ACMM, Delhi issued summons to the petitioner for various offences Under Section 292/294/298 of the Indian Penal Code ('IPC' for short) against which the present revision petitions have been filed.

7. Notices were issued by this Court and exemption was granted to the petitioner from personal appearance. In view of certain propositions having arisen, this Court deemed it appropriate to issue court notice to the Ld. Attorney General in order to depute a law officer for assistance to this Court. A perusal of the order sheets shows that none had sought to appear and argue the matter for the respondents in Crl. Rev. P. 114/2007 and Crl. Rev. P. 280/2007, thus this Court vide order dated 20-03-2008 closed the right of the said respondents to advance any further submissions. However, the GPA holder of the respondent in Crl. Rev. P. 280/2007 entered appearance on 31-03-2008 and requested to make further submissions in that behalf which was permitted.

Paras 8-27 deleted

28. .... the Hicklin's Test has been applied to determine obscenity in England since its evolution [In 1857, Lord Campbell enacted the first legislative measure against obscene books etc. and his successor in the office of Chief Justice interpreted his statute in Regina v. Hicklin (Supra) where it was held as follows: “The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to

such immoral influences and into whose hands a publication of this sort may fall. This came to be known as the Hicklins test.(paras 23-24of the judgement)]. The Courts in the United States of America have given up the Hicklins Test, but the Indian law on obscenity is more or less based on it. In addition to this, law on obscenity in India also panders to the test of 'lascivious and prurient interests' as taken from the American law.

India

29. The general law of obscenity in India can be found in Section 292 of the Indian Penal Code, 1860 which reads as under:

Section 292. Sale, etc., of obscene books, etc.-[(1)] For the purposes of Sub-section (2) book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene, if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely , having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.] [(2) Whoever- sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation or for purposes of sale, hire, distribution public exhibition of circulation, makes produces, or has in

(a) Possession any obscene book, pamphlet, paper, drawing painting, representation or figure or any other obscene objects whatsoever, or

(b) Imports, exports or conveys any obscene objects for any of the purposes, aforesaid, on knowing or having reason to believe that such objects will be sold let to hire, distributed or publicly exhibited or in any manner put into circulation or

(c) takes part in or receives profit from any business in the course of which he knows or has reasons to believe that such an object are for any of the purposes aforesaid, made produced, purchased , kept, imported, exported, convey, publicly excited, or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) Offers or attempts to do any act which is an offence under this section, shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.] [Exception.- this section does not extend to-

(a) any book, pamphlet, paper, writing, drawing, painting, representation of figure-

(i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purpose;

(b) any representation sculptured, engraved, painted or otherwise represented on or in-

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958(24 of 58), or

(ii) any temple, or any car used for the conveyance of idols, or kept or used for any religious purpose.]]

30. Section 292 IPC was enacted by the Obscene Publications Act to give effect to Article I of the International Convention for suppression of or traffic in obscene publications to which India is a signatory. By Act 36 of 1969, Section 292 was amended to give more precise meaning to the word 'obscene' as used in the section in addition to creating an exception for publication of matter which is proved to be justified as being for the public good, being in the interest of science, literature, art or learning or other objects of general concern. Prior to its amendment, Section 292 contained no definition of obscenity. The amendment also literally does not provide for a definition of 'obscenity' inasmuch as it introduces a deeming provision.

31. On a bare reading of Sub-section (1) of Section 292 it is obvious that a book etc. shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter alleged to be obscene. It is only once the impugned matter is found to be obscene that the question of whether the impugned matter falls within any of the exceptions contained in the section would arise.

32. Section 67 of the Information Technology Act, 2000 relevant for the subject under discussion reads as follows:

67. Publishing of information which is obscene in electronic form.--Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

33. Thus Section 67 is the first statutory provisions dealing with obscenity on the Internet. It must be noted that the both under the Indian Penal Code, 1860 and the Information Technology Act, 2000 the test to determine obscenity is similar. Therefore, it is necessary to understand the broad parameters of the law laid down by the courts in India, in order to determine "obscenity".

Artistic Freedom and Obscenity

44. There is a sharp distinction between Constitution of United States of America and India. In the former, freedom of speech guaranteed is absolute and in the later the Constitutional itself provides for certain exceptions. The duty cast upon the courts in India is to ensure that the State does not impose any unreasonable restriction.

45. The Constitution of India, by virtue of Article 19 (1) (a), guarantees to its citizen the freedom of speech and expression. India is also a party to the International Covenant on Civil and Political Rights and therefore bound to respect the right to freedom of expression guaranteed by Article 19 thereof, which states:

a. Everyone shall have the right to hold opinions without interference.

b. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in form of art, or through any other media of his choice.

46. Nevertheless, there is an inseparable connection between freedom of speech and the stability of the society. This freedom is subject to Sub-clause (2) of Article 19, which allows the State to impose restriction on the exercise of this freedom in the interest of public decency and morality. The relevant portion of the same has been reproduced below:

Article 19(1) (a): All citizens shall have a right to freedom of speech and expression.

...(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, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of 4[the sovereignty and integrity of India,] 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.]

47. A bare reading of the above shows that obscenity which is offensive to public decency and morality is outside the purview of the protection of free speech and expression, because the Article dealing with the right itself excludes it. Thus, any interpretation of 'obscenity' in the context of criminal offences must be in consonance with the constitutional guarantee of freedom of expression which freedom is not confined to the expression of ideas that are conventional or shared by the majority. Rather, it is most often ideas which question or challenge prevailing standards observed by the majority that face the greatest threat and require the greatest protection as was so observed in Ranjit Udeshi's case (supra).

55. In so far as the scope of Section 292 is concerned, from the above discussion, it is clear that that for an offence to be made out under the said section, its ingredients need to be met. In the context of the present painting to be deemed to be obscene, it has to satisfy at least one of the three conditions: (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter alleged to be obscene. In addition to this, the relevance of exceptions arises in excluding otherwise obscene matter from the ambit of the criminal offence of obscenity and such exceptions has no role to play in determination of the obscenity of the impugned matter.

56. The evolution of law in relation to the delicate balance between artistic freedom viz-a-viz the right of speech and expression while dealing with the question of obscenity requires certain important norms to be kept in mind. .

70. To fall within the scope of 'obscene' under Section 292 & 294 IPC, the ingredients of the impugned matter/art must lie at the extreme end of the spectrum of the offensive matter. The legal test of obscenity is satisfied only when the impugned art/matter can be said to appeal to

a unhealthy, inordinate person having perverted interest in sexual matters or having a tendency to morally corrupt and debase persons likely to come in contact with the impugned art.

71. It must also be remembered that a piece of art may be vulgar but not obscene. In order to arrive at a dispassionate conclusion where it is crucial to understand that art from the perspective of the painter, it is also important to picture the same from a spectator's point of view who is likely to see it.

75. The complainants/respondents in Crl. Rev. P. Nos. 114/2207 and 282/2007 have also alleged of an offence Under Section 294 and 298 IPC against the petitioner. Section 294 IPC reads as under:

Section 294. Obscene acts and songs. Whoever, to the annoyance of others-

(a) Does any obscene act in any public place, or

(b) Sings, recites or utters any obscene song, balled or words, in or near any public place, Shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]

76. Section 294 IPC deals with the prevention of an obscene act being performed in public to the annoyance of the public. In this respect, the submissions made by the petitioner was that to make out a case under the aforesaid section the main ingredients of the section need to be complied with which includes the impugned act to be performed in a public place; the said act to be obscene and lastly, to cause annoyance to others. The learned Counsel placing reliance on Narendra H. Khurana and Ors. v. The Commisssioner of Police and Anr. 2004 Cri.L.J. 3393 stated there is no prima facie case made out under the aforesaid section since there is no disclosure made in the complainants of any immediate, proximate nexus between the alleged annoyance of the complainants and act done in a public place by the petitioner. The alleged annoyance could have been by viewing the painting on the internet and the only alleged act of the petitioner having a nexus with the alleged annoyance is the uploading of the painting on the website. It was also pleaded that there could have been no 'annoyance' caused to the complainants by their viewing the said painting on the website for the reason that the complainants could have easily chosen not to view the website any further.

77. For the offence to be made out under Section 298 IPC, the accused must have a deliberate intention of wounding the religious feelings of the complainant by uttering some word or making some sound or a gesture or placing an object in the sight of the complainant and it is the contention of the learned Counsel for the petitioner that the petitioner has done no such act which can fall under the said purview. Section 298 IPC provides as under:

Section 298. Uttering, words, etc., with deliberate intent to wound the religious feelings of any person Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

78. Akin to Section 294 IPC, Section 298 IPC also requires a nexus between the impugned act and the alleged deliberate intention of the petitioner to wound the religious feelings of the complainants, which according to the learned Counsel is not so in the present case. It is the case of the learned Counsel for the petitioner that the impugned painting cannot form the basis of any deliberate intention on the part of the petitioner to wound the religious feelings of the complainants since the figure, on the basis of the identity alleged, represents an anthropomorphic depiction of the nation. It is also not a religious depiction which is capable of offending the 'Hindu' religious feelings as alleged as also that the concept of Bharat Mata is not the sole premise or belief of Hindus alone. Learned Counsel for the petitioner drew strength from the judgments of Narayan Das and Anr. v. State ; Shalibhadra Shah and Ors. v. Swami Krishna Bharati and Anr. 1981 Cri. L.J. 113 and Acharya Rajneesh v. Naval Thakur and Ors. 1990 Cri.L.J. 2511 to advance the proposition that a mere knowledge of the likelihood that the religious feelings of another person may be wounded would not be sufficient to hold a person liable Under Section 298 IPC.

79. In addition to this, in Crl. Rev. P. No. 282/2007, the offence Under Section 500 IPC is also alleged against the petitioner. It is submitted by the learned Counsel for the petitioner that such offence cannot be made out against the petitioner for the reason that the basic ingredient of the offence of defamation being some imputation capable of harming the reputation of the complainant is absent from the complaint.

87. The learned Counsel argued that it is not the case that the impugned painting was put up for display in some art gallery or private exhibition, instead it was uploaded on his own website which could be accessed by any person and any common man who is a patriot would get affected by the said picture. Hence, the yardstick to determine whether the painting is obscene or not should be seen from the mindset of the society as a whole and not of a particular 'class'.

96. I have heard the learned Counsels for the parties and given deep thought to the matter keeping in mind the importance of the legal principles raised in this matter. A perusal of the complaints and the material placed on record show that the narrow questions which need consideration of this Court are that whether an artist like in the present case be given the liberty to paint a nation in the context of motherland in nude and whether such a painting would be considered as obscene or not. In the trial proceedings, only summoning orders have been passed till now, thus the determination of the above said questions shall be based on certain assumptions that the painter had made the said painting portraying Mother India in nude titled 'Mother India Nude Goddess' and put up on the website owned by the artist himself.

98. In the conspectus of the legal principles enunciated and discussed aforesaid both of India and across the globe, the legal tests governing the law on obscenity are clear. On applying the said tests governing obscenity, in my considered view, the said painting cannot be said to fall within the purview of Section 292 thereby making it obscene. The impugned painting on the face of it is neither lascivious nor appeals to the prurient interests. At the same time, the person who is likely to view the said painting would not tend to be depraved or corrupted. In other words, the said painting would not arouse sexual interest in a perverted inordinate person or would not morally corrupt and debase a person viewing the said painting. Though

some might feel offended or disgusted at the very inception of seeing the alleged Mother India in nude but that by itself and nothing more in my opinion is not sufficient to qualify the test of obscenity. The said painting depicting India in a human form in no manner has that tendency to make an average person feel embarrassed by naked portrayal of a concept which has no particular face to it since the painting has not lost its artistic value/touch.

99. An attempt to understand the said painting from the artist's/petitioner's perspective would show how the painter by way of an abstract expression has tried to elucidate the concept of a nation in the form of a distressed woman. No doubt, the concept of a nation has had a long association with the idea of motherhood but just because the artist has expressed it in nude does not make the painting obscene per se thereby satisfying the test that nudity or sex alone cannot be said to be obscene. If the painting is looked as a whole, it would reveal that that the revulsion referred to by learned Counsel for the respondents of patriotic nationals would not arise for the reason that except the fact that it is in nude, there is nothing which can be considered as pinching to the eye. As a matter of fact, the aesthetic touch to the painting dwarfs the so called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked.

100. Once Hans Hofmann said and I quote, "A work of art is a world in itself reflecting senses and emotions of the artist's world." To put it differently in the words of Edward Hopper, "Great art is the outward expression of an inner life in the artist." If the above holds true, then it would not be wrong to suggest that the petitioner is pained by the growing untold misery of our nation and made an attempt to bring the same out on a canvass. The artist's creativity in this painting is evident from the manner in which the artist by way of a tear and ruffled, unkempt, open hair of the woman tried to portray the sad and the dispirited face of our nation who seems to have suffered a great deal of anguish and agony. A woman's sorrow has been described by the way the woman is lying with her eyes closed, with one arm raised on her face and a tear dropping from the eye. The object of painting the woman in nude is also part of the same expression and is obviously not to stimulate the viewer's prurience but instead to shake up the very conscious of the viewer and to invoke in him empathy for India and abhorrence for the culprits. The person who may view the painting is likely to react in tears, silence or analogous to the same but no way near the feelings of lust. There can be many interpretations to the painting. One of the interpretations to it can be to show the disconsolate India which is entangled in various problems like corruption, criminalisation, crisis of leadership, unemployment, poverty, over population, low standard of living, fading values and ethics etc. The other can be that Bharat Mata is perhaps just used as a metaphor for being so bereft because of the earthquake which occurred around the time when this painting was made. Other than this, the bold use of colour and the depiction of the great range of Himalayas by way of the hair flowing of the women restores the artistic touch in the painting.

101. One of the tests in relation to judging nude/semi nude pictures of women as obscene is also a particular posture or pose or the surrounding circumstances which may render it to be obscene but in the present painting, apart from what is already stated above, the contours of the woman's body represent nothing more than the boundaries/map of India. There can be a numbers of postures or poses that one can think of which can really stimulate a man's deepest hidden passions and desires. To my mind, art should not be seen in isolation without going

into its onomatopoetic meaning and it is here I quote Mr. Justice Stewart of the US Supreme Court in Jacobellis v. Ohio 378 U.S. 184 (1964) who defined 'obscenity' as, "I will know it when I see it". The nude woman in the impugned painting is not shown in any peculiar kind of a pose or posture nor are her surroundings so painted which may arouse sexual feelings or that of lust in the minds of the deviants in order to call it obscene. The placement of the Ashoka Chakra or the States in the painting is also not on any particular body part of the woman which may be deemed to show disrespect to the Ashoka Chakra/States and the same was conceded by the learned Counsel for the respondent during the course of the arguments advanced. Even if a different view had to be taken that if the painter wanted to depict India in human form, it may have been more appropriate to cloth the woman in some manner may be by draping a sari or by a flowing cloth etc., but that alone cannot be made a ground to prosecute the painter. It is possible that some persons may hold a more orthodox or conservative view on the depiction of Bharat Mata as nude in the painting but that itself would not suffice to give rise to a criminal prosecution of a person like the petitioner who may have more liberal thoughts in respect of mode and manner of depiction of Bharat Mata. The very theme of our Constitution encompassing liberty, equality and fraternity would abhor the non tolerance of another view. The judge also must not apply his more liberal or conservative view in determining this aspect but should place himself in the shoes of the painter and endeavor to decipher the theme and thought process of the painter who created the painting. It would always be prudent for the judge to err on the side of a liberal interpretation giving the scheme of our Constitution.

105. The conundrum which has blocked the minds of a few today was given a riposte by Swami Vivekananda in the following words8:

...we tend to reduce everyone else to the limits of our own mental universe and begin privileging our own ethics, morality, sense of duty and even our sense of utility. All religious conflicts arose from this propensity to judge others. If we indeed must judge at all, then it must be `according to his own ideal, and not by that of anyone else'. It is important, therefore, to learn to look at the duty of others through their own eyes and never judge the customs and observances of others through the prism of our own standards.

106. It would not be proper to hold that the painter/petitioner had a deliberate intention to manifestly insult Bharat Mata which is clear from his various interviews and reports placed on record where he has consistently maintained that he actually celebrates nudity and considers it as the purest form of expression. It also cannot be lost sight of that he had immediately withdrawn the said painting from the auction and apologised to those offended, thus making it clear that his is only an artistic impulse. Under the criminal jurisprudence, for an offence to be made out against an accused, the ingredients of means read and actus reas need to be proved. In the present case, since the scope of the subject is so limited, it does not really require any evidence to be led and on the face of it, both the elements i.e. means rea and actus reas appear to be absent.

107. I am unable to accept the plea raised by the learned Counsel for the respondents that the said painting uploaded on a website could be accessed by any person sitting across the globe who in consequence whereto could get affected by viewing the same. There can be no exasperation caused by viewing such painting on the website for the reason that a person

would firstly access such a website only if he has some interest in art and that too contemporary art and in case he does view such a website, he always would have the option to not to view or close the said web page. It seems that the complainants are not the types who would go to art galleries or have an interest in contemporary art, because if they did, they would know that there are many other artists who embrace nudity as part of their contemporary art. Hence, the offence alleged Under Section 294 IPC can not be made out. Similarly, the ingredients of Section 298 IPC as alleged are not met since there seems to be no deliberate intention on the part of the petitioner to hurt feelings of Indians as already stated and as a matter of fact, the subject matter i.e Bharat Mata could be alleged to wound nationalist feelings of an individual and not any religious feelings. I am in agreement with the contention raised by the learned Counsel for the petitioner that the impugned painting cannot form the basis of any deliberate intention to wound the religious feelings of the complainants since the figure, on the basis of the identity alleged, represents an anthropomorphic depiction of a nation as also that to hold a person liable under the above said section, mere knowledge of the likelihood that the religious feelings of another person may be wounded would not be sufficient.

108. Section 500 IPC requires the basic ingredient of defamation to be satisfied which seems to be completely absent in the present case.

116. Our Constitution by way of Article 19(1) which provides for freedom of thought and expression underpins a free and harmonious society. It helps to cultivate the virtue of tolerance. It is said that the freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom. It is the wellspring of civilization and without it liberty of thought would shrivel.16

117. Every time an artist portrays something different, something which is an unpopular view point, it may accompany discomfort and unpleasantness but that in itself cannot be a ground to curb the artistic freedom and quickly go on to label it as obscene. There might be people who may actually get offended by those of Hussain's paintings or others but the right course of action for them, is to simply shrug it off or protest peacefully. In my considered view, criticism of art may be there. Rather, there are many other more appropriate avenues and fora for expression of differences of opinion within a civil society. But criminal Justice system ought not to be invoked as a convenient recourse to ventilate any and all objections to an artistic work. It should not be used as a mere tool in the hands of unscrupulous masters which in the process can cause serious violations of the rights of the people especially taking into consideration the people in the creative fields. Such a pernicious trend represents a growing intolerance and divisiveness within the society which pose a threat to the democratic fabric of our nation.

Thus, the practice of tolerance in our multi-religious, multi-cultural nation must be regarded as a fundamental duty of every citizen and must be actively encouraged and performed if we are to make our pluralist democracy a living robust.17

118. In this regard, the role of the magistrates and judicial scrutiny in protecting individual rights and freedoms and promoting constitutional values is not discretionary but obligatory. In

a constitutional democracy wedded to and governed by the rule of law, responsibilities of the judiciary arouse great expectations.18 Justice Frankfurt once remarked:

It is not a printed finality, but a dynamic process. Its applications to the actualities of Government is not a mechanical exercise, but a high function of statecraft.

Thus, a magistrate must scrutinise each case in order to prevent vexatious and frivolous cases from being filed and make sure that it is not used a tool to harass the accused which will amount to gross abuse of the process of the court. Only in appropriate cases should a private complaint case proceed further without a prior investigation by the police consequent upon the direction of the Magistrate Under Section 156(3) of the said Code in the matter. Especially taking into account the recent amendment to Section 202 of the said Code, a Magistrate should postpone the issue of process against the accused where the accused is residing at a place beyond the area in which he exercises jurisdiction. He may postpone the issue of process against the accused and either enquire himself into the case or direct investigation to be made by the police or by such other person as he deems fit, for the purposes of deciding whether or not there is sufficient ground for proceeding Under Section 204 of the Code. He must examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused as enunciated in Pepsi Foods Ltd.'s Case (Supra) and Naganagouda Veeranagouda Patil & Anr.'s Case (Supra).

119. The general principles laid down of the duties to be performed by the Magistrate before issuing summons are all the more applicable in matters pertaining to art, cinema, writings etc. to prevent any unnecessary harassment of persons from the creative fields where liberal thought processes permeate. We have had the scenario of painters, actors, writers, directors and theatre personalities being dragged to court on account of a mechanical exercise of issuance of summons ignoring the pressures created on such persons implicit in the process of issuance of summons. The result would be that that apart from the harassment element there would be growing fear and curtailment of the right of the free expression in such creative persons. This is hardly a desirable or an acceptable state of affairs.

120. In the end, it may be said that education broadens the horizons of the people and means to acquire knowledge to enhance one's ability to reason and make a sound judgment. However, when one is instructed to only view things in a certain manner, regardless of truth and facts, this is actually a form of programming - not education.19 There are very few people with a gift to think out of the box and seize opportunities20 and therefore such peoples' thoughts should not be curtailed by the age old moral sanctions of a particular section in the society having oblique or collateral motives who express their dissent at the every drop of a hat. The society instead should be engaged in more meaningful activities which would go to show the importance of education over plain literacy.

121. In view of the aforesaid, the summoning orders and warrants of arrest issued against the petitioner in the complaint cases are quashed and the revision petitions filed against them are allowed leaving the parties to bear their own costs.

JURISDICTION

122. During the course of the hearing, the learned Counsel for the parties were even confronted with a general question as to which court would be considered as a competent court having the jurisdiction to try the matter particularly when the nature of the case is like the present one where the impugned painting uploaded on the website, accessible to people across the globe, was being viewed by different people/complainants across the country who in turn got offended with such painting and filed their complaints at various places in India, especially keeping in mind the vexatious and the frivolous complaints which can be filed as an instrument to harass the accused. In the present case, the petitioner is a celebrated artist who can afford the costs borne out of such litigation but what about those who are not in a position to expend that much of an amount and are unnecessarily foisted with such liability and harassment.

123. Learned ASG accepted and submitted that as such our Criminal Code does not deal with such jurisdictional aspect directly and submitted that the answer only rested in the power conferred to the Supreme Court of India under Section 406 of the said Code which procedure has been adopted in the present case and reads as under:

406. Power of Supreme Court to transfer cases and appeals. (1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2) The Supreme Court may act under this section only on the application of the Attorney General of India or of a partly interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

(3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case.

124. The sum and substratum of the his submissions was that Chapter XIII of the Criminal Procedure Code, 1973 governs the law relating to the jurisdiction of courts with respect to inquiries and trial and under Section 177 of the said Code, every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. Section 178 provides that when it is uncertain in which of the several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or is a continuing one and continues to be committed in more local areas or one or consists of several acts done in different local areas, in such cases then it may be tried and inquired by a court having jurisdiction over any of such local areas.

125. Section 179 of the Code reads as follows:

179. Offence friable where act is done or consequence ensues.-When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

126. As per Section 179 of the Code, in case of an act which is an offence because of the ensuing consequences either the Court where the act was committed or where the consequences ensued will have jurisdiction. Under the above provision, it is not necessary to prove that things done must necessarily be an offence, as the conjunction "and" used in this section suggests that the act contemplated becomes an offence on account of the cumulative effect of the things done and the consequences ensued. In Ashok v. State of U.P 2005 Cri L.J. 2324 where a leader of a political party made insulting remarks against a particular religious community in an interview to weekly magazine having all India circulation, the Court held that the Courts either in the place where interview was given or in the place where consequences of these interviews ensued, had jurisdiction to try the offence. In S. Bangarappa v. Ganesh Narayan 1984 Cri L.J. 1618 where defamatory statement made in press conference were published in the newspaper in the same place and on the next day, in a newspaper in a different place, it was held that the Court in second place had the jurisdiction to try the offense.

127. Section 186 of the said Code provides that in cases where two or more courts have taken cognizance of the same offence then the High Court will resolve the doubt relating the jurisdiction of the one of those courts to proceed with the matter in the following manner:

a. where the courts are subordinate to the same High Court, that High Court;

b. where the courts are not subordinate to the same High Court, then the High Court within whose appellate jurisdiction the proceedings were first commenced.

128. In Kuljit Singh v. CBI 2000 CriLJ 3681, a case was registered based on a report from the Indian Ambassador in Greece regarding the incident of a high sea tragedy on the night intervening 24/25 December 1996 in which 170 Indians were drowned. The Central Government entrusted the matter to CBI for investigation which charge-sheeted the accused persons on 8.9.1997 and the Chief Metropolitan Magistrate took cognizance of the offence and issued process against the accused persons. Thereafter, four separate criminal cases were also registered in District Hoshiarpur, Punjab. The Court in this case applied Section 186 CrPC and held that the CMM, Delhi would alone be competent to inquire into and try the offences in question.

129. In my considered view, this particular aspect of jurisdiction fettered within the parameters of scrutiny of Section 202 of the said Code as discussed above derives its importance especially with the advent of the technological explosion where a person sitting anywhere across the globe can get access to what ever information he has been looking for just with a click of a mouse. Therefore, it has become imperative that in this information age, jurisdiction be more circumscribed so that an artist like in the present case is not made to run from pillar to post facing proceedings. It was found necessary to at least examine this aspect in view of the large number of incidents of such complaints which had been brought to light by press resulting in artists and other creative persons being made to run across the length and

breath of the country to defend themselves against criminal proceedings initiated by oversensitive or motivated persons including for publicity. This however is not an aspect where a direction can be issued since it is within the domain of appropriate legislation. The learned ASG while assisting this Court fairly stated that he would advice the Government to take steps by way of appropriate legislative amendments as may be proper keeping in mind the balancing of interest between the person aggrieved and the accused so as to prevent harassment of artists, sculptors, authors, filmmakers etc. in different creative fields. I say nothing more but hope that this aspect would get the attention it deserves and the legislature in its wisdom would examine the feasibility of possible changes in law.

Epilogue

130. A liberal tolerance of a different point of view causes no damage. It means only a greater self restraint. Diversity in expression of views whether in writings, paintings or visual media encourages debate. A debate should never be shut out. 'I am right' does not necessarily imply 'You are wrong'. Our culture breeds tolerance- both in thought and in actions. I have penned down this judgment with this favorent hope that it is a prologue to a broader thinking and greater tolerance for the creative field. A painter at 90 deserves to be in his home - painting his canvass.

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SELF LEARNING STIMULATING EXERCISE

1. If a poet through his poetry classify Mother India in the same fashion by his words as described by the artist in his painting. Can you apply the same principle as laid in MF Hussain Case? (*Samresh Bose* v. *Amal Mitra*, (1986 AIR 967), Difference between obscenity and vulgarity)

Anvar P.V v. P.K.Basheer & Ors

Civil Appeal No. 4226 of 2012 (SC) decided on 18 September, 2014
Bench: Chief Justice R M Lodha, Kurian Joseph, Rohinton Fali Nariman

KURIAN, J.:

Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records, is one of the principal issues arising for consideration in this appeal.

In the general election to the Kerala Legislative Assembly held on 13.04.2011, the first respondent was declared elected to 034 Eranad Legislative Assembly Constituency. He was a candidate supported by United Democratic Front. The appellant contested the election as an independent candidate, allegedly supported by the Left Democratic Front. Sixth respondent was the chief election agent of the first respondent. There were five candidates. Appellant was second in terms of votes; others secured only marginal votes. He sought to set aside the election under Section 100(1)(b) read with Section 123(2)(ii) and (4) of The Representation of the People Act, 1951 (hereinafter referred to as the RP Act) and also sought for a declaration in favour of the appellant. By order dated 16.11.2011, the High Court held that the election petition to set aside the election on the ground under Section 123(2)(a)(ii) is not maintainable and that is not pursued before us either. Issues (1) and (2) were on maintainability and those were answered as preliminary, in favour of the appellant. The contested issues read as follows:

Electronic Evidence

The evidence consisted of three parts (i) electronic records, (ii) documentary evidence other than electronic records, and (iii) oral evidence. As the major thrust in the arguments was on electronic records, we shall first deal with the same.

Electronic record produced for the inspection of the court is documentary evidence under Section 3 of The Indian Evidence Act, 1872 (hereinafter referred to as Evidence Act). The Evidence Act underwent a major amendment by Act 21 of 2000 [The Information Technology Act, 2000 (hereinafter referred to as IT Act)]. Corresponding amendments were also introduced in The Indian Penal Code (45 of 1860), The Bankers Books Evidence Act, 1891, etc. Section 22A of the Evidence Act reads as follows:

22A. When oral admission as to contents of electronic records are relevant.- Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. Section 45A of the Evidence Act reads as follows:

45A. Opinion of Examiner of Electronic Evidence.-When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000(21 of 2000)., is a relevant fact.

Explanation.--For the purposes of this section, an Examiner of Electronic Evidence shall be an expert. Section 59 under Part II of the Evidence Act dealing with proof, reads as follows:

59. Proof of facts by oral evidence. All facts, except the contents of documents or electronic records, may be proved by oral evidence. Section 65A reads as follows:

65A. Special provisions as to evidence relating to electronic record: The contents of electronic records may be proved in accordance with the provisions of section 65B. Section 65B reads as follows:

65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: -

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, ofone or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which itwas produced;

(b) giving such particulars of any device involved in the production of that electronic record as maybe appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation: For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process. These are the provisions under the Evidence Act relevant to the issue under discussion.

In the Statement of Objects and Reasons to the IT Act, it is stated thus:

New communication systems and digital technology have made drastic changes in the way we live. A revolution is occurring in the way people transact business. In fact, there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective. The guidance relevant to the issue before us is reflected in the statutory provisions extracted above.

Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A opinion of examiner of electronic evidence.

The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

In State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru[1], a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While

considering the printouts of the computerized records of the calls pertaining to the cellphones, it was held at Paragraph-150 as follows:

150. According to Section 63, secondary evidence means and includes, among other things, copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub- section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65. It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be

admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.

Deleted paras 4 and 5

Now, we shall deal with the last ground on announcements. The attack on this ground is based on Exhibit-P10-CD. We have already held that the CD is inadmissible in evidence. Since the very foundation is shaken, there is no point in discussing the evidence of those who heard the announcements. Same is the fate of the speech of PW-4-Palliparamban Aboobakar and PW-30-Mullan Sulaiman.

We do not think it necessary to deal with the aspect of oral evidence since the main allegation of corrupt practice is of publication of Exhibit-P1- leaflet apart from other evidence based on CDs. Since there is no reliable evidence to reach the irresistible inference that Exhibit-P1-leaflet was published with the consent of the first respondent or his election agent, the election cannot be set aside on the ground of corrupt practice under Section 123(4) of the RP Act.

The ground of undue influence under Section 123(2) of the RP Act has been given up, so also the ground on publication of flex boards.

It is now the settled law that a charge of corrupt practice is substantially akin to a criminal charge. A two-Judge Bench of this Court while dealing with the said issue in Razik Ram v. Jaswant Singh Chouhan and others[5], held as follows:

15. The same evidence which may be sufficient to regard a fact as proved in a civil suit, may be considered insufficient for a conviction in a criminal action. While in the former, a mere preponderance of probability may constitute an adequate basis of decision, in the latter a far higher degree of assurance and judicial certitude is requisite for a conviction. The same is largely true about proof of a charge of corrupt practice, which cannot be established by mere balance of probabilities, and, if, after giving due consideration and effect to the totality of the evidence and circumstances of the case, the mind of the Court is left rocking with reasonable doubt not being

the doubt of a timid, fickle or vacillating mind as to the veracity of the charge, it must hold the same as not proved. The same view was followed by this Court P.C. Thomas v. P.M. Ismail and others[6], wherein it was held as follows:

42. As regards the decision of this Court in Razik Ram and other decisions on the issue, relied upon on behalf of the appellant, there is no quarrel with the legal position that the charge of corrupt practice is to be equated with criminal charge and the proof required in support thereof would be as in a criminal charge and not preponderance of probabilities, as in a civil action but proof beyond reasonable doubt. It is well settled that if after balancing the evidence adduced there still remains little doubt in proving the charge, its benefit must go to the returned candidate. However, it is equally well settled that while insisting upon the standard of proof beyond a reasonable doubt, the courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well-nigh impossible to prove any allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process. (please see S. Harcharan Singh v. S. Sajjan Singh) Having regard to the admissible evidence available on record, though for different reasons, we find it extremely difficult to hold that the appellant has founded and proved corrupt practice under Section 100(1)(b) read with Section 123(4) of the RP Act against the first respondent. In the result, there is no merit in the appeal and the same is accordingly dismissed.

There is no order as to costs.

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SELF LEARNING STIMULATING EXERCISES

1. Are WhatsApp Chats admissible as Evidence (Hint: A2Z Infraservices v. Quippo Infrastructure (SC, July 2021)

My Space Inc. v. Super Cassettes Industries Ltd.

Delhi (DB), FAO(OS) 540/2011, C.M. APPL.20174/2011, 13919 & 17996/2015 decided on 23 December, 2016

HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MS. JUSTICE DEEPA SHARMA MR. JUSTICE

S. RAVINDRA BHAT :

1. This is a defendants interlocutory appeal in C.S(OS) 2682/2008 ("the suit")wherein the order, onapplication by the plaintiff("Super Cassettes" or "SCIL")for interim injunction was granted and the appellant ("MySpace") was restrained from hosting on its website all of SCILs works including future works. Its application for vacation of the previously granted *ex parte* interim injunction was dismissed. SCILs suit claimed permanent injunction restraining Myspace from infringing and exploiting its intellectual property, primarily the copyright owned by it in cinematograph films, sound recordings, and literary and musical works and has also claimed damages for such exploitation. This court, by the present judgment is conscious of the caution sounded in regard to interlocutory judgments by the Supreme Court in *International Confederation of Societies of Authors and Composers* v *AdityaPandey*2016 SCC Online 967 (decided: 20 September 2016),that an elaborate reasoning with the footnote that the same are prima facie or tentative is hardly an effective remedy to prevent the imprint of such observations on the human mind that mans the court at different levels. The single judges impugned judgment spanned 132 pages; this court has striven, but not entirely succeeded to cover the entire spectrum of the case, the arguments addressed, the case-law cited and also furnish its reasoning, by this judgment in slightly over a third of that length.

2. SCIL also known as T-Series, started its business in recorded audio and videocassette productionand flourished to become one of India's largest music companies. It now owns and controls copyright in more than 100,000 songs in various languages. It claims to acquires and produce various copyrighted works such as films (cinematograph films), music videos (audio-visual songs), songs (sound recordings), underlying musical works (melody) and literary work (lyrics) and that for acquisition of such work, it invests substantial sums and bears risks. It claims to be the launch-pad for several talented individuals and to have invested significantly to ensure high quality standards in audio-video production. SCILs business is exploitation of its copyrighted works either by sale of audio/ video records or by licensing their use (including for sale, reproduction, sound recording, etc.) and on multiple platforms like satellite television, radio, digital, Internet and mobile platforms. By its program- the TPPL scheme ("T-Series Public Performance Licenses") it grants licenses to all those forming the user-base of its works, including restaurants/ discotheques, TV and radio stations, malls, hotels, public performers etc. The licensees are enabled to play/ use/ perform/ or communicate the respondents works to the public. The revenue garnered by these furthers SCILs business and provides a public platform to

the original artists to showcase their talent. SCIL also enters into licensing agreements with various Internet music and video sharing/ streaming platforms and Internet service providers. This helps it to regulate and protect the use of its intellectual property and also ensures that a balance is maintained between the rights of the owner of copyrighted work and the use of such work in emerging media.

3. Myspace (variously referred to as "defendant" or "appellant") is an Internet Service Provider (ISP) and claims to be an "internet intermediary "and operates the social networking and entertainment website www.myspace.com. Its website was first launched in the United States but it now has global outreach. Its foray to India was sometime in 2007. When a user accesses Myspace from here she/he is automatically redirected to the websites India- centric version. Here users can access music works, entertainment videos, images, cinematograph works etc. without paying any fee. Essentially, Myspace provides a free of cost platform to its users and offers an interactive user-submitted network of friends, personal profiles, blogs, groups and photos, music, video, instant messaging services etc. Mere browsing or accessing content on Myspace does not require registration. If a user chooses to upload content on the website, albeit for free, he/she is required to register with Myspace. User registration is governed by the Myspace.com Terms of Use Agreement and Privacy Policy which oblige the registrant inter alia to respect the intellectual property rights of others and prohibits them from uploading, embedding, posting, emailing, transmitting or otherwise making available any material that infringes any copyright, patent, trademark, trade secret or other proprietary rights of any other person or entity. If MySpace notices that content uploaded on its website is in violation of its user terms, the content can be either removed or the membership of the violator can be terminated at its discretion. MySpaces business model, in addition to acting as a conduit for information, is also to provide automated ancillary services, whereby a limited license is sought from the user to use, modify, delete from, add to, publicly perform, publicly display, reproduce and display the User Generated Content (UGC)so as to facilitate access to user-stored material so that it can be converted into a format which is compatible with the website. Thus, it is through this agreement that it has a limited power to remove content if found violative of its user terms. It claims not to derive monetary gains from its User Generated Content (UGC). While advertisement is its chief source of revenue, the advertisements are not marked directly against the UGCs but are against licensed content through a service known as "Adwords". Here it is clarified by the appellant that while advertisements may exist against a UGC, their functioning is not tied to the content being viewed. Advertisements are generated by an automated process- which is term- centric and not content-centric. It explains that when a user types a search term, the search engine displays results closest to the search term in descending order of relevance- these are "natural results".

4. The referencing service "Adwords" generates advertisements alongside the web content. How thisservice works is that a commercial entity reserves one or more keywords so that as and when search terms are typed by a user which resemble the keyword so registered, an advertisement is generated under the heading "Sponsored Link" which is displayed either on the right hand side of the screen or to the right of the natural results or above the natural results.

MySpace states that the nature of its service, renders it somewhat vulnerable, that despite the user agreement, infringing material could make its way into the website. Being a US based company has in compliance with the US Digital Millennium Copyright Act ("DMCA"), which provides for intermediary laws, installed a notice and take down procedure. Under this regime, a copyright owner can send notice to the appellant that its content is on the website without any authorization and accordingly the appellant will take corrective steps by removing (taking down) the specified content. Other than this, the appellant has developed three safeguard tools on its own cost:

a) Hash[1] Block Filter
b) Take Down Stay Down[2]
c) Rights Management Tool

The hash block filter works by recording the "hash" and creating a "fingerprint" of the file, which has been removed; both of these are unique identifiers for that file. By doing so it is ensured that content which has been removed is not posted again. Thus, as soon as MySpace receives a notice for take down from an owner, it adds the hash of the file to the Hash-Block Filter and the fingerprint to the "Take Down Stay Down tool". The latter too ensures that once an infringing content is taken down it is not uploaded again. Other than this, a Rights Management Tool is available to all copyright owners for free. To use this the content owner has to register with MySpace and create digital fingerprints of its contents by using a software designed by Audible Magic[3]. The content owner then provides the fingerprint to the appellant to block all such content, which have the same fingerprint.

Essentially, if the first 30 seconds of any uploaded content matches the fingerprint provided by the copyright owner, it is blocked automatically. In this way, the appellant has created several mechanisms to ensure that copyrighted material is taken down from its website as soon as it detected.

5. Sometime in January 2008MySpace offered SCIL and other copyright and content owners theoption of registering for its Rights Management Tool. Upon discerning infringing content on Myspaces website SCIL issued a legal notice dated 20.02.2008 to take down (i.e remove) such content towards which it provided a sample list of the webpages which were displaying its content and also claimed damages for infringement. On 12.03.2008, Myspace replied to the notice assuring SCIL that the infringed content identified by it had been taken down and had been placed in the "copyright filter" in order to prevent further infringement. SCIL

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[1]A hash is a word or phrase preceded by a hash sign (#), used on social media sites such as Twitter to identify messages on a specific topic.

[2]A "take down" procedure is one where, upon receipt of notice regarding unauthorized upload of copyrighted material, the host sitewould remove the allegedly infringing file, and also take digital fingerprint of the offending material, then store the information binary numbers uniquely representing the file - in a database, to ensure that it will not be reposted without settling the controversy

[3] A concern which provides automatic media content recognition software and services.

alleged that Myspace was still broadcasting infringing content on its website despite the assurance that such content had been taken down. After this, the parties tried to amicably settle the issue, but were unsuccessful which finally led to the institution of the suit by SCIL. It filed the suit court alleging that MySpaces business model facilitates infringement of its intellectual property rights through a platform in which its works are made available to the public for viewing, distributing and sharing despite no authorization or valid license by it to the host, MySpace. A substantial amount of content is unauthorized audio-video clips and songs the copyright of which exists with several owners including the plaintiff. SCIL claimed that Myspace generates revenue from its website by strategically advertising alongside copyrighted content and that its terms and conditions agreement itself includes a clause which enables MySpace to procure a limited license from the uploader to modify, add to or delete uploaded content. SCIL is also aggrieved by MySpaces refusal to take down the infringing content from its website, by using existing technology, that resulted in continued infringement. SCIL alleges that MySpace also invites and encourages users to upload additional content on its website thereby making the copyrighted work accessible to millions of viewers for free. Such unauthorised works are copied and stored under control by MySpace to facilitate further illegal distribution and sharing.

6. The plaint alleged that the extent of infringement can be understood by the way MySpacefacilitates easy access to information on the website by a) providing identifiers along with the content like the name of the song, producer, genre etc.; b) allowing users to comment on the content which is viewable by other users; and c) creating "tags" on the uploaded content which serve as keywords to enable others to locate content on the site. It has also explained the flow of information on MySpaces website through a schematic diagram. SCIL urged that such freely available copyrighted content, which is otherwise available to users at a charge has made the website immensely popular- more the popularity, higher the traffic on its site which results in more views and consequently more revenue. Every "click" on SCILs content in the Internet generates ` 1 and since this content is available across territorial borders and on multiple devices, the loss of revenue because of MySpaces website is immeasurable. Further, the free and easy availability of content on the website makes it unnecessary for users to legitimately buy CDs or DVDs and has resulted in substantial business as well as revenue loss for SCIL. Therefore, SCIL sought permanently injunction restraining MySpace from reproducing, adapting, distributing, communicating, transmitting, disseminating or displaying on its website any content the copyright of which exists with it and also sought damages. In its application for ad interim injunction SCIL urged that despite sending notices to MySpace and despite its assurance that content had been taken down, they were still available for public viewing. It also impossible, argued SCIL to keep track of its copyrighted content, because it was available the world over on MySpaces website and further fresh material was uploaded each second. SCIL asserted that since the interim injunction would be with respect to its own work MySpace would be free to continue its business with all other content. Furthermore, once the necessary licenses were secured by MySpace, it was free to upload and stream SCILs content on its website. SCIL in para 47 of its application provided a list of its works (movies/ music albums) which were due for release in

order for MySpace to ensure that such works do not find way into its website without proper authorization. It relied on previous orders in *Super Cassettes Industries Ltd*. Vs *Youtube LLC &Ors*(CS (OS) No. 2192/ 2007) and *Super Cassettes Industries Ltd*. Vs *Yahoo Inc. and Anr* (CS (OS) No. 1124/ 2008) where it had claimed and was granted similar interim relief. Citing irreparable loss of revenue because of the continuing infringement the plaintiff sought the interim relief to restrain MySpace, its representatives, agents etc. from reproducing, adapting, distributing, communicating, transmitting, disseminating or displaying on their website www.myspace.com, www.in.myspace.com or any sub-domain thereof or otherwise infringing in any manner the cinematograph films, sound recordings and/or the underlying literary or musical works in which the Plaintiff owns exclusive, valid and subsisting copyright(s) and further temporary injunction to restrain such persons acting on their behalf and in active concert or participation with them or any of them from causing, contributing to, inducing, enabling, facilitating or participating in the infringement of, in any manner the cinematograph films, sound recordings and/or the underlying literary or musical works in which the Plaintiff owns exclusive, valid and subsisting copyright(s) on their website www.myspace.com, www.in.myspace.com or any sub-domain thereof or otherwise;

7. On 19.12.2008, when the suit and application was heard, the Court, while registering the suitpassed the following interim directions:

> " In the meantime... the plaintiff agrees as a gesture of goodwill, to handover the copies of the albums mentioned in para 47 of the plaint to Myspaces, for Myspaces to ensure that the copyright of the plaintiff in any of the aforesaid audio visual, songs, sound recordings and literary and musical works is not communicated to the public through/ on/ via/ the website of the plaintiff (sic) www.myspace.com. SCIL also had to furnish an updated catalogue of its works in which it has a copyright, to Myspaces. MySpace was to endeavour to ensure removal of the infringing contents in which the plaintiff have a copyright, from its aforesaid website and file an affidavit of compliance in this regard before the next date of hearing. It is thus evident, that the ad interim order was made on assumption of MySpaces infringement, by acceptance of SCILs allegations, without any discussion of the prima facie merits of the action.

8. MySpace in its written statement and reply stated that after the order of19.12.2008 was passed, SCIL provided 9 CDs to it containing 11music albums(para 47 of the application). Another disk consisting of an updated catalogue of all SCILs works too was given. So far as the 11 albums were concerned, MySpace sent it to Audible Magic Corporation to create digital fingerprints of all the songs featuring in those albums for the purpose of blocking them and from being uploaded on MySpaces website. MySpace found that the list and catalogue ran into almost 3000 pages with close to 150,000 titles rendering it technologically difficult to comply with the second part of the order. Instead, MySpace stated, that if SCIL were to use the fingerprinting service, for no cost, it would be a more practical and feasible approach to deal with infringement of copyrighted work as this was also the accepted industry practice. MySpace argued that by not

registering for the RMT, the plaintiff was acting illogically, placing the entire liability on MySpace to track each and every work of its and accordingly buying their licenses. MySpace stated that SCIL as content owner could not disclaim its responsibility to monitor online content for possible violations. Simultaneously, MySpace appealed against the second part of the order (in FAO(OS) 31/2009).

9. Whilst it was pending the court granted it liberty to apply under Order 39 Rule 4 for vacation ofthe interim directions made on 19.12.2008. MySpace argued in its appeal that the order to "endeavour to ensure removal..... before the next date of hearing" was impossible to comply as the catalogue consisting SCILs works ran into 10 volumes and it was difficult to discern the works which actually featured on its website. On the other hand SCIL argued in those appellate proceedings that infringing material was being uploaded every moment, rendering it impossible for the plaintiffs to pinpoint exactly which of its content was available on MySpaces website and it was because of these reasons that the entire catalogue was supplied. After hearing both sides and referring to the prayer made in the suit, this Court passed the following order on 06.03.2009 "12. In our view the prayer in the respondent's plaint is general in nature. It does not refer to specific titles in respect of which infringement has taken place. The catalogue when printed out gives the name and title of songs and films in which the plaintiff claims copyright. The plaint does not state that all of the songs/ films have been uploaded on the appellant's website. However, the scope and nature of the plaint is left to be determined in the suit. In light of this fact, we are of the view that as and when the respondent provides details of its songs and films which have been uploaded on the website of the appellant, the appellant shall immediately take remedial measures to remove the same from its website not later than within one week from the date of such communication. In our view, if such requisitions of the respondent are complied with within a week by the appellant, it would constitute sufficient protection of the respondent's rights as an interim measure, and would demonstrate the endeavour of the appellant to comply with the interim order dated 19th December, 2008. We, however, make it clear that nothing said in this order would come in the way of the decision of the learned Single Judge."

10. MySpace also moved an application under Order 39 Rule 4, CPC. It argued that the relief soughtin the suit was open-ended and capable of compliance because it was a near-impossible task for MySpace to identify content which actually belonged to SCIL- there existed a technological constraint to search through millions of videos and identify those works which were owned by the plaintiff. MySpace stated that as an intermediary it did not possess any actual or real knowledge about the content being uploaded nor could it control the kind of content that was being uploaded except to the extent that it could remove that content which was stored in its systems once it received a notice detailing the content as well as it location (URL) from the copyright owner. It explained that once content was uploaded on the Internet, a unique address was generated called the Uniform Resource Locator (URL). Every time the content was shared, a fresh URL was created and since the Internet was a vast space, countless URLs holding the same content could be created. This resulted in a scenario where removing infringing content became

impossible. Therefore, once the original owner of the works intimated MySpace about the content and its location, it would become much easier to remove it.

11. MySpace claimed that once it received notice dated 20.02.2008 for removing the content itpromptly complied and that it was misrepresentation on part of SCIL before the court when it complained about non-compliance by MySpace in removing infringed works. For instance, SCIL had asked MySpace to remove its work titled Aajkiraat. After MySpace removed and blocked the song, it conducted a random search of the song and found that a remix (combination of two songs) of aajkiraat whose duration was only 01.15 minutes came up in the search. MySpace claimed that existing technological \tools only combed out songs which were an exact match to the one provided by the copyright owner; thus, songs which were just snippets or of poor quality or mashups and remixes could not be filtered out. Similarly, if the song was uploaded by a third party who had bought the license from a copyright owner, then by removing the content MySpace would be violating the users right to use the works.

12. In the hearing of the suit, for interim orders, SCIL argued that MySpace, by using its contentwithout licence or any authority committed infringing activities under Section 51(a)(i) and 51(a)(ii) of the Copyright Act (hereafter "the Act").It argued that the moment MySpace communicated SCILs works to the public without permission and which consequently resulted in loss of revenue, the matter became a clear case of violation under Section 51(a)(i). It was further argued that MySpace was generating revenue by creating a website for users to upload unauthorized content; it was making profit by providing a "space" as contemplated under Section 51(a)(ii) and consequently MySpace was liable under the said provision too. In order to clarify its stance, SCIL argued that "place" under section 51(a)(ii) was to include not just a physical or tangible space but an intangible space too like the internet and that in the present case, the exception to Section 51(a)(ii) would not be invited as MySpace possessed the knowledge as well as had reasons to believe that the content being uploaded was without authorization from the original owner; this would be evident from the fact that all the technological tools were created only because MySpace had a reasonable apprehension of copyright violation on its website. SCIL asserted that the US Digital Millennium Copyright Act (DMCA) provisions did not apply, as the laws of this country i.e. the Act would apply. It was argued that Section 14 and 51 of the Act had to be read together to prove primary infringement of the intermediary. MySpace, by providing a space were actually authorizing users to make content available to millions of other users. Relying on several precedents, it was urged that MySpace had committed copyright infringement. The safeguard tools adopted by it were inadequate because, still rampant violation took place. If SCIL were to intimate MySpace, about a violation- so it was urged, especially in cases of fresh releases where maximum revenue is generated within the first few days of the release, then by the time it took down the content, the work would have been communicated to a large audience resulting in substantial revenue loss to SCIL.

13. MySpace on the other hand argued that no injunction was warranted in the circumstances of thecase it claimed to be only an intermediary and even otherwise since registration was free, no revenue was being generated because of the works of the users. As for "Adwords" it was

argued that these were nothing more than hints. To illustrate it was stated if a user were to search for Punjaban, a song would appear in the results and along with it an advertisement, like Punjabi Matrimonial would pop up automatically because of the similarity in the keyword. It was emphasized that thousands of videos were uploaded each day to an audience of millions and the sheer volume of data in question made it impossible for MySpace to manually monitor uploaded content for infringement. MySpace tried to make a distinction between infringement happening in the real/ physical world and that happening in cyberspace/ virtual world. MySpace stated that to appreciate the nature of online content vis-à-vis its legal implications, international covenants- WIPO Copyright Treaty (WCT) and WIPO Performance and Phonogram Treaty (WPPT)had to be taken into account. It quoted Article 8 of the WIPO Copyright Treaty to explain that its role as a facilitator did not invite liability associated with infringement. MySpace also stated that by creating a website for users to share their content it was only acting as an "intermediary", under the Information Technology Act ("IT Act"). It argued that the provisions of the IT Act and Act had to be read harmoniously. As a US based company, it took several remedial measures in compliance with the DMCA. MySpace argued that not reading the IT Act and Act in a complimentary manner would lead to an absurd situation where an intermediary would be absolved from liability under the IT Act but would still invite strict liability under the Act; surely this was not the intention of the legislation as the entire reason for enacting Section 79 of the IT Act was to shield intermediaries from liability invited by primary infringers as long as the intermediary fulfils the conditions set out in the provision including exercise of due diligence and lack of actual knowledge.

14. MySpace highlighted that SCIL did not claim relief against any specific infringed work and hadrequired it to remove all its works- both current as well as future works.

The impossibility of acting on such demand came in when a)MySpace was required to peruse through the current works, which runs into more than 100,000 titles and b) MySpace had to monitor of every future work being uploaded on the Internet. In the latter instance, another issue arose, i.e liability for infringement of works not in existence and were to be uploaded in the future could not be assumed or fastened. The *quia timet* relief sought by the plaintiff was impermissible in law. Lastly, it was argued that MySpace had several safeguard measures in place to track and remove infringing content, which included the Rights Management Tool, Take Down Stay Down tool, and the Hash Block Filter. All SCIL had to do was register with MySpace to take benefit of these technologies. In the absence of the plaintiff taking such recourse, the entire burden of liability could not have been transferred to the intermediary alone.

15. After hearing arguments of both the sides, the learned Single Judge made a detailed and lengthyanalysis to ascertain whether a prima facie case for interim injunction was made out. Proceeding first with the history of internet technology and the consequent evolution of law to cope up with such technological advancements, the impugned judgment analysed relevant Copyright provisions under Sections 13, 14 and 51 and was of the opinion that under Section 51(a)(i), one is liable for infringement under two circumstances a) when he/she does those acts which the owner of copyright is conferred by the act to do, without the latters authority or b)

when a person permits any place for profit for infringement of copyright. Interpreting the word "any place" under Section 51(a)(ii), the learned Single Judge held that the terminology would include both physical and virtual place. The impugned judgment contrasted provisions of Indian copyright law from the UK CDPA Act, 1988 and the repealed UK Copyright Act 1956, and held that while the relevant provision under the UK Act of 1956 used the words "place of public entertainment", the Indian Act deliberately used any place to cover all places where infringement occurs without not restricting it to a class of place. It was noted that "apparatus" occurred in the UK CDPA Act, whereas Parliament in India had not explained the scope of "any place" and kept its import wide, to encompass technological developments including the creation of a new space- i.e. web space. The impugned judgment relied upon *Comdel Commodities Ltd*. Vs *Siporex Trade SA*, (1990) 2 All ER 552, which ruled that when new conditions arise in the society after the enactment of a statute, there cannot be an a priori assumption that the provisions of the Act would not apply.

16. The learned Single Judge also held that MySpace had created a "space" and allowed uploading ofcontent by users, which was saved it in its database and collected a limited license to add, modify and delete content for that purpose. The placement of advertisements alongside uploaded content, resulted in profits which prima facie led to "permitting for profit any place" under Section 51(a)(ii). The single judge surmised that the kind of advertisement displayed before a movie clip - keeping the user busy till the actual content played which required MySpaces complicity. MySpaces post infringement safeguards, under the Sections51(a)(ii) and 55 of the Act could only assist in reduction of damages. An infringers liability was not mitigated because safeguard tools were applied or the party had exercised due diligence post infringement. MySpace was aware of possible infringement, for which it created safeguard tools. It was held that provisions of the DMCA were of no help for decision because Indian laws contained no provision to balance an infringers right with a content owners. Creation of safeguard tools on apprehension of infringement did not preclude a finding of knowledge of infringement. The single Judge held that the DMCA and the Indian Copyright Act were not pari materia because there was no safe harbor in the Indian Act.

17. The Single Judge held that MySpaces refuge and claim under Section 79 of the IT Act, as safeharbor for intermediary liability was unfounded as Section 81 has overriding effect, contains a proviso- excepting and thus protecting copyright and patent owners rights. It was also held that MySpace was not without knowledge of SCILs works on its website because it had been provided an entire list of such works and had notified MySpace repeatedly about infringements. Knowledge was deduced by the limited license by MySpace when the content was uploaded, then saved on its server to enable its programmers to modify content and insert advertisements, company logos etc. to the video clips. Moreover an India-centric operational office, which modified works and inserted India centric advertisements into the videos, strengthened the inference of MySpaces knowledge and liability for infringement under Section 51(a)(ii). Section 14 of the Act, compels as a precondition for use of copyrighted works, "authorization" by the owner; has a wide import, which meant that MySpace should countenanced uploading of

infringing works, this was distinguishable from permitting a place for profit under Section 51(a)(ii). The single judge was of the view that no prima facie case of copyright violation was made out under Section 51(a)(i). The Single Judge required further proof, at the time of trial, to establish infringement. It was held that in the absence of any proof that MySpace did wilfully flouted the Division Bench order of 06.03.2009 or that despite receiving notice of the SCILs rights in particular works, it had not taken down the content, then there was infringement. MySpaces argument that it was an intermediary under Section 79 of the IT Act was not agreed to because, the single judge held that it did not provide access to a communication system to store, host or transmit third party information but also taking a limited license. Therefore, it transgressed the limited role an intermediary's limited role under Section 79(2)(a). Modification of content, that was uploaded, meant that it did not satisfy the conditions prescribed under Section 79(2(b). He also negated MySpaces contention to read harmoniously the provisions of the IT Act with that of the Act, ruling that doing so would lead to a situation unforeseen by the legislature. He held that MySpaces interpretation would lead to excusing liability under Section 79 and a copyright owner, despite proviso to Section 81 would be remediless. The judgment felt that proviso to Section 81 meant that the Copyright Act is a complete code of rights and remedies.

18. The impugned judgment held that MySpace could not use volume of titles as an excuse to shrugits responsibilities. To this end, the Single Judge provided possible solutions to MySpace inasmuch as it could, at the stage of modification, enquire about the works including its title and ownership and before directly making it available to the public, run a preliminary background check. The Single Judge granted *quia timet* interim relief, rejecting MySpaces argument stating that it was not limited to tortuous liability but also in cases of future wrongs in copyright cases. MySpace had stated that to trace out ownership in each and every work would be next to impossible. The court rejected this argued and held MySpace responsible to weed out unauthorized uploads and granted a prohibitoryorder- i.e. requiring MySpace to issue prior notice to the actual owners of the content to take preventive action before the infringement even takes place. The Single Judge relied upon *Garware Plastics and Polyester Ltd. and Ors Vs. Telelink and Ors*; AIR 1989 Bom 331 to reject MySpaces contention regarding difficulty to segregate infringing from non-infringing material. The impugned judgment ruled that SCIL would suffer irreparable loss if injunction were denied; it restrained MySpace and its agents/representatives from modifying SCILs works by adding advertisements, logos or sponsorships thereto or earning profits consequent to uploading matter on its websites or thereby make them available to the public "without making endeavours to enquire the ownership of the plaintiff (as at that stage of modification, MySpace's have all means to enquire about the same) and thereby making them available to the public either by displaying (or playing or exhibition) of on the website or allowing the downloading from their website or otherwise of the said works in the modified form which will lead to permitting the place for profit within the meaning of Section 51 (a) (ii) of the Act and causes infringement of copyright of the plaintiff. An injunction in relation to SCILs future works to be uploaded by the users other than those which are mentioned in (a) and to

delete the works of the plaintiff as and when the plaintiff provides the details of its songs and films which have been uploaded on the website of MySpace's, MySpace's shall immediately take remedial measures to remove the same from its website not later than one week from the date of such communication. was given.

Appellant/ MySpace's arguments

19. MySpace urges that a substantial question of public interest has arisen with respect to the rightsand liabilities of service providers, social media websites and other Internet intermediaries. It is argued that every time a copyright violation takes place, fixing liability on intermediaries-who merely provide an information-sharing platform, results in a dangerous trend. The manner of Internet functioning would be under threat. Elaborating it is urged that information dissemination over the Internet is different from(and in a "non- material" fashion) as compared to information dispersion in the material world. Therefore, application of Copyright laws should keep in mind this information dissemination over the Internet. Reference is made to two treaties, the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty. In India, after the 2009 amendment to the IT Act, it cannot be said that the Parliament still fix liability on intermediaries even if they satisfy the conditions listed under Section 79 of the Act. Under the current legal scheme, MySpace cannot be held liable vicariously for the acts of others. MySpace says that its users are to respect others copyrights, evident from its "User Agreement and Privacy Policy". If a user accepts the agreement, the onus not to upload copyrighted works is on the user.

20. MySpace also urges that the single judge erred as the relief granted is open, general andincapable of compliance. It is impossible to scan through millions of videos or audio files to remove which SCIL claims are copyrighted. Its catalogue has more than 150,000 songs and no prima facie case was made to show that such content was uploaded on MySpaces website. The direction to remove SCILs future works i.e. works for which no copyright violation was shown; it is urged this is opposed to Section 51(a)(ii) which refers to "the work" implying a existing specific work not referring to or all or future works. The impugned order is far-reaching and erroneous. MySpace relies on Time Warner Entertainment Company, L.Cpl. & Others Vs. RPG Netcom 2007 (34) PTC 668 which held that a vague injunction order with respect to future works is unwarranted. Also, it is impossible for the Court to monitor implementation of the order in respect to content, not in existence. MySpace states that the Division Bench order dated 06.03.2009 is workable as it reckons notice and take down measures as practicable. MySpace urges that existing technology enables content removal only when a content owner gives to notice of infringing works. MySpace argues to keeping in place several safeguard tools, described earlier, to ensure that copyright of an individual is respected. The single Judge mandated it to take pre-infringement measures, i.e. go through each work for infringement before communicating it to the public. This is incapable of performance. MySpace besides may violate a content owners right to fair use. MySpace cannot possibly know the nature of rights, which an up-loader has; the only solution is for SCIL to notify each of its works. Reliance is placed on the judgement in *Stephanie Lenz* Vs *Universal Music*572 F.Supp.2d 1150 (N.D. Cal. 2008) where it

was held that an obligation was on copyright owner to consider fair use before sending take down notification and failure to do so raised a triable issue as to whether the owner acted with good faith before sending such notification.

21. The Division Bench order dated 06.03.2009 is relied urging that it is workable since it reckonsnotice and take down measure as a practicable arrangement. MySpace urges that in existing technology, content removal is feasible if content owner gives to notice of the infringing works. MySpace submits to keeping in place several safeguard tools, which have been discussed above, to ensure that copyright of an individual is respected. However, the Single Judge has discarded this effort on the ground that the Indian law does not absolve liability of an intermediary merely because it has safeguard provisions. The impugned judgment failed to appreciate giving effect to vague directions, would result in MySpace shutting down its India operations; it would in effect have to geo-block its website in India, causing irreparable business and financial loss. It relies on the decision of a US Court in *Religious Technology Center* Vs. Netcom Online Communication Services Inc. 907 F. Supp. 1361 (1995) where the Court had upheld protection of an internet intermediary from liability. The Court was sensitive to the fact that holding internet intermediaries liable for all activities that cannot be reasonably deterred would be unworkable; as billions of bits of data stream through the Internet it would be practically impossible to sift infringing information from non-infringing ones. Counsel for MySpace also relied on UMG Recordings Inc., et al Vs. Veoh Networks, Inc., et al.,620 F.Supp.2d 1081, 1092 wherein the intermediary Veoh which had created a web space for users to upload, stream and download videos which were automatically modified into "flash format", was granted immunity from liability by application of S 512(c) of the DMCA (safe harbor provisions). Reliance was also placed on Scarlet Extended SA Vs. Societe Beige Des Auteurs, Compositeurs Et EditeuresECLI:EU:C:2011:771; Tiffany (NJ) Inc. and Tiffany And Company Vs EBay Inc.600 F.3d 93; and the decision of the Amsterdam Court of Appeal in*BUMA and Stemra Vs. Kazaa Amsterdam*, Court of Appeal, 4th Three-Judge Civil Section, 28 March 2002, to assert the above proposition. Society of Composers, Authors and Music Publishers of Canada Vs. Canadian Assn. of Internet Providers; 2004 SCC 45 has been relied upon to elucidate the protection granted to intermediaries from liability in case of copyrighted content under the Canadian law.

22. Counsel for MySpace argues that the Copyright Act forbids anyone to "permit" for profitcommunication of a work and that to grant such "permission", some minimum control should be shown.This control has to be in respect of works complained of. Reliance is placed on *Performing Right Society Vs. Ciryl Theatrical Syndicate Ltd*, (1924) 1 K.B.1, which held that exercise of control specific knowledge of performance preconditions conclusion of permission. MySpace asserts to not exercising any control or possessing knowledge of the infringed works. MySpace complains that the impugned judgment creates a legally baseless artificial distinction as it ignores the exception under Section 51 (2)(ii)- that excludes intermediary liability if it is unaware or has no reasonable belief that the works communicated to the public infringe copyright. That exception, it is urged contemplates "authorization" which is permitting a place for

communicating copyrighted works. It is argued also that the amendment to the Copyright Act, w.e.f 21.06.2012 took note of the challenges faced by intermediaries despite following due diligence procedures. Reference is made to Section 52(1)(b), which provides absolute immunity to intermediaries, who are the backbone of the Internet, i.e. whose functions are core to the working of the Internet like telecommunication carriers and Internet service providers (ISPs). On the other hand Section 52(1)(c) provides a limited immunity to the intermediary. This immunity is available to intermediaries such as search engines, social media websites etc. so long as they have no reasonable belief that the content hosted infringes copyright.

MySpace refers to its use of safeguard tools, and says that the erroneous opinion of the single Judge such use, constituted "actual knowledge". Here, MySpace contends that it is on the basis of "general knowledge" of infringement that the safeguard tools were introduced and this could not be the test for attaching secondary liability, when the accepted standard worldwide is "actual knowledge" and cited the "red flag" test which has evolved under the US law under Section 512 of the DMCA; in fact even in Indian law, under the IT Act, Section 79(3) requires exercise of due diligence, and employing safe guard tools was in furtherance of that requirement. Reference is also made to the Information Technology Intermediaries Guidelines issued on 13.04.2011 and the subsequent clarification of 18.03.2013 (under Section 79) to assert that an intermediary was required to respond to a notice from a content owner within 36 hours of receiving such notice and comply by taking down the content within one month. This made it certain enough that safe harbor provisions existed even with respect to copyright act. Reliance is placed on *Viacom International Vs. YouTube Inc*.No. 07 Civ. 2103 (LLS) to show that general knowledge/ awareness is not enough to place liability on an intermediary. The intermediary should be "actually aware" of infringing content; further the onus of pointing out and policing infringing content is on the content owner and not on the intermediary and once the owner sends out notice or a "red flag" for taking down content, the duty is cast on the intermediary to remove it, failing which it would attract liability.

23. MySpace argues that Section 81 has an overriding effect and that the learned single judge erredin not appreciating that the proviso to the section only clarifies that the IT Act shall not prevent a copyright owner from exercising its rights under the Copyright Act. If the legislature intended to make an exception to the defence guaranteed under Section 79, a proviso would have been made within that section. Its omission means that Section 79 continues to exempt intermediaries such as the appellant as long as they satisfied the conditions mentioned therein.

24. MySpace also argues, additionally, that Section 52 (1)(b) and (c) provide it immunity fromliability because transient storage for the facilitation of sharing is permissible and that a upon receipt of intimation that such storage has infringing content, is the intermediary responsible to remove it; in case within a specified period, the copyright owner does not secure an order from the court, such content can continue to be retained and facilitated in the intermediary’s website. This amendment to the Act, emphasizes MySpace, supports its argument that without specific knowledge on its part, there cannot be secondary liability based on deemed or attributed knowledge.

Intervenor's Arguments

25. An intervenors application C.M. No 3095/ 2012 was moved by Centre for Internet and Society,an independent, non-profit research organisation, accredited as a permanent observer with WIPO which works in the field of internet research and society. On 22.05.2014, this Court, conscious of the nature of the issue and its implication on a substantial portion of the public, granted the intervenor liberty to assist the Court without impleading it as a party. Similarly another intervenor Flipkart Internet Pvt Ltd has also submitted several propositions on the IT Act and the Copyright Act along with various international as well as Indian judicial propositions on safe harbor provisions as well intermediary liability.

Arguments of plaintiff/SCIL

26. SCIL contends that MySpace is not an ISP, but a resource centre accessible through an ISP.Comparing MySpace with a mall owner, SCIL claims that it has both knowledge as well control over the content shown, on its website in the manner a mall owner exercises control over his premises. SCIL urges that Myspace is guilty of both direct as well as contributory infringement. It urges that MySpace copies the works of the respondent and creates a platform to share and download the content; MySpace solicits users to contribute content which may be infringing as well as non-infringing which it stores on its servers and then itself modifies and duplicates the content after which it places advertisements strategically to gain monetary benefits. SCIL argues that MySpace copies and stores content in its own servers and thereby commits direct infringement under Section 51(a)(i) of the Act. Further, it also infringes under Section 51(a)(ii) when it permits use of its "space" for profit by communicating to the public, SCILs works. SCIL relied upon the decision of this Court in *Super cassette Industries Vs Nirulas Corner House (P) Ltd*. 148 (2008) DLT 487 where this court found MySpace hotel liable under Section 51(a)(ii) of the Copyright Act when it had set up television sets broadcasting songs and videos belonging to the plaintiff in its rooms for guests to view. The court observed that prima facie balance of convenience lay in granting relief of injunction to the plaintiff.

27. SCIL argued that several of its rights were violated, demonstrating it visually by a chart. It urgesthat under Section 51(a)(ii), once a copyright owner establishes that an intermediary has permitted its space for communicating infringing works to the public, the burden is upon its ignorance or lack of reasonable grounds to believe that infringing content was uploaded on its website. The language of Section 51(a)(ii) shows that an infringers lack of knowledge about infringement is irrelevant. MySpace had knowledge of continuing infringement despite notice-that was sufficient to hold its reasonable grounds of belief about infringement on its website. Reliance was placed on *Sega Enterprises Ltd. Vs MAPHIA*, 857 F. Supp. 679, 683 (N.D. Cal. 1994) to say that where there is knowledge, encouragement, direction and provision to enable infringement, the website is liable regardless of its lack of knowledge of exact location of the files. The exclusive right to exploitation, adaptation, storage including and especially electronic storage, reproduction and communication to the public was now violated because of MySpace's acts. Its inaction to take down offending content resulted in infringement.

28. SCIL argues that to claim exception sought by MySpace under Section 52(1)(b) and (c), it shouldsatisfy the criteria spelt out. It asserts that the storage referred to in those provisions are "transient" storage, such as cached data and that stored temporarily to facilitate online functions, whereas MySpace permanently stores data on its site to make it available to its audience. According to SCIL, both Section 52(1)(b) and 52(1)(c) provide exemption in case of transient and incidental storage for electronic communication and electronic access to links. Transient storage should be of lawful content. Thus the owner should duly authorize the primary work; any transient storage then is exempt under Section 52(1)(b) and 52(1)(c). SCIL illustrates this assertion by stating that when cricket matches or songs are broadcast or streamed online on websites such as YouTube, licensing is an essential precondition. A streaming license may extend to content downloading activity. However, at times cached data is created automatically which temporarily stores data on to the servers to facilitate streaming. This kind of cached data is exempted under the amended provisions and not the kind that the appellant wilfully stores, i.e. entire content permanently.

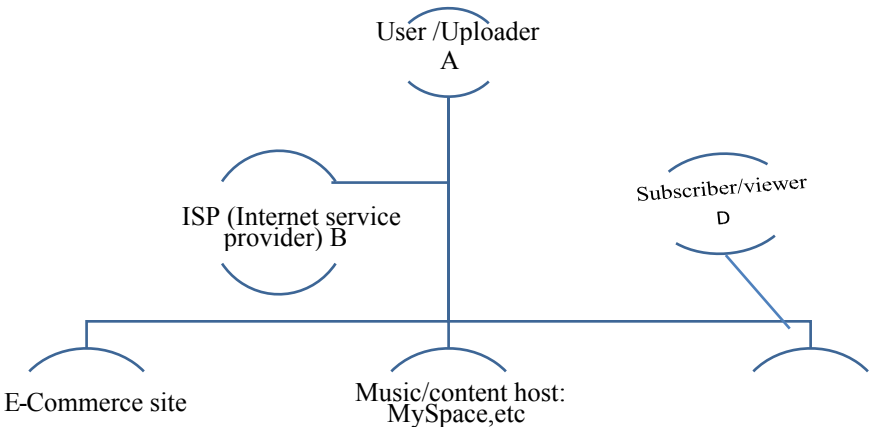
29. SCIL relied on the Standing Committee report on copyright amendment, which had excludedonly ISPs from absolute liability. Websites such as MySpace, that host content are protected only if they are unaware of infringing content. Thus, intermediaries except ISPs were not completely immune from copyright liability. It is urged that MySpaces reliance on Section 79 of the IT Act is meritless. MySpace does not exercise due diligence and the moment it takes the license to modify uploaded works, it possesses knowledge about the infringing nature. MySpace is has to obtain the license from the original owner and not from the infringer. Furthermore, the proviso to Section 81clearly states that the rights of copyright and patent owners would not in any way be curtailed by the provisions of the IT Act. Arguendo, even if it were assumed that MySpace could claim safe harbor under Section 79, it does not fulfil the criteria enlisted in the provision. It would not fall under Section 79(1) because that deals with information held by an intermediary in its capacity as an intermediary. If an intermediary actively begins participation in communicating such content and does not comply with the requirements of Section 79(2) and 79(3), the safe harbor under Section 79(1) is inapplicable. Myspace initiates transmission, negating Section 79(2)(b), by setting up a website enabling users to transmit information. SCIL stresses that the term "initiates" is to be interpreted meaningfully. MySpace not only created the website, but also tracks and monitors activity what takes place on its web-space. Similarly, Section 79(2)(c) is inapplicable as due diligence required to be exercised under that section was not fulfilled. Neither did Myspace remove content SCIL asked it to, nor has did it terminate the subscription of an individual user who had uploaded infringing content. Similarly MySpace is in contravention of Section 79(3)(a) and (b) when it aids and abets copyright infringement and places the onus on the respondent to supply it with details of each of its works available on SCILs website. Notice is brought to the fact that several other service providers, due to lack of technology to identify and remove copyrighted works have entered into voluntary license schemes to legally distribute copyrighted works.

30. Emphasis is placed on Section 16 of the Copyright Act, which deems the Act to be a completecode, and thus any exemption or remedy would have to be found within the Copyright Act itself. MySpaces reliance on DMCA provisions is misplaced as the intent of that Act is not overriding copyrights. On a combined reading of Section 79 (safe harbor) and Section 81 the natural conclusion is that the Act has to be referred to even in the case of infringement by intermediaries and safe harbor provisions are accordingly limited. No harmonious construction of Section 79 and 81 along with the provisions of the Copyright Act is possible, as the learned Single Judge rightly observed, because the objective sought under the Copyright Act is independent of the protection guaranteed to an intermediary under Section 79 and this bridge is created by the proviso to Section 81. If any remedy exists for the appellant, then that has to be sought from the Act. SCIL also contests that the impugned order is un-implementable and relies upon the Canadian decision in *Spectravest Vs Aperknit*FSR [1988] 161where the High Court of Justice- Chancery Division held that in cases of intellectual property infringement, injunctions should be given not only to restrain current infringing activities which can be described with certainty but also restrain future/ fresh infringement which may not always be described exactly. In Spectravest (supra) it was observed that those who were infringing would find new and ingenuous ways to infringe and injunction orders cannot be "cabined or confined". SCIL also relied on *Pacific and Southern Co. Inc Vs Duncan*744 f.2d 1490 (1984). Here the defendant, a news company was broadcasting works, the copyright of which existed with the plaintiff. The United States 11th Circuit Court of Appeals held that a small damage recovery would be made everytime the plaintiff could identify the works infringing works. It was observed that where in cases there has been a past infringement and there is likelihood of future infringement, the Court must exercise discretion and grant injunction in respect of copyrighted works, whichmay have not necessarily been registered. Reliance was also placed on the 1994 judgment of the United States District Court in SEGA Enterprises (supra)where the Court granted injunction to the plaintiff which designed and created computer games and owned copyright in it against the defendant which ran an electronic bulletin board, which allowed for electronic storage, uploading and downloading of copyrighted work by third party users. Lastly, SCIL relied on *Garware Plastics* (supra) to urge that that if MySpace does not remove the infringing works and if the order of the single judge is not upheld then it would suffer severe financial losses despite the balance of convenience lying in its favour whereas no such hardship would be faced by MySpace which still had the option of obtaining appropriate licenses from the respondent to continue streaming its works. SCIL argues that Section 52 (1)(b) and (c) in fact reinforce its argument that primary liability occurs in the first instance when MySpace enables its users to post infringing content and that the exception of Section 52 would be considered if at all, on case to case basis. However, as to the content itself, liability cannot be escaped.

Analysis and Conclusions

31. This Court, at the outset, notices that issues, which arise in this appeal, have far reachingimplications to the parties as well as the general public at large, given the fact that world over a conflicting opinion prevails on intermediary liability. The court is equally conscious that

this judgment should not preclude a full dress argument on these issues after evidence as to the extent of infringement alleged, the proportion of such infringement to the total content hosted by MySpace, and the proportion of advertisement and other revenue attributable to infringed works (as opposed to the entire revenue generated including non-infringed works) is clear. Therefore, the discussion proposed in this judgement would be to the extent possible, the barest minimum and decide on the soundness or feasibility of the interim order at this stage of the suit and centre round three broad questions: first whether MySpace could be said to have knowledge of infringement as to attract Section 51(a)(ii) and consequent liability; Second, does proviso to Section 81 override the "safe harbor" granted to intermediaries under Section 79 of the IT Act third, possibility of harmonious reading of Sections 79 and 81 of the IT Act and Section 51 of the Copyright Act. Before proceeding further, the nature of the dispute in respect of internet transactions, is explained through a diagram, extracted below:



Search engine (e.g. Google),
E-newspaper/magazine etc

C 1 C 2 C 3

The "user" at the top of the figure A is visitor of MySpace, who uploads content. The content that he uploads is available through the ISP (B), in C2- which is the website/platform created by MySpace At any given point of time, there can be potentially thousands: possibly hundreds of thousands of subscriber/viewers (D). If an original song or video is posted by its creator and gains popularity, the number of "hits"[4]would increase. The Internet Service Provider is the service provider.[5] The three figures (C1, C2 and C3) at the end of the figure are the intermediaries who host, or facilitate hosting of content.

Re Point No. 1:

32. MySpace argues that several million videos are uploaded on its website and it is not possible forit to monitor all data hosted on its website. Both under the Copyright Act and the IT Act, "actual" knowledge and not just suspicion is essential to fasten liability. Merely apprehension of unlawful content on the website and embargos placed through user agreements do imply its knowledge of infringement. The provision for safeguard devices (the Rights Management Tool, Notice and Take Down provision, Take Down Stay Down tool and Hash Block Filter) does not imply actual knowledge of infringement. MySpace is aggrieved by the observation that it permitted use of its place for profit and had knowledge of copyright violations and argues that video modification or for advertisement insertion was through automated processes and did not suffer manual interference. The limited license obtained was to perform this automated task of modifying and inserting advertisements to the video: it was from the content up-loader- not SCIL. All these show that it did not possess "actual knowledge" nor have "reason to believe" that uploaded content infringed SCILs rights. Clause 6.1 of MySpaces agreement with its users is relied on to say that it never claims any ownership of content; it clearly stated also that the entity which posts on MySpaces portal is with understanding that the limited license given to it is for all purposes and that the content owner would continue having rights and by posting Content on, through or in connection with the Myspace Services only limited license is granted to MySpace to display, reproduce, transmit, publicly perform it. SCIL, however, imputes knowledge to MySpace urging that its business model depends on inviting people to share and upload content on its website and then strategically inserting advertisements next to content, contributing to its revenue. Users do not profit from uploading. It is argued that MySpace stores permanently such works on its servers and placing advertisements and modifying data it proves that MySpace can control data shared on its website. It argues exercise of such control an element of knowledge

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[4] Denoting the number of times that song or video is viewed by those visiting the website it to hear or view it.

[5]ISP refers to a company that provides Internet services, including personal and business access to the Internet. For a monthly fee, the service provider usually provides a software package, password, username and phone number access.

surely exists. By providing a free platform for users to upload/ download/ stream/ view videos along with other interactive features like commenting and "liking" videos the appellant induces users to an attractive website and unlawfully enriches itself. In the circumstances, the learned Single Judge was correct in holding that the appellant had knowledge that the content on its website was infringing. SCIL states that it notified that its lists of titles owned; MySpace also dealt previously with SCIL and was therefore aware that songs likely to be uploaded did not in likelihood belong to its users or those uploading them. The existence of an India office with India centric operations, which facilitate alteration of content by insertion of advertisements etc. points to knowledge.

33. Before going further on the issue of knowledge, it would be relevant to extract Section 51, whichdeals with infringement.

51. When copyright infringed. -Copyright in a work shall be deemed to be infringed-

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of thecopyright, or

(ii) permits for profit any place to be used for the communication of the work to the public wheresuch communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) when any person-

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire,or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the ownerof the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into India, any infringing copies of the work.

Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation.- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".

34. The issue here is secondary infringement i.e. Section 51(a)(ii). On the issue of primaryinfringement covered under Section 51(a)(i), the Single Judge stated that further evidence was needed to show if MySpace directly infringed its rights. Since the subject matter of the appeal is only limited to Section 51(a)(ii), this Court shall restrict its analysis to only the said provision. Section 51(a)(ii), in its first part states that when anyone permits for profit any place for communication of copyrighted work to the public he/she is liable for infringement. MySpace owns a website where third party users upload and view content. In a sense the appellant is provider of a place, albeit virtual, to communicate various kinds of works. MySpace does enter

into a contract with users, but for a limited purpose. The contract does not specify the kind of works users would upload. Users are free to upload whatever content they wish to, without specifically informing MySpace about it. It provides the space freely, and users choose their content for communicating it to the public. What MySpace does is insertion of advertisements through automated processes without going through the content itself. Thus, it cannot be doubted that MySpace permits a place for profit as it definitely generates revenue.

35. Section 51(a)(ii) contains, in the second part, an exception, i.e of lack of knowledge or reasonablebelief. Where a party is unaware and had no reasonable ground for believing that the works so communicated are infringing works, then, the first part, (casting liability would be inapplicable). The Single Judge held that a general awareness is sufficient, instead of specific knowledge to impute knowledge. The provision of safeguard tools and as clauses in the user agreement, concluded the single judge disclosed MySpaces general awareness that works uploaded (on its website) were infringing. This Court does not agree with the "knowledge" test applied by the Single Judge. Simply put, that test overlooks that unlike "real" space, in a virtual world, where millions of videos are uploaded daily, it is impossible under available technology standards to identify the streaming content, which actually infringes. Knowledge has a definite connotation, i.e a consciousness or awareness and not mere possibility or suspicion of something likely. The nature of the Internet media is such that the interpretation of knowledge cannot be the same as that used for a physical premise.

36. Copinger and Skone James on Copyright, 16th Edition, Vol 1classifies "knowledge"as both actualknowledge and constructive knowledge. Actual knowledge would connote, facts such as whether the infringer turns a blind eye or adopts as a "Nelsonian" outlook showing failure to take steps to inquire into the kind of work it permits; this is to be seen in the context of digital media. A general awareness or apprehension that a work may be violative of copyright here would not pass the knowledge test. This rule when applied to an Internet service provider attains a different connotation. In the present case, where the system stores millions of videos, can MySpace be attributed with specific knowledge of infringement as to attract content responsibility? To say so would require MySpace - to know all owners of all works, and not just that of SCIL- a possibilitynot contemplated by the Copyright Act.A further aspect to this exception is "reason to believe" or what is referred to as constructive knowledge. Mere suspicion is insufficient; and similarly an apprehension is not enough. Here again would it be reasonable to expect a defendant/content host to sift through millions of videos or audio files to form a reasonable belief that certain specific data infringes copyright of someone? The requirement is to give specific information to the content host or the website(MySpace) that infringement occurs with respect to the specific work. A general or vague description of the works would be insufficient as this then leaves room for MySpace to rely guesswork as to what content has to be removed. Therefore, the onus is upon the plaintiff to give detailed description of its specific works, which are infringed to enable the web host to identify them. SCILs argument here that insertion of advertisements or modification of content by MySpace disclosed its knowledge- is unpersuasive. MySpace consistently states that the advertisement insertions etc.are through

automated processes-which has not been seriously disputed. The modification made is to the format of the video or audio file and not to its content. The automated process does not apparently involve MySpaces actual control. The extent of automation or for that matter the amount of manual/ human control can be discerned only at trial once evidence is led to show how the automatic process works and to what extent modifications are made and controlled. In the absence of such evidence, at a prima facie level this Court is of the opinion that if the modification/ addition is entirely through an automatic process without any human intervention then knowledge cannot be attributed to MySpace.

37. The question of deemed or constructive notice, in the opinion of the court, cannot be on the basisof any generalization, without inquiry into circumstances: it is a fact dependent exercise. For instance, in the context of even a "deemed" notice about existence of encumbrance by way of statutory charge, under Section 3 of the Transfer of Property Act, the Supreme Court held that There is no principle of law imputing, to all intending purchasers of property in municipal areas where municipal taxes are a charge on the property, constructive knowledge of the existence of such municipal taxes and of the reasonable possibility of those taxes being in arrears. It is a question of fact or a mixed question of fact and law depending on the facts and circumstances of the case.(Cf. *Ahmedabad Municipal Corporation v Haji Abdulgafur Haji Hussenbhai*AIR 1971 SC 1201). Likewise, it was emphasized in a later decision that A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. (*R.K. Mohammed Ubaidullah v Hajee C. Abdul Wahab*2000 (6) SCC
402). Knowledge is to be therefore placed in pragmatically in the context of someone's awareness (i.e a human agency); a modification on the technical side by use of software wouldper se not constitute knowledge. Nevertheless, if the software requires some kind of approval or authorization from a person or authority as opposed to a computer system then knowledge can be attributed. This however has to be seen at the stage of trial and is beyond the purview of this appeal.

38. In this case, SCIL claims to have sent MySpace several notices describing the infringing works.Despite this MySpace did not take down the content. MySpace counters that SCIL had supplied to it more than 100,000 songs and works in which it held copyright. MySpace performed a scan and found that several of these works listed SCILs notice, were uploaded by distributors or performers. This presented two impossibilities, one that the list provided by SCIL did not point to specific works nor did it provide the location where the works were accessible; the list was vague and general and listed every work that SCIL produced without showing whether it was available on the appellants site and importantly, that it completely ignored the "fair use" aspect. In the peculiar circumstances, this court agrees with MySpaces contentions. SCIL is under a duty to specify the works in which it owns copyright. Merely giving the names of all content owned by it without correspondingly stating those, which MySpace is prima facie infringing, is contrary to the established principles of copyright law. It is only when a specific work is mentioned can it be said that MySpace possesses knowledge of a work being infringed on its website. Providing long lists

of all works, tasking MySpace with identifying and removing infringing content is not enough. It is only when MySpace has specific or actual knowledge or when it has reasonable belief, based on information supplied by SCIL and if despite such knowledge or reasonable belief it fails to act can it be held liable for infringement. It would be crucial here to highlight a grey area, with respect to knowledge, e.g when a genuine licensee uploads works of SCIL. In the absence of a notice containing specific works there is possibility whereby MySpace makes a general search to identify the plaintiffs copyrighted work, it may come across works uploaded by authorized distributors/ promoters. The general notice would constrain it to blindly remove the content, which can lead to disputes. In some other instances, a licensed performer may upload a video which is a combination of two songs or a remix- where rights in one half originally vest with SCIL and the owner of the second could be some person other than SCIL, makes it impossible for MySpace to discern the nature of rights and whom it finally vests with. There could be still other cases, where a copyrighted work may be adapted in the form of another creation, based on the original.[6] In such cases, requiring removal would result in prejudice and injury.[7] In the absence of specific titles and locations it would be impossible for MySpace to identify and remove such content. In such cases it becomes even more important for a plaintiff such MySpace to provide a specific titles, because while an intermediary may remove the content fearing liability and damages, an authorized individuals license and right to fair use will suffer or stand negated. In other words, an indiscriminate and blind acceptance of SCILs entire list to run a general filter and "take down" all content would result in grave damage and result in likely multifarious disputes: with up-loaders, many of whom are original creators in their own right and might have used a miniscule quantum of the copyrighted content in their larger original creation; with distributors, who might hold genuine licenses and with others who create versions, remixes or original titles which may have little content; still there may be other content uploaders whose material only superficially resembles with the titles owned by SCIL, because of the lyrics or titles but is otherwise genuine creation with its independent copyright. The remedy proposed by SCIL and accepted by the single judge in such cases results in snuffing out creativity. This court holds that in the context of the prima facie conclusion that there was no direct infringement by MySpace, the finding by the single judge of constructive knowledge and "secondary" infringement, is incongruous and not tenable. For the foregoing reasons, this court concludes that prima facie there was no knowledge on the part of MySpace, with respect to allegations of infringement of

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[6]"adaptation" is defined as "(iv) in relation to a musical work, any arrangement or transcription of the work" in the Copyright Act

[7]For an Indian Classical Carnatic instrumental version of Adeles album Hellohas beenposted by one Mahesh Raghvan on YouTube (https://www.youtube.com/watch?v=wPTgMrOQ7fk- accessed on 20 December 2016). The video was viewed over 1.1 times. The title of the song is Hello, identical to the original title. Yet, it is a complete adaptation as the work is in a new format.

the plaintiff-SCILs works.

39. The Internet is a virtual space of undefined boundaries. Its sheer expanse renders enforcementof regulations a challenging task. Also exponential growth in hardware technology, makes Internet access easy. Most hardware devices are Internet compatible; further, the increase in geographical coverage and Internet speed (3rd and 4th Generation currently and eventually many more!)makes possible access to high-speed data in remote areas as well. These strides also throw up concerns about the value for another individuals right to privacy, reputation, or copyright etc. Most legal systems across the world have tried to keep pace with technology; yet the peculiar nature of the Internet, and its pace, renders the task difficult. Emergence of the Internet saw concerns regarding copyright, resulting in intensive discussions on the agreements framed under the Berne Convention (for protection of literary and artistic works) and Rome Convention (protection of performers and producers of phonograms and broadcasting organization). The emergence of new types of markets and new types of information dissemination needed revisiting of these conventions; as a result WPPT and WCT, commonly known as "internet treaties" were framed in 1996. They recognized the need for establishing a framework in domestic legal systems towards protecting copyright of individuals while balancing digital economy as well as rights of Internet intermediaries.

40. In the USA, DMCA was signed into law in 1998 to give effect to the 1996 Internet treaties and itcreated a system imposing limitations on the liabilities of internet service providers when found engaging in certain types of activities. These activities carried the immunity known as "safe harbor". Such safe harbor provisions apply as long as (i) the intermediary establishes, publicizes and implements a "Notice and Take Down" regime for removing content once a copyright owner sends a notice to the intermediary; (ii) there exists a system for identifying repeat offenders and removing them from the system and

(iii) to make provisions for technical protection measures. Similarly in the European Union including United Kingdom, Internet Service Providers are given immunity under the European Copyright Directives (ECD). Here the range of enterprises covered under "ISP" is much larger and includes not just traditional service providers but also include hosting services, e-commerce merchants, social networking sites, cloud computing services, mobile hosts etc. Under the ECD, to maintain immunity, the ISP must not initiate the transmission, select the receiver of the transmission or modify the information contained in the transmission; similarly the intermediary is not liable for cached material as long as the above factors are complied with. Immunity is also subject to the ISP taking down cached content once it receives actual knowledge that the original source of the information has been removed or access to it disabled, or removal or blocking of access has been ordered by a competent court or authority. A hosting defence is also available to service providers which limits liability which may accrue on providing information storage services as long as the service provider does not have actual knowledge of unlawful activity or that upon receiving such knowledge fails to act expeditiously to remove or disable access to such information. Around the globe, similar regimes are prevalent especially in China and Korea.

41. In India, Internet technology is regulated by the IT Act. The Act also stood as a facilitator ofdigital commerce in the country by providing safeguard tools. In many ways the Indian "safe harbor" provisions for online intermediaries are similar to the ECD, not the DMCA. "Intermediary" is a broadly defined term, catering to all perceivable kinds of service providers on the Internet and is similar to the definition of intermediaries as found in the ECD. Intermediaries find mention and are defined under Section 2(1)(w) of the Act which reads as follows:

> (w) intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online-payment sites, online-auction sites, online-market places and cyber cafes;

42. The concept of intermediaries attains more significance in the context of Section 79, whichprovides safe harbor to intermediaries in India subject to certain terms enunciated thereunder. This court is conscious that a significant amendment to this provision took place in 2008; the Information Technology Amendment Act was brought into force on 5 February, 2009. However, that amendment brought in greater clarity to the nature of duty and the circumstances whereby intermediaries could be held liable. It is therefore, relevant in the present case, as it covers the greater part of the period in these proceedings. Section 79 provides intermediaries exemption from liability for any third party information, data or communication link made available or hosted by it. Section 79 reads as under:

> "79. Exemption from liability of intermediary in certain cases.- (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.
>
> (2) The provisions of sub-section (1) shall apply if-
>
> (a) the function of the intermediary is limited to providing access to a communication system over which information made available by communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or
>
> (b) the intermediary does not -
>
> (i) initiate the transmission,
>
> (ii) select the receiver of the transmission, and
>
> (iii) select or modify the information contained in the transmission;
>
> (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
>
> (3) The provisions of sub-section (1) shall not apply if-
>
> (a) the intermediary has conspired or abetted or aided or induced, whether bythreats or promise or authorise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriateGovernment or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.- For the purpose of this section, the expression third party information means any information dealt with by an intermediary in his capacity as an intermediary.

43. In this case MySpace, the appellant, facially falls within Section 2(1)(w) and qualifies as anintermediary/ Internet service provider because it acts as a "conduit"/ portal for information where users can upload and view content. It acts as a service provider by allowing users to upload, stream, share and view content which it hosts. This brings the court to the second part of the discussion i.e. whether MySpace can claim protection from liability as an Internet intermediary under Section 79. MySpaces business enables third parties enter into a contract with it to upload content. Undoubtedly such content can be both infringing or non-infringing/ original or copyrighted. What MySpace seeks to achieve is create a platform- without adding or contributing any information on its own, where users can freely exchange data in the form of songs, videos, documentaries etc. By this model all content is uploaded by users and qualifies as "User Generated Content" (UGC) and all that MySpace does is provides a neutral platform. To access or stream songs hosted by MySpace no subscription or signing up is required; users have to register with it and sign up under the terms and conditions to upload content or comment on the songs and videos. While signing up, Myspace requires its users to agree to its user agreement as well terms and conditions which expressly states that up-loaders are required to respect the IP Rights of others and not post infringing content. Clause 10 of its Privacy Policy reads as under:

"10. Protecting Copyrights and Other Intellectual Property You may not use the Myspace Services in a manner that violates other's intellectual property rights. If you are an intellectual property owner that believes its rights are being infringed by a use of the Myspace Services, you can contact us. More"

Elaborately, this is stated under Clause 10 of the Myspace Terms of Use Agreement:

"10. Protecting Copyrights and Other Intellectual Property Myspace respects the intellectual property of others, and requires that our users and Members do the same. You may not upload, embed, post, email, transmit or otherwise make available any content that infringes any copyright, patent, trademark, trade secret, privacy, publicity or other proprietary rights of any person or entity. It is Myspace's policy to terminate, in appropriate circumstances, the membership of repeat or substantial infringers. If you believe your work has been copied and posted on or through the Myspace Services in a way that constitutes copyright and/ or trademark infringement, please see the Copyright Infringement Notice Form and the Trademark Infringement Notice Form where you may notify Myspace of your complaint. More information about copyright and trademark can be found here."

44. MySpace clearly places an embargo on its users from uploading content in which they do notpossess the relevant rights and at the same time gives content owners the option of notifying them in the event that they find the content hosted on its website is without due license. It claims immunity from liability, as an intermediary following due diligence as well complying with the provisions of Section 79. It contends to neither initiating the transaction nor selecting its receiver. As far as modification is concerned, MySpace urges that the modifications (by inserting advertisements) are automatic and are part of the core system with the only purpose of making the content compatible with the webpage. This being the case, the argument by MySpace is that it complies with the requirements of Section 79(2)(b) and consequently should be guaranteed protection under Section 79(1).

45. SCIL, the respondent opposes this and states that the appellant modifies the content wilfully andbesides this has placed advertisements to make profits and consequently it cannot seek protection under the safe harbor provisions. Furthermore, by virtue of the overriding Section 81 of the same Act and more importantly its proviso, the safe harbor provisions would be of no avail to the appellant and that ultimately, only the provisions of the copyright act, specifically Section 51(a) would be applicable. The learned Single Judge agreeing with the respondent held that the appellant was barred from seeking relief under Section 79(1) and that only the copyright act would apply to it. Holding this, the Single Judge found the appellant prima facie to be liable of secondary copyright infringement under Section 51(a)(ii); on primary infringement the Single Judge was of the opinion that no prima facie case existed which warranted interim relief and that a trial would be needed to prove primary or direct liability under Section 51(a)(i).

46. Section 79, has an overriding effect; it begins with the words "Notwithstanding anythingcontained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3)," which means that the only restriction to be placed in the application of Section 79(1) is contained within the section: Section 79 (2) and Section 79 (3). This means that irrespective of any other law, an intermediary is guaranteed a safe harbor and the only restriction comes from Section 79(2) and (3). However, the added twist in construction arises due to the proviso under Section 81. Section 81 which itself provides for an overriding effect of the Act reads as follows:

> Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970) Interestingly, the amendment to Section 79 came into effect from 27.10.2009 and through the same amendment a proviso was added to Section 81. What prompted Parliament to amend Section 79 still remains a speculation but the deliberate act of adding the proviso to Section 81 could only lead one to assume that the Parliament intended to not disturb the rights of copyright or patent holders in light of the 2008 amended provisions to the IT Act. This is also apparent from the Intermediary Guidelines Rules, 2011 ("Rules"), which was framed as clarification to the 2008

amendment. Observing the language of Rule 3(2)(d) of the Rules, an intermediary would be required to inform users by including in its user agreement or terms and conditions to not host, display, upload, modify, publish, transmit, update or share any information that "infringes any patent, trademark, copyright, or other proprietary rights". Reference is also made to the report of the Parliamentary Standing Committee which states that the proviso shall be such that the rights conferred under the IT Act shall be supplementary to and not in derogation of the provisions of the Copyright Act or the Patents Act. While it is true that Reports of Parliamentary Standing Committees cannot be the absolute basis for interpreting statutes, however, in the absence of any further discussion on this aspect, this report is a relevant tool in discerning the intent of the Parliament in enacting the proviso at the same time of introducing safe harbor provisions.

47. In this Courts opinion, Section 79 grants a measured privilege to an intermediary. However, thatwould not mean that the rights guaranteed under the Copyright Act are in any manner curtailed. All Section 79 does is regulates the liability in respect of intermediaries while the Copyright Act grants and controls rights of a copyright owner. Under the circumstances, it is difficult to conceive how one would pose a barrier in the applicability of the other. The true intent of Section 79 is to ensure that in terms of globally accepted standards of intermediary liabilities and to further digital trade and economy, an intermediary is granted certain protections. Section 79 is neither an enforcement provision nor does it list out any penal consequences for non-compliance. It sets up a scheme where intermediaries have to follow certain minimum standards to avoid liability; it provides for an affirmative defence and not a blanket immunity from liability.

48. At the other end is the Copyright Act which does not specifically mention or define internetintermediaries nor does it lay down any special protection except as provided for under Section 52. Even under Section 51, the infringement contemplated is general in the sense that it does not distinguish between virtual space and actual physical space. Parliament by amending the IT Act intended to create a separate provision and regime for intermediaries. To avoid the consequence of a width and sweep of Section 79, resulting in blanket immunity to intermediaries, Parliament deemed it essential to state that copyright owners could still pursue legal remedies against such intermediaries in specified circumstances. To put it differently, but for the proviso (to Section 81), copyright owners would have been unable to pursue legal recourse against Internet intermediaries. Under the current regime, while private copyright owners can still demand action against intermediaries who may themselves post infringing content, intermediaries can seek safe harbor where the content is uploaded by third party users or is user generated.

49. Here it is pertinent to mention that while Section 51 of the Copyright Act provides for a system of"notice", Section 79(3) contemplates "receiving actual knowledge" or through notification by the government or its agency. The scope was widened in *Shreya Singhal* Vs *UOI* (2015) 5 SCC 1, where actual knowledge was held to mean a Court order in cases relatable to Article 19 of the Constitution of India. In case of Section 51(a)(ii), the only exception is that MySpace was not aware or had no reasonable grounds to believe that the content was infringing. Section 79(3) perhaps is more mindful of the way the internet functions and supplemented knowledge with the term "actual knowledge". Given the supplementary nature of the provisions-

one where infringement is defined and traditional copyrights are guaranteed and the other where digital economy and newer technologies have been kept in mind, the only logical and harmonious manner to interpret the law would be to read them together. Not doing so would lead to an undesirable situation where intermediaries would be held liable irrespective of their due diligence. By acting as mere facilitators and despite complying with legal norms, intermediaries can attract great liability, for no fault of theirs which in the long run would not only discourage investment, research and development in the Internet sector but also in turn harm the digital economy- an economy which is currently growing at a tremendous pace and without which life could potentially come to a standstill. Surely, such a consequence was not intended by Parliament, which mindful of techno- legal developments around the world created for safe harbor provisions. Another aspect is the manner how Internet is accessed. If a strict regime is implemented with respect to intermediary liability, such intermediaries could conveniently migrate to a location where data protection laws are not as rigorous and the content would still be accessible. Under such circumstances while the economic loss is one aspect, it would become near impossible to trace intermediaries to take down content.

50. Section 79(3) of the IT Act specifies that when a person has actual knowledge or uponnotification by the appropriate government or its authority fails to expeditiously remove or disable access to an unlawful content then the immunity granted under Section 79(1) is revoked. The knowledge contemplated under this section is actual knowledge. In *Shreya Singhal* (supra), Section 79(3) with Rule 3(4) of the Rules were read down to mean receipt of actual knowledge from a court order or on being notified by the appropriate government. However, this was in respect of restrictions under Article 19(2) of the Constitution of India. The Supreme Court was conscious of the fact that if millions of requests for take down are made, it would become difficult for intermediaries (such as Google) to identify legitimate requests. In the case of copyright laws it is sufficient that MySpace receives specific knowledge of the infringing works in the format provided for in its website from the content owner without the necessity of a court order.

51. Several judicial systems around the world have ruled on knowledge and what would constituteknowledge so as to invite liability. Under the DMCA, a red flag" test, which has both subjective and objective elements. In determining whether the service provider was aware of a red flag, the subjective test of whether under the given facts and circumstances a reasonable observer could discern infringement, however such determination should be arrived at by using an objective standard. In the US judgment- Viacom v YouTube (supra), Viacom claimed copyright infringement against YouTube, which is a famous Internet service provider. It was held YouTube (an online intermediary) qualified for safe harbor provisions under the DMCA and the court outlined of the Red Flag test to determine whether the defendant had specific and identifiable knowledge or just a general awareness of the infringing activity on its website. The Court also acknowledged "fair use" and volume of data that such intermediaries host and observed as under:

> "That makes sense, as the infringing works in suit may be a small fraction of millions of works posted by others on the service's platform, whose provider cannot by inspection determine whether the use has been licensed by the owner, or whether its posting is a fair use of the material, or even whether its copyright owner or licensee objects to its posting."

While talking of red flag the court held as under:

> "Although by a different technique, the DMCA applies the same principle, and its establishment of a safe harbor is clear and practical: if a service provider knows (from notice from the owner, or a red flag) of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the infringement. General knowledge that infringement is ubiquitous does not impose a duty on the service provider to monitor or search its service for infringement. "

52. In the 2013 decision of *UMG* Vs*Veoh*718 F 3d 1006, 1026, the 9th Circuit Court of Appealsgranted the intermediary Veoh safe harbor protection under § 512 of the DMCA. In its earlier decision of 2008, the Court found that the software functions of Veoh including the process for storing data was covered under safe harbor provisions. Safe harbor protected conversion of videos into flash form by chunking videos to make it more accessible for easy viewing and downloads by the user, which only affected the form and not the content of the movies. In 2013 too, whilst largely approving the 2012 decision in Viacom Vs YouTube (supra), the court held that safe harbor provisions apply and recognized that web hosting services would have to store user material to make them accessible to other users and also held that specific knowledge of a particular infringing activity would be required in order to fulfil the objective element of the "red flag" test. In another context but on the red flag issue, *Perfect 10* Vs*CCBill*, 488 F.3d 1102 it was held that mere storage of files with names suggestive of infringement by a third party itself would not be a red flag. It was emphasized that § 512 did not require service providers to police the content on their server but rather to terminate at an "appropriate time" after having actual knowledge of infringing activity. MySpace relies upon Religious Tech Centre (supra), which was decided before the DMCA came into effect. This Court finds some merit in the observations made in that decision. The Court held that where the infringing subscriber is clearly directly liable for infringement, imputation of liability on countless service providers whose role is nothing more than setting up and operating systems which necessary for the functioning of the Internet is illogical. It was further held that finding intermediaries responsible for the act of others, which cannot be deterred would be impractical and theoretically impossible especially given that "Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from non- infringing bits". An objective test was prescribed where the Court held that had the defendant not received notice from the plaintiff then it could be said that it did not have knowledge. However, in that case since the defendant received notices for taking down content, and yet refused to acknowledge and remove it, the court held it to be liable of contributory infringement. This judgment lays down an objective test that in case of Internet intermediaries, if

a notice is sent and no action is taken then, MySpace would be liable under secondary infringement. In *A& M Records Inc* v *Napster*, LLC 239 F.3d. 1004 (2001) the issue was whether Napster, the defendant was liable for deliberate knowledge; what was the applicable standard for deciding an intermediary's infringement. On the facts, it was held that Napster had actual information and knowledge of copyrighted infringed works on its site. The appellate court indicated the relevant test for the purpose:

> We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. ... Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.

Napster was held to possess actual knowledge that specific infringing material is available using its system which it could block access to the system by suppliers of the infringing material, and that it failed to remove the material. In a later decision, the US Supreme Court had occasion to consider the issue of copyright infringement in the context of software that had potentially infringing use. In *MGM Studios Inc* v *Grokster, Ltd* 545 US 913 (2005) the proper test in such cases was laid down:

> We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. More relevant for the discussion in this case is the test indicated for discerning intent:
>
> it has to be shown that the distributors of the program have advertised and/or otherwise induced its use for copyright infringement; if this intent can be shown, additional contributory aspects may be relevant. For example, MGM et al. had asserted that the defendants' refusal to incorporate protocols that would filter copyrighted materials from the file-sharing network constitutes an intent to promote copyright infringement. Justice Souter also noted that "...in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial non infringing uses. Such a holding would tread too close to the Sony safe harbor."

53. More recently, in a judgment dated 16th June 2016 in Capitol Records, LLC v. Vimeo, LLC. 826 F.3d 78, the US Second Circuit went a step further and held that to disqualify a service provider from safe harbor, the plaintiff is under burden of proving that the defendant had knowledge. Interestingly the Court held that mere interaction by a service providers employees with user videos of recognizable songs did not imply knowledge Furthermore, a mere suspicion by the service providers employees that infringement was taking place on the site and sporadic incidents of alleged employee encouragement of user infringement, was insufficient to negate the safe harbor protection. The High Court of Australia in Roadshow Films Pty Ltd. VsiiNet Ltd

[2012] HCA 16 absolved the liability of iiNet, which was a peer to peer service provider. The Court was of the in order to ascertain liability what would be relevant is to see the extent of control the intermediary has in preventing the infringement, the relationship between the service provider and the infringer as well as if there are any reasonable tools to control or prevent infringement. No liability could be attached on iiNet, which exercised no control on the content uploaded, nor could it modify or take down the content. In the absence of such control and a limited contractual relationship- one entered into only for the purpose of using iiNets software, it could not be held liable for infringement.

54. To attribute knowledge to the intermediary industry would mostly likely lead to its shutdown,especially where content is of this magnitude and size. Closure of website and business would inevitably follow, for instance, if messenger services like Whatsapp or social media portals like Facebook or Twitter, (given the number of users registered with these service providers as well as the volume of information being broadcasted/ "forwarded"), were held liable for each infringement. The greater evil is where a private organization without authorization would by requirement be allowed to view and police content and remove that content which in its opinion would invite liability, resulting in a gross violation of the fundamental right to privacy.

Due Diligence

55. Parliament was mindful of a content owners rights and accordingly mandated intermediaries tofollow certain minimum standards of diligence. These standards are set out under Section 79 of the IT Act read with the Intermediary Guideline Rules, 2011. Section 79 provides an affirmative defence to an intermediary as long as it complies with the associated conditions. Under Section 79(2)(a) an intermediary can seek safe harbor protection if its role is limited to "providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted." MySpaces business -in its own words is one where it owns and controls servers that stored data permanently unless specifically deleted by it or the user. It however points out that this permanent storage of data is part of how the Internet, especially service providers function. Storage is necessary to transmit or host data. Storage could be either on the users hardware device, as in the case of "peer to peer sharing" networks, or in a central server like the ones contemplated of in MySpaces case. Storage is an essential part of the transmission/ hosting process and MySpace only provides access to system to third parties enabling transmission of information. It is necessary to distinguish made between "transmitted", "temporarily stored" and "hosted". Transmission includes both live data: such as live streaming as well as data saved on a system for transmission. Parliament did not distinguish between the kinds of data transmission. Problems might arise in the case of stored data, where content, for the purpose of transmission is stored on the server of the service provider. In such cases too knowledge (of infringement) becomes relevant. If the host has specific knowledge that the transmitted content is unlawful, then no safe harbor can be granted. Another term used under 79(2)(a) is "host". Reference is made here to Rule 3(3) of the Intermediary Rules, which was released by

way of a clarification to Section 79 of the IT Act. Rule 3(3) specifically provides that an intermediary shall not knowingly host or publish any information for the purpose of sub rule 2 to Rule 3. Rule 3(4) emphasizes on intermediaries whose computer system are used for storing or hosting or publishing of information. The relevant portions of the intermediary rules are extracted below:

"Information Technology (Intermediaries Guidelines) Rules, 2011

3. Due diligence to be observed by intermediary -- The intermediary shall observe following due diligence while discharging his duties, namely : --

XXXXXX XXXXXX XXXXXX (2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that --

(a) belongs to another person and to which the user does not have any right to;

(b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic,libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever; ....

....

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force; .....

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations withforeign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation (3) The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2):

Provided that the following actions by an intermediary shall not amount to hosing, publishing, editing or storing of any such information as specified in sub- rule: (2) --

(a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource;

(b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorised by the intermediary pursuant to any order or direction as per the provisions of the Act;

(4) The intermediary, on whose computer system the information is stored or hosted or published,upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

(5) The Intermediary shall inform its users that in case of non-compliance with rules andregulations, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to immediately terminate the access or usage rights of the users to the computer resource of Intermediary and remove non-compliant information.

56. Furthermore, under Section 79(2)(b) an intermediary should not initiate the transmission, selectthe receiver of the transmission and select or modify the information. It is reasonably clear that MySpace complies with the first and second sub-clauses; it has a "free for all" platform, which by itself does not initiate the sharing feature. While it has created the "share" option that per se does not mean that it "initiates" an action. Content, which is shared can be both lawful and unlawful and in any case at a prima facie stage, this Court does not discern that MySpace initiates the transmission; the usage of that feature rests purely in the hands of third party users. Similarly it does not choose its audience/ receiver. Anyone with Internet access can open its website and be a receiver/ viewer of the data being transmitted. Now, on the third sub-clause of whether MySpace selects or modifies information, this court at a prima facie stage finds that firstly the modification is to the format and not to the content and secondly even the process of modifying the format is an automatic process without either MySpaces tacit or expressed control or knowledge. In the circumstances this Court concludes that MySpace prima facie complies with the requirements of Section 79(2)(b).

57. The other aspect that needs to be complied with is the "due diligence" clause under Section79(2)(c). Here once again, the Intermediary Rules are relevant-especially Rule 79 (3). MySpaces website -for purposes of viewing does not require the user subscription to its terms and conditions. However, for the purpose of uploading, sharing, commenting etc. subscription with MySpace is needed and for this purpose an agreement is entered into between the parties. To comply with the due diligence procedure specified in the Rules, MySpace has to publish its rules, regulations, privacy policy and user agreement for access of usage. These agreements and policies on the appellants website must comply with Sub Rule 2 of the Rules. MySpace has annexed its user agreements and privacy policies which suggest due compliance with the said rules. It requires its users to comply with its privacy policy and user agreements before they can create their accounts with the appellant in order to modify, add, host, upload, and transmit etc. their data. This however, does not end the list of duties MySpace has to follow. There are several users who may agree to the terms and conditions and still upload infringing content. Under Section 79(3) read with Rule 3(4) of the Rules posit an intermediary on receiving "actual knowledge" or upon obtaining knowledge from the affected person in writing or through email to

act within 36 hours of receiving such information disable access to such information. If copyright owners, such as SCIL inform MySpace specifically about infringing works and despite such notice it does not take down the content, then alone is safe harbor denied. However, it is for SCIL to show that despite giving specific information the appellant did not comply with its notice.

40. In view of the above discussion, this Court is of the considered view that proviso to Section 81 does not preclude the defence of safe harbor for an intermediary in case of copyright actions. Accordingly it is held that Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously.

Applicability of Section 52 of the Copyright Act

58. An additional defence was later included that MySpace was shielded from liability by virtue of Section 52(1)(b) and (c). It is clarified here that the amendment to Section of the Copyright Act, w.e.f from 21.06.2012 would not be applicable in the circumstances of the case. Relevant portion of Section 52 is as under:

52. Certain acts not to be infringement of copyright. -(1) The following acts shall not constitute an infringement of copyright, namely:

XXXXXX XXXXXX XXXXXX

(b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

(c) transient or incidental storage of a work or performance for the purpose of providing electroniclinks, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy: Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access;

59. Section 52(1)(b) and (c) refer to transient and incidental storage. Transient means any workwhich is temporary or impermanent and incidental would mean something subordinate to something of greater importance (Blacks Law Dictionary, 7th Edition). These include "cached" data, web cookies or any other like form of data, which is generated automatically to improve the performance of the core function. The ECD, under Article 13, refers to caching as an "automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of that service." Concise Oxford English Dictionary, 10th Edition defines caching as an auxiliary memory from which high-speed retrieval is possible.[8] While ISPs may

[8]http://www.dictionary.com/browse/caching defines this expression, in relation to computers as a

generate cached content as part of the process, the content in question is of a different type. Hosting and storing data, as observed earlier does not qualify to be referred to as incidental or transient data. The nature of the data being uploaded is of a permanent type, one which is accessible whenever demanded or searched for. These are the major functions and any storage which is of a temporary form aiding in the better performance of the main function would be covered under Section 52(1)(b) and (c). Under the current circumstances of the appeal, the content in question is the permanent kind. If it is found, during trial that the appellant stores temporary information to further its main goal of providing smooth access to permanent content, then it can choose to seek defence under Section 52(1)(b) and (c).

The nature of relief

60. MySpace urged that the relief provided by the single Judge to SCIL is vague and general and alsocompletely without considering how the Internet functions, rendering the order un-implementable. It is argued that without giving a specific list of works, MySpace cannot go through several millions of videos to identify those works in which SCIL owns copyright. Moreover, the learned Single Judge could not have granted injunction in respect of future works as there can be no copyright in respect of works that are not even in existence. MySpace fears that the only way to implement the order of the learned Single Judge, in the absence of specific titles would be to completely shut down its India centric business which, needless to say would cause it irreparable damage especially at a prima facie stage where there is no concrete proof that it is causing infringement. It is also pointed out that the order of the Division Bench of this Court dated 06.03.2009 was a possible workable solution and MySpace could have duly complied with it if it were restored. SCIL refutes this argument, highlighting that infringing content is uploaded on MySpaces website, causing it business losses; the order of the learned Single Judge granting it comprehensive injunction should be upheld because that would adequately take care of its interests. MySpace- says SCIL, should merely remove the content belonging to SCIL and continue broadcasting those in which it does not have a copyright. This would prevent SCILs further business losses. SCIL urges that the relief granted by the learned Single Judge should be upheld as the balance of convenience lies in its favour. SCIL relied upon the judgment of this Court in *Super Cassettes Industries Ltd. Vs Nirulas Corner House (P) Ltd, 148(2008)DLT487.*

61. Nirulas Corner House is inapplicable to the present case because a hotel owner is not anintermediary and secondly the hotel was attributed with directly playing infringing content. Moreover the problem in this case is about identifying actual works from millions of works; this aspect was not contemplated in *Nirulas* (supra). For similar reasons SCILs reliance on Pacific and Southern Company Inc. Vs Carol Duncan, 744 F.2d 1490 would also have to be rejected. Sega Enterprises Ltd is of little relevance given that the judgment was passed in 1994, before the safe harbor regime and enactment of the DMCA. Furthermore, from then till

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temporary storage space or memory that allows fast access to data..

now several developments have taken place in the field of both Internet as well as intermediary technology.

62. Though prima facie MySpace is not liable for secondary infringement, yet there is no gainsayingthat infringing works are on its website. The court is under a duty to device an equitable relief suited to the facts when liability has not been ascertained fully. At the same time precious independent talent would suffer without due recognition and monetary incentives given that monies performers would have received by licensing content are now available freely without payment. Despite several safeguard tools and notice and take down regimes, infringed videos find their way. The remedy here is not to target intermediaries but to ensure that infringing material is removed in an orderly and reasonable manner. A further balancing act is required which is that of freedom of speech and privatized censorship. If an intermediary is tasked with the responsibility of identifying infringing content from non-infringing one, it could have a chilling effect on free speech; an unspecified or incomplete list may do that. In an order of relief such as that passed by the learned Single Judge, MySpace would be in contempt of court for not complying with an order, which is otherwise impossible or at best onerous and cumbersome of performance. In order to avoid contempt action, an intermediary would remove all such content, which even remotely resembles that of the content owner. Such kind of unwarranted private censorship would go beyond the ethos of established free speech regimes.
63. Another factor for consideration while granting relief is the potential threat to a private contract,which an individual user would have with an ISP. Without a clear and specific list of titles by the content owner to the ISP, to avoid liability it would remove content stored/ uploaded by legitimate users too. A user enters into a contract with an ISP to share her/his content as long as it complies with the terms of the user agreement. If a user uploads his original works to be communicated to the public including for the purposes of fair use, then the ISP removing such content while complying with a notice of a general kind would surely be in breach of a private contract with its user. In Roadshow Films (supra) the court recognized this and held that incomplete notices by the content owner would invite upon the ISP the legal risk of wrongfully terminating a user account.
64. The rapid growth of technology calls for new legislative and judicial approaches; dialogues are tobe held between various stakeholders for creating non-discriminatory and transparent licensing schemes as well as a mutually acceptable framework for exchanging rights information. To avoid risking legal action from breach of contract, a four-step mechanism could be setup. This was identified by the OECD in its draft report "The role of intermediaries in Advancing Public Policy Objective" dated 29th September 2010 and includes (i) notice and take down (ii) notice and notice (iii) notice and disconnection and

(iv)filtering. The first step has been elaborately discussed and does not need further analysis. The second step is notice and notice where once an intermediary receives notice from a content owner it passes on the notice to the infringing subscriber. The third step is the notice and disconnection or "three strikes" model evolved by the French government. Here once an infringing subscriber is

found to be uploading infringing content more than 3 times, the intermediary can go ahead and terminate the services of such intermediary; this step to a certain extent acts like a deterrent. Finally there's the filtering step where tools like the kind developed by the appellant are used to identify and remove content automatically. EMI Vs UPC, [2009 no. 5472 P] is a case where the Irish High Court suggested implementing tools such as DtecNet or Copysense, used to identify subscribers uploading infringing content.

65. MySpace already has the notice and take down tool under which SCIL can notify it of specificinfringing works enabling a "take down". It also has the Rights Management tool which SCIL can take benefit of to identify and remove content belonging to it. However, this does not mean that other innovative techniques for balancing traditional rights of copyright should not be pursued. Several other intermediaries have created innovative techniques to protect copyright. For instance, YouTubes Content ID, which neither blocks it or removes infringing content, but tracks or monetize the video content.

A similar cooperation can be worked out between the parties where MySpace may work out the monetary benefit derived from such infringed content and share it with SCIL without actually removing the content. These are possibilities worth exploring; in any event they are handy tools at the stage of trial, to calculate damages.

66. On the question of what relief would be practical, the Division Bench by its order dated06.03.2009 had directed SCIL to supply a list of its works to MySpace, which it would remove within one week of receipt of notice. Perhaps the Division Bench was more mindful of technological constraints as well as the notice and take down mechanism considering the order was made before the amendment to the IT Act which introduced safe harbor provisions only in October 2009. The Court is conscious of the fact that under the current system, MySpace hosts several hundreds and thousands of videos, which is only growing every single day. Without a notice containing the details and location of the exact works in which infringement is complained of, MySpace cannot be expected to scan through such large number of videos to discern infringement. This is not only impractical but also dangerous for reasons discussed previously. A vague order of injunction against works which are yet to exist is not only contrary to law but also impossible to monitor. Therefore, SCIL cannot give vague and general lists of its works but will have to give notice with specific details as well as locations of the works, which the appellant shall remove within 36 hours of receiving such notice.

- Despite the lengthy analysis and reasoning, a fundamental aspect overlooked by the learnedSingle Judge is the peculiarity of the Internet intermediary industry. The Internet industry often coined the term "fastest growing industry" enabling access and innovations at an exponential rate. In cases like these, the Court has to appreciate that relief should be sound and practical, not far-reaching and momentous in regard to policy and growth of trade or information dissemination. Such care is warranted where interim orders in respect of liabilities are yet to be ascertained and claims tried. Whilst in other areas of law like property or contracts, the enforcement mechanism has remained relatively unchanged, enforcement

under the technology regime, because its very nature is different. It is these considerations, which the court has to keep in mind while granting relief. Apart from avoidable prolixity and attendant imprecision in the impugned judgment (which a reader may perhaps justifiably complain about this judgment as well) the width of the directions has resulted in what was colourfully described by the US Supreme Court in Reno v American Civil Liberties Union 521 US 244,as to burn the house to roast the pig (i.e a disproportionate response, or a remedy worse than the disease). The court has - as always to tread a delicate balance between the Scylla of over protection (of intellectual property and privileging it in an overbearing manner) and the Charybdis[9] of ineffective or under-protection, of IP rights: both of which chill and kill creativity, in the final analysis, harmful to society.

67. To summarize the conclusions, it is held as follows

(a) Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously. Accordingly, it is held that proviso to Section 81 does not preclude the affirmative defence of safe harbor for an intermediary in case of copyright actions.

(b) Section 51(a)(ii), in the case of internet intermediaries contemplates actual knowledge and not general awareness. Additionally, to impose liability on an intermediary, conditions under Section 79 of the IT Act have to be fulfilled.

(c) In case of Internet intermediaries, interim relief has to be specific and must point to the actual content, which is being infringed.

In light of the above discussion impugned order of the learned Single Judge is set aside and is substituted with the following relief:

> (i) The plaintiff Super Cassettes shall provide an updated catalogue of "specific" works in which it holds copyright along with the location/ URL of such work on the appellant Myspaces website to the appellant as and when SCIL detects infringement. (ii) On receiving such notice from the plaintiff SCIL, the appellant/MySpace shall within 36 hours remove/ block access to such content, in accordance with Rule 3 (4) of the Intermediary Guidelines Rules of 2011.
>
> (iii) MySpace shall also keep an account of all such content removed pursuant to such requests as well as other details such as the number of viewings (wherever mechanisms exist to track such action) of such content, till it is removed, the advertisement revenue earned from it (proportionately) etc to enable calculation of damages, at the trial stage.

69. The learned Single Judge, we notice, has directed the completion of depositions of parties witnesses latest by 14th August, 2017. In the circumstances, and since the suit has been pending for a long period - about 10 years, every endeavour shall be made to complete the hearing by end of 2017 and dispose of the suit finally by end of December 2017.

70. The appeal is allowed in the above terms.

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[9]An allusion to Greek mythical monsters in the form of sea hazards which the hero, Ulysses had to navigate between: avoiding one meant danger by the other, making the choice of the path a dangerous one.

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SELF LEARNING STIMULATING EXERCISES

1. Under section 79 of The Information Technology Act 2000,

   The court held - for an intermediary it is required that they initiate transmission, select the receiver of the transmission, select or modify the information contained in the transmission.

   "One can be intermediary and still be deprived of the safe harbour provision."

   Under section 2(1) (w) The Information Technology Act 2000, is it necessary that and intermediary must be active or passive.

   Under what condition Safe Harbour Rule under section 79 could be made applicable to passive players in online medium which are placed outside India.

   Due diligence under section 79 of the information technology act has been narrowed whereas the safe harbour rule is wide. Analyse with reasons in support of the statement

   [Hint - *Amazon seller Services Private Limited* v. *Amway India Enterprises Private Limited*, Del (DB) decided on Jan 31, 2020]

2. The purpose of *captcha* has been to draw distinction between access to humans and machines. How *captcha* are able to resolve the intermediary liability issues, in case the objectionable content is shared by Malware Program.

3. Does the Virtual Private Network used for Cyber Security while storing data for 5 years create Privacy Issues in Cyberspace? (Understanding VPN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455722)

Google India Pvt Ltd v. M/s Visaka Industries Ltd

A P High Court Crl P No, 7207 of 2009 dt 19/4/2011

HONOURABLE SRI JUSTICE SAMUDRALA GOVINDARAJULU

ORDER:

1.The petitioner/A-2 is accused of offences punishable under Sections 120-B, 500, 501/34 I.P.C in C.C. No.679 of 2009 on the file of XI Additional Chief Metropolitan Magistrate, Secunderabad along with another. The petitioner/A-2 is Google India Private Limited represented by its Managing Director (Sales and Operations). The 1st respondent/complainant is Visaka Industries Limited, Secunderabad represented by its authorised signatory who is its Deputy Manager- Legal. The complainant is engaged in business of manufacturing and selling of Asbestos cement sheets and allied products. It is alleged that A-1 viz., Gopala Krishna is a Co-ordinator "Ban Asbestos India" a group which is hosted by A-2 and publishes regular articles in the said group and that on 21.11.2008 an article was published in the said group and it was captioned as "poisoning the system; Hindustan Times" aiming at a single manufacturer of Asbestos cement products viz., the complainant and names of renowned politicians of the country G.Venkata Swamy and Sonia Gandhi who have nothing to do with the ownership or management of the complainant-company were named in that article. It is further alleged that on 31.07.2008 another article captioned as "Visaka Asbestos Industries making gains" and that both the above articles contained defamatory statements against the complainant and they are available in Cyber space in the form of articles for world wide audience. In the complaint, details of defamatory remarks made in several other articles published by A-1 in A-2 group are given in detail, which details may not be necessary for the purpose of disposal of this criminal petition.

2) It is contended by the senior counsel appearing for the petitioner/A-2 that actions of intermediaries such as Google Inc., which is a service provider providing platform for end users to upload content, does not amount to publication in law and consequently the question of holding such intermediaries liable for defamation does not arise. Senior Counsel appearing for the petitioner placed reliance on Section 79 of the Information Technology Act, 2000 (in short, the Act) in support of this contention.

3) Section 79 which occurs in Chapter XII of the Act originally as it stood enacted in the year 2000 reads as follows:

"CHAPTER XII NETWORK SERVICE PROVIDERS NOT TO BE LIABLE IN CERTAIN CASES

Sec.79. Network service providers not to be liable in certain cases: For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. Explanation. For the purposes of this section,

(a) "network service provider" means an intermediary;

(b) "third party information" means any information dealt with by a network service provider in his capacity as an intermediary."

The said provision exempts network service providers from liability under the Act, rules or regulations made thereunder for any third party information or data made available by him. It did not exempt a network service provider from liability muchless criminal liability for the offences under other laws or more particularly under the Indian Penal Code. Further, the above provision exempts network service provider from liability, only on proof that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. Proof in that regard can be let in by way of leading evidence by the accused. Therefore, the said question is a question of fact which this Court may not go into in this petition filed under Section 482 Cr.P.C.

4) Chapter XII of the Act including Section 79 was amended by the Information Technology (Amendment) Act, 2008 (10 of 2009) dated 05.02.2009 with effect from 27.10.2009 by way of substituting the following in the place of original chapter:

"CHAPTER XII INTERMEDIARIES NOT TO BE LIABLE IN CERTAIN CASES

79. Exemption from liability of intermediary in certain cases: (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communciation link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if- (a) the functions of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission; (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of Sub-section(1) shall not apply if- (a) The intermediary has conspired or abetted or aided or induces whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.- For the purposes of this section, the expression "third party information" means any information dealt with an intermediary in his capacity as an intermediary."

It is only under the said amendment, non-obstenti clause was incorporated in Section 79 keeping application of other laws outside the purview in a fact situation covered by the said provision. Now, after the amendment, an intermediary like a network service provider can claim exemption from application of any other law in respect of any third party information, data or communication link made available or hosted by him; provided he satisfied the requirements under Sub-section (2) of Section 79. Further, as per amended Sub- section (3) of Section 79, the exemption under Sub-section (1) cannot be applied by any Court and cannot be claimed by any intermediary in case the intermediary entered into any conspiracy in respect thereof. Also, the intermediary cannot claim exemption under Sub-section (1) in case he fails to expeditiously remove or disable access to the objectionable material or unlawful activity even after receiving actual knowledge thereof. In the case on hand, in spite of the 1st respondent issuing notice bringing the petitioner about dissemination of defamatory material and unlawful activity on the part of A-1 through the medium of A-2, the petitioner/A-2 did not move its little finger to block the said material or to stop dissemination of the unlawful and objectionable material. Therefore, the petitioner/A-2 cannot claim any exemption either under Section 79 of the Act as it stood originally or Section 79 of the Act after the amendment which took effect from 27.10.2009. The present case in the lower Court was instituted in January, 2009 relating to the offences which are being perpetrated from 31.07.2009 onwards i.e., since long prior to the amendment to the said provision.

5) There is no exemption of any criminal liability in respect of a company which is a juristic person and which has no body that can be damned or contemned. In case found guilty, the petitioner company can be awarded with appropriate punishment though not corporal punishment. In that view of the matter, I find no merit in this criminal petition.

6) Accordingly, the Criminal Petition is dismissed.

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Vyakti Vikas Kendra, India Public v. Jitender Bagga (Del HC)

I.A. No. 8877/2012 in CS(OS) No.1340/2012
Order decided on : 09.05.2012

HON'BLE MR. JUSTICE MANMOHAN SINGH

5. The four plaintiffs, namely, Vyakti Vikas Kendra, India CS (OS) No.1340/2012 Page 1 of 6 Public Charitable Trust, Mr Gautam Vig, Mrs. Bhanumati Narsimhan and Mrs. Sharmila Murarka, have filed present suit against the defendants for damages to tune of Rs.5,09,00,000/-, permanent and mandatory injunction, mainly on the ground that they are aggrieved, hurt and immensely concerned on account of certain highly defamatory materials posted on an internet website by the name http://www.blogger.com/ by one Mr Jitender Bagga, the defendant No.1 herein. The said website is owned by Google, the defendant No.2. It is a Blog Publishing Service which allows people to create and publish a "Blog".

6. According to the plaintiff, the defendant No.1 has been indiscriminately sending e-mails and has published a large number of blogs on the website http://www.blogger.com/, which according to them is highly vulgar, disgusting and abusive references towards His Holiness Sri Sri Ravi Shankar, owner of Art of Living Foundation, and towards various other persons associated with the Art of Living.

7. It is stated in the plaint that the plaintiff No. 1, Vyakti Vikas Kendra, India Public Charitable Trust, is a registered Public Charitable Trust constituted to implement and promote the spiritual, educational, social and developmental activities for The Art of Living in India. The Art of Living, founded in 1981, is one of the world‟s largest volunteer based, humanitarian and educational organizations inspired by His Holiness Sri Sri Ravi Shankar‟s vision of creating a stress-free, violence-free society. The plaintiff No. 2, Mr. Gautam Vig is a devout follower of His Holiness Sri Sri Ravi Shankar. The plaintiff No. 3, Mrs. Bhanumati Narsimhan is His Holiness Sri Sri Ravi Shankar‟s sister and an Art of Living teacher. The plaintiff No. 3 is personally a victim of the defendant No. 1‟s defamatory acts. The plaintiff No. 4, Mrs. Sharmila Murarka is an Art of Living Teacher. CS (OS) No.1340/2012 Page 2 of 6

Plaintiff No. 4 is also personally a victim of defendant No. 1‟s defamatory acts. The defendant No. 1 has created and published various materials on the Internet, which are highly defamatory to the plaintiffs. In para 10, there is a table containing defamatory materials to the plaintiffs, the Art of Living Foundation, its spiritual head Sri Sri Ravi Shankar and his family members. The list of Internet URL is as under:

Internet URL http://revolutionprithvi.blogspot.in/ http://revolutionprithvi.blogspot.in/ http://revolutionprithvi.blogspot.in/ http://revolutionprithvi.blogspot.in/ http://revolutionprithvi.blogspot.in/ http://revolutionprithvi.blogspot.in http://revolutionprithvi0.blogspot.in/ http://revolutionprithviandmore.blogspot.in/ http://srisriravishankarisguruorconman.blogspot.in/ http://chairmanrilabetsrioting.blogspot.in http://chairmanrilabetsrioting.blogspot.in/2011/12/chair man-reliance-industries-limited.html http://chairmanrilabetsrioting.blogspot.in/2012/01/does

-chairman-reliance-industries.html http://chairmanrilabetsrioting.blogspot.in/2012/02/is-reliance-industries-limited-chairman.html http://diduspresidentcreateterrorists.blogspot.in/ http://revolutionprithviandmore.blogspot.in/2012/02/sri

-sri-ravi-shankar-barack-obama.html http://revolutionearthandmore.blogspot.in/2011/12/revolution-earth-more.html http://diduspresidentcreateterrorists.blogspot.in/2012/0 2/aol-founder-us-president-are-global.html http://diduspresidentcreateterrorists.blogspot.in/2012/0 1/arent-present-un-secretary-general-us.html http://diduspresidentcreateterrorists.blogspot.in/2012/01/is-us-president-incompetent-fraud.html http://chairmanrilabetsrioting.blogspot.in/2012/01/does

-chairman-reliance-industries.html http://chairmanrilabetsrioting.blogspot.in/2011/12/chairman-reliance-industries-limited.html http://chairmanrilabetsrioting.blogspot.in/2012/01/does

-chairman-reliance-industries.html http://chairmanrilabetsrioting.blogspot.in/2012/02/is-reliance-industries-limited-chairman.html CS (OS) No.1340/2012 Page 3 of 6

8. It is contended by the plaintiffs that in case the interim order is not passed against the defendants, the plaintiffs will suffer irreparable loss and injury. They will also suffer immense loss of reputation, mental trauma, harassment and humiliation.

9. It is stated in the plaint that notice was given to the defendant No.1, who failed to give any reply.

10. The plaintiffs have filed the policy of defendant No.2 for removal of defamatory content from its website http://www.blogger.com/. The relevant extract thereof reads as under :

"After careful review, Blogger may remove content or place a content warning page before viewing content deemed offensive, harmful, or dangerous, such as : • Hate against a protected group • Adult or pornographic images • Promotion of dangerous and illegal activity • Content facilitating phishing or account hijacking • Impersonated user identity Additionally, we are aware that there may be content on Blogger that is personal in nature or feels invasive. Please note that Blogger is a provider of content creation tools, not a mediator of that content. We allow our users to create blogs, but we don"t make any claims about the content of these pages. We strongly believe in freedom of expression, even if a blog contains unappealing or distasteful content or presents unpopular viewpoints. We realize that may be frustrating, and we regret any inconvenience this may cause you. In cases where contact information for the author is listed on the page, we recommend that you work directly with this person to have the content in question removed or changed.

Here are some examples of content we will not remove unless CS (OS) No.1340/2012 Page 4 of 6 provided with a Court order :

- Personal attacks or alleged defamation
- Parody or satire of individuals
- Distasteful imagery or language
- Political or social commentary"

11. Defendant No.2 is an „intermediary" within the definition of Section 2(1) (w) and Section 79 of the Information Technology Act, 2000. Under Section 79 (3)(b) of the IT Act,2000,

defendant No.2 is under an obligation to remove unlawful content if it receives actual notice from the affected party of any illegal content being circulated/published through its service. He is bound to comply with Information Technology (Intermediaries Guidelines) Rules 2011.

Rule 3(3) of the said rules read with Rule 3(2) requires an intermediary to observe due diligence or publish any information that is grossly harmful, defamatory, libellious, disparaging or otherwise unlawful.

12. Rule 3(4) of the said rule provides obligation of an intermediary to remove such defamatory content within 36 hours from receipt of actual knowledge. The said rule expressly provides as follows-

" The Intermediary , on whose computer system the information is stored or hosted or published , upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in sub rule (2) above, shall act within 36 hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub rule (2)."

13. In view of the foregoing facts and reasons mentioned above, it appears that the plaintiffs have been able to make out a CS (OS) No.1340/2012 Page 5 of 6 strong prima facie case of passing of ex-parte interim order. The balance of convenience also lies in favour of the plaintiffs and against the defendants. Incase, interim order is not passed, the plaintiffs will suffer irreparable loss and injury. Thus, till the next date, the defendant No. 2 is directed to remove all defamatory contents about the plaintiffs posted by the defendant No.1 on defendant No.2"s website http://.blogger.com/ as well as the links mentioned in paragraph 4 of the present application within 36 hours from date of knowledge of the order passed by this Court. The defendant No.1 is restrained from sending any e-mail including e-mails, the details of which are given in para 7 of this order or posting any material over the internet which has a direct or indirect reference to the plaintiffs or the Art of Living Foundation or any member of the Art of Living Foundation, or His Holiness Sri Sri Ravi Shankar.

14. Compliance of Order XXXIX, Rule 3 CPC be made within three days.

15. Copy of the order be given dasti under the signature of the Court Master/Private Secretary.

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Shreya Singhal v. U.O.I (SC)

WRIT PETITION (CRIMINAL) NO.167 OF 2012

24 March, 2015

R.F. NARIMAN, J. -

1. This batch of writ petitions filed under Article 32 of the Constitution of India raises very important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. The immediate cause for concern in these petitions is Section 66A of the Information Technology Act of 2000. This Section was not in the Act as originally enacted, but came into force by virtue of an Amendment Act of 2009 with effect from 27.10.2009. Since all the arguments raised by several counsel for the petitioners deal with the unconstitutionality of this Section it is set out hereinbelow:

"66-A. Punishment for sending offensive messages through communication service, etc.-Any person who sends, by means of a computer resource or a communication device,-

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.- For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."[1]

2. A related challenge is also made to Section 69A introduced by the same amendment which reads as follows:-

"69-A. Power to issue directions for blocking for public access of any information through any computer resource.-(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

3. The Statement of Objects and Reasons appended to the Bill which introduced the Amendment Act stated in paragraph 3 that:

"3. A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Indian Penal code, the Indian Evidence Act and the code of Criminal Procedure to prevent such crimes."

4. The petitioners contend that the very basis of Section 66A - that it has given rise to new forms of crimes - is incorrect, and that Sections 66B to 67C and various Sections of the Indian Penal Code (which will be referred to hereinafter) are good enough to deal with all these crimes.

5. The petitioners' various counsel raised a large number of points as to the constitutionality of Section 66A. According to them, first and foremost Section 66A infringes the fundamental right to free speech and expression and is not saved by any of the eight subjects covered in Article 19(2). According to them, the causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill- will are all outside the purview of Article 19(2). Further, in creating an offence, Section 66A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said Section. In fact, a large number of innocent persons have been booked and many instances have been given in the form of a note to the Court. The enforcement of the said Section would really be an insidious form of censorship which impairs a core value contained in Article 19(1)(a). In addition, the said Section has a chilling effect on the freedom of speech and expression. Also, the right of viewers is infringed as such chilling effect would not give them the benefit of many shades of grey in terms of various points of view that could be viewed over the internet.

The petitioners also contend that their rights under Articles 14 and 21 are breached inasmuch there is no intelligible differentia between those who use the internet and those who by words spoken or written use other mediums of communication. To punish somebody because he uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case.

6. In reply, Mr. Tushar Mehta, learned Additional Solicitor General defended the constitutionality of Section 66A. He argued that the legislature is in the best position to understand and appreciate the needs of the people. The Court will, therefore, interfere with the legislative process only when a statute is clearly violative of the rights conferred on the

citizen under Part-III of the Constitution. There is a presumption in favour of the constitutionality of an enactment. Further, the Court would so construe a statute to make it workable and in doing so can read into it or read down the provisions that are impugned. The Constitution does not impose impossible standards of determining validity. Mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Loose language may have been used in Section 66A to deal with novel methods of disturbing other people's rights by using the internet as a tool to do so. Further, vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary. He cited a large number of judgments before us both from this Court and from overseas to buttress his submissions.

Freedom of Speech and Expression Article 19(1)(a) of the Constitution of India states as follows:

"Article 19. Protection of certain rights regarding freedom of speech, etc.- (1) All citizens shall have the right-

(a) to freedom of speech and expression;"

7. Article 19(2) states:

"Article 19. Protection of certain rights regarding freedom of speech, etc.- (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 sovereignty and integrity of India, 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."

8. The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. It cannot be over emphasized that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.

9. Various judgments of this Court have referred to the importance of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government. For example, in the early case of Romesh Thappar v. State of Madras, [1950] S.C.R. 594 at 602, this Court stated that freedom of speech lay at the foundation of all democratic organizations. In Sakal Papers (P) Ltd. & Ors. v. Union of India, [1962] 3 S.C.R. 842 at 866, a Constitution Bench of this Court said freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. In a separate concurring judgment Beg,J. said, in Bennett Coleman & Co. & Ors. v. Union of India & Ors., [1973] 2 S.C.R. 757 at 829, that the freedom of speech and of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions.[2]

10. Equally, in S. Khushboo v. Kanniamal & Anr., (2010) 5 SCC 600 this Court stated, in paragraph 45 that the importance of freedom of speech and expression though not absolute

was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance, the culture of open dialogue is generally of great societal importance.

11. This last judgment is important in that it refers to the "market place of ideas" concept that has permeated American Law. This was put in the felicitous words of Justice Holmes in his famous dissent in Abrams v. United States, 250 US 616 (1919), thus:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

12. Justice Brandeis in his famous concurring judgment in Whitney v. California, 71 L. Ed. 1095 said:

"Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking

heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." (at page 1105, 1106)

13. This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.[3] It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty& integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order".

14. It is at this point that a word needs to be said about the use of American judgments in the context of Article 19(1)(a). In virtually every significant judgment of this Court, reference has been made to judgments from across the Atlantic. Is it safe to do so?

15. It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the U.S. first Amendment - Congress shall make no law which abridges the freedom of speech. Second, whereas the U.S. First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(a) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject matters - that is any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject matters set out in Article 19(2).

16. Insofar as the first apparent difference is concerned, the U.S. Supreme Court has never given literal effect to the declaration that Congress shall make no law abridging the freedom of speech. The approach of the Court which is succinctly stated in one of the early U.S. Supreme Court Judgments, continues even today. In Chaplinsky v. New Hampshire, 86 L. Ed. 1031, Justice Murphy who delivered the opinion of the Court put it thus:-

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well- defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional

problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed.1213, 128 A.L.R. 1352." (at page 1035)

17. So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the U.S. Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject matters that there is a vast difference. In the U.S., if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject matters set out under Article 19(2). If it does not, and is outside the pale of 19(2), Indian courts will strike down such law.

18. Viewed from the above perspective, American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. It is only when it comes to sub- serving the general public interest that there is the world of a difference. This is perhaps why in Kameshwar Prasad & Ors. v. The State of Bihar & Anr., 1962 Supp. (3) S.C.R. 369, this Court held:

"As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United State reading "Congress shall make no law.... abridging the freedom of speech..." appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power

- the scope of which however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications etc., has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising under Art. 19(1) (a) or (b) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision." (At page 378)

19. But when it comes to understanding the impact and content of freedom of speech, in Indian Express Newspapers (Bombay) Private Limited & Ors. v. Union of India & Ors., (1985) 2 SCR 287, Venkataramiah,J. stated:

"While examining the constitutionality of a law which is alleged to contravene Article 19 (1) (a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19 (1)

(a) and of Article 19 (1) (g) of our constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed under Article 19 (1) (a) and Article 19 (1) (g) of the Constitution are to be read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made." (at page 324)

20. With these prefatory remarks, we will now go to the other aspects of the challenge made in these writ petitions and argued before us.

A. Article 19(1)(a) -

Section 66A has been challenged on the ground that it casts the net very wide - "all information" that is disseminated over the internet is included within its reach. It will be useful to note that Section 2(v) of Information Technology Act, 2000 defines information as follows:

"2. Definitions.-(1) In this Act, unless the context otherwise requires,-

(v) "Information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."

Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public's right to know is directly affected by Section 66A. Information of all kinds is roped in - such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know - the market place of ideas - which the internet provides to persons of all kinds is what attracts Section 66A. That the information sent has to be annoying, inconvenient, grossly offensive etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc. The petitioners are right in saying that Section 66A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66A.

In this regard, the observations of Justice Jackson in American Communications Association v. Douds, 94 L. Ed. 925 are apposite:

"Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the

citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

Article 19(2) One challenge to Section 66A made by the petitioners' counsel is that the offence created by the said Section has no proximate relation with any of the eight subject matters contained in Article 19(2). We may incidentally mention that the State has claimed that the said Section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

21. Under our constitutional scheme, as stated earlier, it is not open to the State to curtail freedom of speech to promote the general public interest. In Sakal Papers (P) Ltd. & Ors. v. Union of India, [1962] 3 S.C.R. 842, this Court said:

"It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom." (at page 863)

22. Before we come to each of these expressions, we must understand what is meant by the expression "in the interests of". In The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, [1960] 2 S.C.R. 821, this Court laid down:

"We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied there from; and between an Act that directly maintained public order and that indirectly brought about the same result. The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act." (at pages 834, 835) "The restriction made "in the interests of public order" must also have reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the

achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause." (at page 835) "The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.....There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order" (at page 836).

Reasonable Restrictions:

23. This Court has laid down what "reasonable restrictions" means in several cases. In Chintaman Rao v. The State of Madhya Pradesh, [1950] S.C.R. 759, this Court said:

"The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality." (at page 763)

24. In State of Madras v. V.G. Row, [1952] S.C.R. 597, this Court said:

"This Court had occasion in Dr. Khare's case (1950) S.C.R. 519 to define the scope of the judicial review under clause (5) of Article19 where the phrase "imposing reasonable restriction on the exercise of the right" also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, where ever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self- restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the

elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable." (at page 606-607)

25. Similarly, in Mohd. Faruk v. State of Madhya Pradesh & Ors., [1970] 1 S.C.R. 156, this Court said:

"The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency-national or local-or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved." (at page 161)

26. In Dr. N. B. Khare v. State of Delhi, [1950] S.C.R. 519, a Constitution Bench also spoke of reasonable restrictions when it comes to procedure. It said:

"While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years externment or ten years externment, the question whether such period of externment is reasonable, being the substantive part, is necessarily for the consideration of the court under clause (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it has to determine if the exercise of the right has been reasonably restricted." (at page 524)

27. It was argued by the learned Additional Solicitor General that a relaxed standard of reasonableness of restriction should apply regard being had to the fact that the medium of speech being the internet differs from other mediums on several grounds. To appreciate the width and scope of his submissions, we are setting out his written submission verbatim:

"(i) the reach of print media is restricted to one state or at the most one country while internet has no boundaries and its reach is global;

(ii) the recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video;

(iii) In case of televisions serials [except live shows] and movies, there is a permitted pre-censorship' which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of an internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory regulation;

In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted I televised I viewed. While in case of an internet, morphing of

images, change of voices and many other technologically advance methods to create serious potential social disorder can be applied.

By the medium of internet, rumors having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums.

In case of mediums like print media, television and films, it is broadly not possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right under Article 21 of the Constitution of India.

By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender.

By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy / borrow a newspaper and / or will have to go to a theater to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed and that too only at a time where it is being telecast. While in case of an internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases.

(ix) In case of other mediums, it is impossible to maintain anonymity as a result of which speech ideal opinions films having serious potential of creating a social disorder never gets generated since its origin is bound to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

(x) In case of other mediums like newspapers, television or films, the approach is always institutionalized approach governed by industry specific ethical norms of self conduct. Each newspaper / magazine / movie production house / TV Channel will have their own institutionalized policies in house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression under Article 19[1] [a].

(xi) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constrains. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said infrastructural and logistical constrains have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click."

28. As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved

- that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has been repelled by us on this ground later in this judgment. But we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a Section creating a new offence, such as Section 69A for instance, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above.

29. In fact, this aspect was considered in Secretary Ministry of Information & Broadcasting, Government of India v. Cricket Association of Bengal, (1995) 2 SCC 161 in para 37, where the following question was posed:

"The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media."

This question was answered in para 78 thus:

"There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(a) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this

control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like the FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media."

Public Order

30. In Article 19(2) (as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made under Section 7 of the Punjab Maintenance of Public Order Act and to an order made under Section 9 (1)(a) of the Madras Maintenance of Public Order Act were allowed in two early judgments by this Court. Thus in Romesh Thappar v. State of Madras, [1950] S.C.R. 594, this Court held that an order made under Section 9(1)(a) of the Madras Maintenance of Public Order Act (XXIII of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.

31. Similarly, in Brij Bhushan & Anr. v. State of Delhi, [1950] S.C.R. 605, an order made under Section 7 of the East Punjab Public Safety Act, 1949, was held to be unconstitutional and void for the self-same reason.

32. As an aftermath of these judgments, the Constitution First Amendment added the words "public order" to Article 19(2).

33. In Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia, [1960] 2 S.C.R. 821, this Court held that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State.

This definition was further refined in Dr. Ram Manohar Lohia v. State of Bihar & Ors., [1966] 1 S.C.R. 709, where this Court held:

"It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State." (at page 746)

34. In Arun Ghosh v. State of West Bengal, [1970] 3 S.C.R. 288, Ram Manohar Lohia's case was referred to with approval in the following terms:

"In Dr. Ram Manohar Lohia's case this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished, from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large Sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French

distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr. Ram Manohar Lohia's case examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another." (at pages 290 and 291).

35. This decision lays down the test that has to be formulated in all these cases. We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned. (Save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent - there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquility. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel `annoying' girls is telling - this Court has held that mere `annoyance' need not cause disturbance of public order. Under Section 66A, the offence is complete by sending a message for the purpose of causing annoyance, either `persistently' or otherwise without in any manner impacting public order.

Clear and present danger - tendency to affect.

36. It will be remembered that Justice Holmes in Schenck v. United States, 63 L. Ed. 470 enunciated the clear and present danger test as follows:

"...The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Stove & Range Co.,

221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." (At page 473, 474)

37. This was further refined in Abrams v. Unites States 250 U.S. 616 (1919), this time in a Holmesian dissent, to be clear and imminent danger. However, in most of the subsequent judgments of the U.S. Supreme Court, the test has been understood to mean to be "clear and present danger". The test of "clear and present danger" has been used by the U.S. Supreme Court in many varying situations and has been adjusted according to varying fact situations. It appears to have been repeatedly applied, see- Terminiello v. City of Chicago 93 L. Ed. 1131 (1949) at page 1134-1135, Brandenburg v. Ohio 23 L. Ed. 2d 430 (1969) at 434-435 & 436, Virginia v. Black 155 L. Ed. 2d 535 (2003) at page 551, 552 and 553[4].

38. We have echoes of it in our law as well S. Rangarajan v. P. Jagjivan& Ors., (1989) 2 SCC 574 at paragraph 45:

"45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

39. This Court has used the expression "tendency" to a particular act. Thus, in State of Bihar v. Shailabala Devi, [1952] S.C.R. 654, an early decision of this Court said that an article, in order to be banned must have a tendency to excite persons to acts of violence (at page 662-663). The test laid down in the said decision was that the article should be considered as a whole in a fair free liberal spirit and then it must be decided what effect it would have on the mind of a reasonable reader. (at pages 664-665)

40. In Ramji Lal Modi v. The State of U.P., [1957] S.C.R. 860 at page 867, this court upheld Section 295A of the Indian Penal Code only because it was read down to mean that aggravated forms of insults to religion must have a tendency to disrupt public order. Similarly, in Kedar Nath Singh v. State of Bihar, 1962 Supp. (2) S.C.R. 769, Section 124A of the Indian Penal Code was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It was added that merely creating disaffection or creating feelings of enmity in certain people was not good enough or else it would violate the fundamental right of free speech under Article 19(1)(a). Again, in Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte & Ors., 1996 (1) SCC 130, Section 123 (3A) of the Representation of

People Act was upheld only if the enmity or hatred that was spoken about in the Section would tend to create immediate public disorder and not otherwise.

41. Viewed at either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.

Defamation

42. Defamation is defined in Section 499 of the Penal Code as follows:

"499. Defamation.-Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.-It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.-It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.-An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.-No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."

43. It will be noticed that for something to be defamatory, injury to reputation is a basic ingredient. Section 66A does not concern itself with injury to reputation. Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation. It is clear therefore that the Section is not aimed at defamatory statements at all.

Incitement to an offence:

44. Equally, Section 66A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66A has nothing to do with "incitement to an offence". As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under

Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved under Article 19(2), is declared as unconstitutional.

Decency or Morality

45. This Court in Ranjit Udeshi v. State of Maharashtra [1965] 1 S.C.R. 65 took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in Hicklin's case which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the UK, United States as well as in our country. Thus, in Director General, Directorate General of Doordarshan v. Anand Patwardhan, 2006 (8) SCC 433, this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value (see Para

31).

46. In a recent judgment of this Court, Aveek Sarkar v. State of West Bengal, 2014 (4) SCC 257, this Court referred to English, U.S. and Canadian judgments and moved away from the Hicklin test and applied the contemporary community standards test.

47. What has been said with regard to public order and incitement to an offence equally applies here. Section 66A cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality' in that what may be grossly offensive or annoying under the Section need not be obscene at all - in fact the word 'obscene' is conspicuous by its absence in Section 66A.

48. However, the learned Additional Solicitor General asked us to read into Section 66A each of the subject matters contained in Article 19(2) in order to save the constitutionality of the provision. We are afraid that such an exercise is not possible for the simple reason that when the legislature intended to do so, it provided for some of the subject matters contained in Article 19(2) in Section 69A. We would be doing complete violence to the language of Section 66A if we were to read into it something that was never intended to be read into it. Further, he argued that the statute should be made workable, and the following should be read into Section 66A:

"(i) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi racial society;

Director of Public Prosecutions v. Collins - (2006) 1 WLR 2223 @ para 9 and 21Connolly v. Director of Public Prosecutions reported in [2008] 1 W.L.R. 276/2007 [1] All ER 1012 House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media And Criminal Offences" @ pg 260 of compilation of judgments Vol I Part B

(ii) Information which is directed to incite or can produce imminent lawless action Brandenburg v. Ohio 395 U.S. 444 (1969);

(iii) Information which may constitute credible threats of violence to the person or damage;

(iv) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances;

Terminiello v. Chicago 337 US 1 (1949)

(v) Information which advocates or teaches the duty, necessity or proprietary of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify glorify such violent means to accomplish political, social, economical or religious reforms [Whitney vs. California 274 US 357];

(vi) Information which contains fighting or abusive material;

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)

(vii) Information which promotes hate speech i.e. Information which propagates hatred towards individual or a groups, on the basis of race, religion, religion, casteism, ethnicity, Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.

Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.

(viii) Satirical or iconoclastic cartoon and caricature which fails the test laid down in Hustler Magazine, Inc. v. Falwell 485 U.S. 46 (1988)

(ix) Information which glorifies terrorism and use of drugs;

(x) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking.

(xi) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it.

Aveek Sarkar and Anr. vs. State of West Bengal and Ors. (2014) 4 SCC 257.

(xii) Context and background test of obscenity. Information which is posted in such a context or background which has a consequential effect of outraging the modesty of the pictured individual.

Aveek Sarkar and Anr. vs. State of West Bengal and Ors. (2014) 4 SCC 257."

49. What the learned Additional Solicitor General is asking us to do is not to read down Section 66A - he is asking for a wholesale substitution of the provision which is obviously not possible.

Vagueness

50. Counsel for the petitioners argued that the language used in Section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a particular communication will fall.

51. We were given Collin's dictionary, which defined most of the terms used in Section 66A, as follows:

"Offensive:-

Unpleasant or disgusting, as to the senses Causing anger or annoyance; insulting For the purpose of attack rather than defence.

Menace:-

To threaten with violence, danger, etc. A threat of the act of threatening Something menacing; a source of danger A nuisance Annoy:-

To irritate or displease To harass with repeated attacks Annoyance The feeling of being annoyed The act of annoying.

Inconvenience The state of quality of being inconvenient Something inconvenient; a hindrance, trouble, or difficulty Danger:-

The state of being vulnerable to injury, loss, or evil risk A person or a thing that may cause injury pain etc. Obstruct:-

To block (a road a passageway, etc.) with an obstacle To make (progress or activity) difficult.

To impede or block a clear view of.

Obstruction:- a person or a thing that obstructs.

Insult:-

To treat, mention, or speak to rudely; offend; affront To assault; attack An offensive or contemptuous remark or action; affront; slight A person or thing producing the effect of an affront = some television is an insult to intelligence An injury or trauma."

52. The U.S. Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in Musser v. Utah, 92 L. Ed. 562, a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.

53. In Winters v. People of State of New York, 92 L. Ed. 840, a New York Penal Law read as follows:-

"1141. Obscene prints and articles

1. A person.....who,

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime;.....

'Is guilty of a misdemeanor, ...'" (at page 846) The court in striking down the said statute held:

"The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law - obscene, lewd, lascivious, filthy, indecent or disgusting-and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct-massing stories to incite crime-has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character 'that men of common intelligence must necessarily guess at its meaning.' Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. The entire text of the statute or the subjects dealt with may furnish an adequate standard. The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities.

The subsection of the New York Penal Law, as now interpreted by the Court of Appeals prohibits distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stories 'so massed as to become vehicles for inciting violent and depraved crimes against the person * * * not necessarily * * * sexual passion,' we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required- no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crime of violence against the person. No conspiracy to commit a crime is required. See Musser v. State of Utah, 68 S.Ct. 397, this Term. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. As said in the Cohen Grocery Co. case, supra, 255 U.S. at page 89, 41 S.Ct. at page 300, 65 L.Ed. 516, 14 A.L.R. 1045:

'It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.' The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. it does

not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. Herndon v. Lowry, 301 U.S. 242, 259, 57 S.Ct. 732, 739, 81 L.Ed. 1066." (at page 851-852)

54. In Burstyn v. Wilson, 96 L. Ed. 1098, sacrilegious writings and utterances were outlawed. Here again, the U.S. Supreme Court stepped in to strike down the offending Section stating:

"It is not a sufficient answer to say that 'sacrilegious' is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States are banned in New York. To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art-for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious.' And if we cannot tell, how are those to be governed by the statute to tell? (at page 1121)

55. In City of Chicago v. Morales et al, 527 U.S. 41 (1999), a Chicago Gang Congregation Ordinance prohibited criminal street gang members from loitering with one another or with other persons in any public place for no apparent purpose. The Court referred to an earlier judgment in United States v. Reese 92 U.S. 214 (1875) at 221 in which it was stated that the Constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the Court to step in and say who could be rightfully detained and who should be set at liberty. It was held that the broad sweep of the Ordinance violated the requirement that a legislature needs to meet: to establish minimum guidelines to govern law enforcement. As the impugned Ordinance did not have any such guidelines, a substantial amount of innocent conduct would also be brought within its net, leading to its unconstitutionality.

56. It was further held that a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.

57. Similarly, in Grayned v. City of Rockford, 33 L.Ed. 2d. 222, the State of Illinois provided in an anti noise ordinance as follows:

"'(N)o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . .' Code of Ordinances, c. 28, 19.2(a)."

The law on the subject of vagueness was clearly stated thus:

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'"(at page 227-228)

58. The anti noise ordinance was upheld on facts in that case because it fixed the time at which noise disrupts school activity - while the school is in session - and at a fixed place - 'adjacent' to the school.

59. Secondly, there had to be demonstrated a causality between disturbance that occurs and the noise or diversion. Thirdly, acts have to be willfully done. It is important to notice that the Supreme Court specifically held that "undesirables" or their "annoying conduct" may not be punished. It is only on these limited grounds that the said Ordinance was considered not to be impermissibly vague.

60. In Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al., 521 U.S. 844 (1997), two provisions of the Communications Decency Act of 1996 which sought to protect minors from harmful material on the internet were adjudged unconstitutional. This judgment is a little important for two basic reasons - that it deals with a penal offence created for persons who use the internet as also for the reason that the statute which was adjudged unconstitutional uses the expression "patently offensive" which comes extremely close to the expression "grossly offensive" used by the impugned Section 66A. Section 223(d), which was adjudged unconstitutional, is set out hereinbelow:-

"223 (d) Whoever-

"(1) in interstate or foreign communications knowingly-

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both." (at page 860) Interestingly, the District Court Judge writing of the internet said:

"[i]t is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country - and indeed the world - as yet seen. The plaintiffs in these actions correctly describe the 'democratizing' effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti- federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern- day Luthers still post their theses, but to electronic bulletins boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen." 929 F. Supp. At 881. (at page 425)

61. The Supreme Court held that the impugned statute lacked the precision that the first amendment required when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the impugned Act effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.

62. Such a burden on adult speech is unacceptable if less restrictive alternatives would be as effective in achieving the legitimate purpose that the statute was enacted to serve. It was held that the general undefined term "patently offensive" covers large amounts of non-pornographic material with serious educational or other value and was both vague and over broad.

It was, thus, held that the impugned statute was not narrowly tailored and would fall foul of the first amendment.

63. In Federal Communications Commission v. Fox Television Stations, 132 S.Ct. 2307, it was held:

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See Connally v. General Constr. Co., 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); Papachristou v. Jacksonville, 405 U. S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" (quoting Lanzetta v. New Jersey, 306 U. S. 451, 453 (1939) (alteration in original))). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See United States v. Williams, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." Ibid. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See id., at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is

required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See Grayned v. City of Rockford, 408 U. S. 104, 108-109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."(at page 2317)

64. Coming to this Court's judgments, in State of Madhya Pradesh v. Baldeo Prasad, [1961] 1 S.C.R. 970 an inclusive definition of the word "goonda" was held to be vague and the offence created by Section 4A of the Goondas Act was, therefore, violative of Article 19(1)(d) and (e) of the Constitution. It was stated:

"Incidentally it would also be relevant to point out that the definition of the word "goonda" affords no assistance in deciding which citizen can be put under that category. It is an inclusive definition and it does not indicate which tests have to be applied in deciding whether a person falls in the first part of the definition. Recourse to the dictionary meaning of the word would hardly be of any assistance in this matter. After all it must be borne in mind that the Act authorises the District Magistrate to deprive a citizen of his fundamental right under Art. 19(1)(d) and (e), and though the object of the Act and its purpose would undoubtedly attract the provisions of Art. 19(5) care must always be taken in passing such acts that they provide sufficient safeguards against casual, capricious or even malicious exercise of the powers conferred by them. It is well known that the relevant provisions of the Act are initially put in motion against a person at a lower level than the District magistrate, and so it is always necessary that sufficient safeguards should be provided by the Act to protect the fundamental rights of innocent citizens and to save them from unnecessary harassment. That is why we think the definition of the word "goonda" should have given necessary assistance to the District Magistrate in deciding whether a particular citizen falls under the category of goonda or not; that is another infirmity in the Act. As we have already pointed out s. 4-A suffers from the same infirmities as s. 4.

Having regard to the two infirmities in Sections 4, 4-A respectively we do not think it would be possible to accede to the argument of the Learned Advocate-General that the operative portion of the Act can fall under Art. 19(5) of the Constitution. The person against whom action can be taken under the Act is not entitled to know the source of the information received by the District Magistrate; he is only told about his prejudicial activities on which the satisfaction of the District Magistrate is based that action should be taken against him under s.4 or s. 4-A. In such a case it is absolutely essential that the Act must clearly indicate by a proper definition or otherwise when and under what circumstances a person can be called a goonda, and it must impose an obligation on the District Magistrate to apply his mind to the question as to whether the person against whom complaints are received is such a goonda or not. It has been urged before us that such an obligation is implicit in Sections 4 and 4-A. We are, however, not impressed by this argument. Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Art. 19(5). The result

of this infirmity is that it has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda. In other words, the restrictions which it allows to be imposed on the exercise of the fundamental right of a citizen guaranteed by Art. 19(1)(d) and (e) must in the circumstances be held to be unreasonable. That is the view taken by the High court and we see no reason to differ from it." (at pages 979, 980)

65. At one time this Court seemed to suggest that the doctrine of vagueness was no part of the Constitutional Law of India. That was dispelled in no uncertain terms in K.A. Abbas v. The Union of India & Another, [1971] 2 S.C.R. 446:

"This brings us to the manner of the exercise of control and restriction by the directions. Here the argument is that most of the regulations are vague and further that they leave no scope for the exercise of creative genius in the field of art. This poses the first question before us whether the 'void for vagueness' doctrine is applicable. Reliance in this connection is placed on Municipal Committee Amritsar and Anr. v. The State of Rajasthan . In that case a Division Bench of this Court lays down that an Indian Act cannot be declared invalid on the ground that it violates the due process clause or that it is vague....." (at page 469) "These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in State of Madhya Pradesh and Anr. v. Baldeo Prasad, 1961 (1) SCR 970 where the Central Provinces and Berar Goondas Act 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4A was that the person sought to be proceeded against must be a goonda but the definition of goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague.

The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases." (at pages 470, 471)

66. Similarly, in Harakchand Ratanchand Banthia & Ors. v. Union of India& Ors., 1969 (2) SCC 166, Section 27 of the Gold Control Act was struck down on the ground that the

conditions imposed by it for the grant of renewal of licences are uncertain, vague and unintelligible. The Court held:

"21. We now come to Section 27 of the Act which relates to licensing of dealers. It was stated on behalf of the petitioners that the conditions imposed by sub-section (6) of Section 27 for the grant or renewal of licences are uncertain, vague and unintelligible and consequently wide and unfettered power was conferred upon the statutory authorities in the matter of grant or renewal of licence. In our opinion this contention is well founded and must be accepted as correct. Section 27(6)(a) states that in the matter of issue or renewal of licences the Administrator shall have regard to "the number of dealers existing in the region in which the applicant intends to carry on business as a dealer". But the word "region" is nowhere defined in the Act. Similarly Section 27(6)(b) requires the Administrator to have regard to "the anticipated demand, as estimated by him, for ornaments in that region." The expression "anticipated demand" is a vague expression which is not capable of objective assessment and is bound to lead to a great deal of uncertainty. Similarly the expression "suitability of the applicant" in Section 27(6)(e) and "public interest" in Section 27(6)(g) do not provide any objective standard or norm or guidance. For these reasons it must be held that clauses (a),(d),(e) and (g) of Section 27(6) impose unreasonable restrictions on the fundamental right of the petitioner to carry on business and are constitutionally invalid. It was also contended that there was no reason why the conditions for renewal of licence should be as rigorous as the conditions for initial grant of licence. The requirement of strict conditions for the renewal of licence renders the entire future of the business of the dealer uncertain and subjects it to the caprice and arbitrary will of the administrative authorities. There is justification for this argument and the requirement of Section 26 of the Act imposing the same conditions for the renewal of the licence as for the initial grant appears to be unreasonable. In our opinion clauses (a), (b), (e) and (g) are inextricably bound up with the other clauses of Section 27(6) and form part of a single scheme. The result is that clauses (a), (b), (c), (e) and (g) are not severable and the entire Section 27(6) of the Act must be held invalid. Section 27(2)(d) of the Act states that a valid licence issued by the Administrator "may contain such conditions, limitations and restrictions as the Administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers". On the face of it, this sub- section confers such wide and vague power upon the Administrator that it is difficult to limit its scope. In our opinion Section 27(2)(d) of the Act must be struck down as an unreasonable restriction on the fundamental right of the petitioners to carry on business. It appears, however, to us that if Section 27(2)(d) and Section 27(6) of the Act are invalid the licensing scheme contemplated by the rest of Section 27 of the Act cannot be worked in practice. It is, therefore, necessary for Parliament to enact fresh legislation imposing appropriate conditions and restrictions for the grant and renewal of licences to dealers. In the alternative the Central Government may make appropriate rules for the same purpose in exercise of its rule-making power under Section 114 of the Act."

67. In A.K. Roy & Ors. v. Union of India & Ors., [1982] 2 S.C.R. 272, a part of Section 3 of the National Security Ordinance was read down on the ground that "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" is an expression so vague that it is capable of wanton abuse. The Court held:

"What we have said above in regard to the expressions 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" which occurs in Section 3(2) of the Act. Which supplies and services are essential to the community can easily be defined by the legislature and indeed, legislations which regulate the prices and possession of essential commodities either enumerate those commodities or confer upon the appropriate Government the power to do so. In the absence of a definition of 'supplies and services essential to the community', the detaining authority will be free to extend the application of this clause of sub-section (2) to any commodities or services the maintenance of supply of which, according to him, is essential to the community.

But that is not all. The Explanation to sub-section (2) gives to the particular phrase in that sub-section a meaning which is not only uncertain but which, at any given point of time, will be difficult to ascertain or fasten upon. According to the Explanation, no order of detention can be made under the National Security Act on any ground on which an order of detention may be made under the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980. The reason for this, which is stated in the Explanation itself, is that for the purposes of sub-section (2), "acting in any manner prejudicial to the maintenance of supplies essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of Section 3 of the Act of 1980. Clauses (a) and (b) of the Explanation to Section 3(1) of the Act of 1980 exhaust almost the entire range of essential commodities. Clause (a) relates to committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 10 of 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community. Clause (b) of the Explanation to Section 3(1) of the Act of 1980 relates to dealing in any commodity which is an essential commodity as defined in the Essential Commodities Act, 1955, or with respect to which provisions have been made in any such other law as is referred to in clause (a). We find it quite difficult to understand as to which are the remaining commodities outside the scope of the Act of 1980, in respect of which it can be said that the maintenance of their supplies is essential to the community. The particular clause in sub- section (2) of Section 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context of the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21." (at page 325-326)

68. Similarly, in Kartar Singh v. State of Punjab, (1994) 3 SCC 569 at para 130-131, it was held:

"130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

131. Let us examine clause (i) of Section 2(1)(a). This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned counsel, even an innocent person who ingenuously and undefiledly communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or disruptionists, can be arrested and prosecuted by abusing or misusing or misapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innoxious innocent person may also be convicted."

69. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined. Section 66 in stark contrast to Section 66A states:

"66. Computer related offences.-If any person, dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

Explanation.-For the purposes of this section,-

(a) the word "dishonestly" shall have the meaning assigned to it in Section 24 of the Indian Penal Code (45 of 1860);

(b) the word "fraudulently" shall have the meaning assigned to it in Section 25 of the Indian Penal Code (45 of 1860)."

70. It will be clear that in all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expression "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66A.

71. The provisions contained in Sections 66B up to Section 67B also provide for various punishments for offences that are clearly made out. For example, under Section 66B, whoever dishonestly receives or retains any stolen computer resource or communication device is punished with imprisonment. Under Section 66C, whoever fraudulently or dishonestly makes use of any identification feature of another person is liable to punishment with imprisonment. Under Section 66D, whoever cheats by personating becomes liable to punishment with imprisonment. Section 66F again is a narrowly drawn section which inflicts punishment which may extend to imprisonment for life for persons who threaten the unity, integrity, security or sovereignty of India. Sections 67 to 67B deal with punishment for offences for

publishing or transmitting obscene material including depicting children in sexually explicit acts in electronic form.

72. In the Indian Penal Code, a number of the expressions that occur in Section 66A occur in Section 268.

"268. Public nuisance.-A person is guilty of a public nuisance who does any act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage."

73. It is important to notice the distinction between the Sections 268 and 66A. Whereas, in Section 268 the various expressions used are ingredients for the offence of a public nuisance, these ingredients now become offences in themselves when it comes to Section 66A. Further, under Section 268, the person should be guilty of an act or omission which is illegal in nature - legal acts are not within its net. A further ingredient is that injury, danger or annoyance must be to the public in general. Injury, danger or annoyance are not offences by themselves howsoever made and to whomsoever made. The expression "annoyance" appears also in Sections 294 and 510 of the IPC:

"294. Obscene acts and songs.-Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

510. Misconduct in public by a drunken person.-Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both."

74. If one looks at Section 294, the annoyance that is spoken of is clearly defined - that is, it has to be caused by obscene utterances or acts. Equally, under Section 510, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66A which in stark contrast uses completely open ended, undefined and vague language.

75. Incidentally, none of the expressions used in Section 66A are defined. Even "criminal intimidation" is not defined - and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

76. Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise - suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions - and that is what renders the Section unconstitutionally vague.

77. However, the learned Additional Solicitor General argued before us that expressions that are used in Section 66A may be incapable of any precise definition but for that reason they are not constitutionally vulnerable. He cited a large number of judgments in support of this submission. None of the cited judgments dealt with a Section creating an offence which is saved despite its being vague and in capable of any precise definition. In fact, most of the judgments cited before us did not deal with criminal law at all. The few that did are dealt with hereinbelow. For instance, Madan Singh v. State of Bihar, (2004) 4 SCC 622 was cited before us. The passage cited from the aforesaid judgment is contained in para 19 of the judgment. The cited passage is not in the context of an argument that the word "terrorism" not being separately defined would, therefore, be struck down on the ground of vagueness. The cited passage was only in the context of upholding the conviction of the accused in that case. Similarly, in Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra & Ors., (2010) 5 SCC 246, the expression "insurgency" was said to be undefined and would defy a precise definition, yet it could be understood to mean break down of peace and tranquility as also a grave disturbance of public order so as to endanger the security of the State and its sovereignty. This again was said in the context of a challenge on the ground of legislative competence. The provisions of the Maharashtra Control of Organised Crime Act were challenged on the ground that they were outside the expression "public order" contained in Entry 1 of List I of the 7th Schedule of the Constitution of India. This contention was repelled by saying that the expression "public order" was wide enough to encompass cases of "insurgency". This case again had nothing to do with a challenge raised on the ground of vagueness.

78. Similarly, in State of M.P. v. Kedia Leather & Liquor Limited, (2003) 7 SCC 389, paragraph 8 was cited to show that the expression "nuisance" appearing in Section 133 of the Code of Criminal Procedure was also not capable of precise definition. This again was said in the context of an argument that Section 133 of the Code of Criminal Procedure was impliedly repealed by the Water (Prevention and Control of Pollution) Act, 1974. This contention was repelled by saying that the areas of operation of the two provisions were completely different and they existed side by side being mutually exclusive. This case again did not contain any argument that the provision contained in Section 133 was vague and, therefore, unconstitutional. Similarly, in State of Karnataka v. Appa Balu Ingale, 1995 Supp. (4) SCC 469, the word "untouchability" was said not to be capable of precise definition. Here again, there was no constitutional challenge on the ground of vagueness.

79. In fact, two English judgments cited by the learned Additional Solicitor General would demonstrate how vague the words used in Section 66A are. In Director of Public Prosecutions

v. Collins, (2006) 1 WLR 2223, the very expression "grossly offensive" is contained in Section 127(1)(1) of the U.K. Communications Act, 2003. A 61 year old man made a number of telephone calls over two years to the office of a Member of Parliament. In these telephone calls and recorded messages Mr. Collins who held strong views on immigration made a reference to "Wogs", "Pakis", "Black bastards" and "Niggers". Mr. Collins was charged with sending messages which were grossly offensive. The Leicestershire Justices dismissed the case against Mr. Collins on the ground that the telephone calls were offensive but not grossly offensive. A reasonable person would not so find the calls to be grossly offensive. The Queen's Bench agreed and dismissed the appeal filed by the Director of Public Prosecutions. The House of Lords reversed the Queen's Bench stating:

"9. The parties agreed with the rulings of the Divisional Court that it is for the Justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ("Old Contemptibles"). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

10. In contrast with section 127(2)(a) and its predecessor subsections, which require proof of an unlawful purpose and a degree of knowledge, section 127(1)(a) provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence against the subsection."

80. Similarly in Chambers v. Director of Public Prosecutions, [2013] 1 W.L.R. 1833, the Queen's Bench was faced with the following facts:

"Following an alert on the Internet social network, Twitter, the defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several "tweets" on Twitter in his own name, including the following: "Crap1 Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high1" None of the defendant's "followers" who read the posting was alarmed by it at the time. Some five days after its posting the defendant's tweet was read by the duty manager responsible for security at the airport on a general Internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the defendant asserted that the tweet was a joke and not intended to be menacing. The defendant was charged with sending by a public electronic communications network a message of a menacing character contrary to section 127(1)(a) of the Communications Act 2003. He was convicted in a magistrates' court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was "menacing per se" and that the defendant was, at the very least, aware that his message was of a menacing character."

81. The Crown Court was satisfied that the message in question was "menacing" stating that an ordinary person seeing the tweet would be alarmed and, therefore, such message would be "menacing". The Queen's Bench Division reversed the Crown Court stating:

"31. Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent. The Crown Court was understandably concerned that this message was sent at a time when, as we all know, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. That is plainly relevant to context, but the offence is not directed to the inconvenience which may be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on "Twitter" for widespread reading, a conversation piece for the defendant's followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address "you", meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or it to be taken as a serious warning. Moreover, as Mr. Armson noted, it is unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to imagine a serious threat in which warning of it is given to a large number of tweet "followers" in ample time for the threat to be reported and extinguished."

82. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In Collins' case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66A is unconstitutionally vague.

Ultimately, applying the tests referred to in Chintaman Rao and V.G. Row's case, referred to earlier in the judgment, it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

Chilling Effect And Overbreadth

83. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views" - such as the emancipation of women or the abolition of the caste system or whether certain members of a non proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

84. Incidentally, some of our judgments have recognized this chilling effect of free speech. In R. Rajagopal v. State of T.N., (1994) 6 SCC 632, this Court held:

"19. The principle of Sullivan [376 US 254 : 11 L Ed 2d 686 (1964)] was carried forward - and this is relevant to the second question arising in this case - in Derbyshire County Council v. Times Newspapers Ltd. [(1993) 2 WLR 449 : (1993) 1 All ER 1011, HL] , a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon". A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in Attorney General v. Guardian Newspapers Ltd. (No. 2)[(1990) 1 AC 109 : (1988) 3 All ER 545 : (1988) 3 WLR 776, HL] popularly known as "Spycatcher case", the House of Lords had opined that "there are rights available to private citizens which institutions of... Government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the United States Supreme Court in New York Times v. Sullivan [376 US 254 : 11 L Ed 2d 686 (1964)] and certain other decisions of American Courts and observed - and this is significant for our purposes-

"while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available." Accordingly, it was held that the action was not maintainable in law."

85. Also in S. Khushboo v. Kanniammal, (2010) 5 SCC 600, this Court said:

"47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the "freedom of speech and expression".

86. That the content of the right under Article 19(1)(a) remains the same whatever the means of communication including internet communication is clearly established by Reno's case (supra) and by The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr., (1995) SCC 2 161 at Para 78 already referred to. It is thus clear that not only are the expressions used in Section 66A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, Kedar Nath Singh v. State of Bihar, [1962] Supp. 2 S.C.R. 769 at 808 -809. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first Ram Manohar Lohia case, namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the Section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the Section takes in the innocent as well as the guilty, bonafide and malafide advice and whether the person be a legal adviser, a friend or a well wisher of the person instigated, he cannot escape the tentacles of the Section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the field of constitutional prohibitions. It further held that the Section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.

87. In Kameshwar Prasad & Ors. v. The State of Bihar & Anr., [1962] Supp. 3 S.C.R. 369, Rule 4-A of the Bihar Government Servants Conduct Rules, 1956 was challenged. The rule states "No government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

88. The aforesaid rule was challenged under Articles 19 (1)(a) and (b) of the Constitution. The Court followed the law laid down in Ram Manohar Lohia's case [1960] 2 S.C.R. 821 and accepted the challenge. It first held that demonstrations are a form of speech and then held:

"The approach to the question regarding the constitutionality of the rule should be whether the ban that it imposes on demonstrations would be covered by the limitation of the guaranteed rights contained in Art. 19 (2) and 19(3). In regard to both these clauses the only relevant criteria which has been suggested by the respondent-State is that the rule is framed "in the interest of public order". A demonstration may be defined as "an expression of one's feelings by outward signs." A demonstration such as is prohibited by, the rule may be of the most innocent type - peaceful orderly such as the mere wearing of a badge by a Government servant or even by a silent assembly say outside office hours - demonstrations which could in no sense be suggested to involve any breach of tranquility, or of a type involving incitement to or capable of leading to disorder. If the rule had confined itself to demonstrations of type which would lead to disorder then the validity of that rule could have been sustained but what the rule does is the imposition of a blanket-ban on all demonstrations of whatever type - innocent as well as otherwise - and in consequence its validity cannot be upheld." (at page 374)

89. The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited. Finally, the Court held:

"The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration - be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result." (at page 384)

90. These two Constitution Bench decisions bind us and would apply directly on Section 66A. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.

Possibility of an act being abused is not a ground to test its validity:

91. The learned Additional Solicitor General cited a large number of judgments on the proposition that the fact that Section 66A is capable of being abused by the persons who administered it is not a ground to test its validity if it is otherwise valid. He further assured us that this Government was committed to free speech and that Section 66A would not be used to curb free speech, but would be used only when excesses are perpetrated by persons on the rights of others. In The Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr., [1962] 3 S.C.R. 786, this Court observed:

"....This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:

"If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably"

and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission [1960 AC 490 at pp. 520-521] :

"It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute."

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." (at page 825)

92. In this case, it is the converse proposition which would really apply if the learned Additional Solicitor General's argument is to be accepted. If Section 66A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66A must be judged on its own merits without any reference to how well it may be administered.

Severability:

93. The argument of the learned Additional Solicitor General on this score is reproduced by us verbatim from one of his written submissions:

"Furthermore it is respectfully submitted that in the event of Hon'ble Court not being satisfied about the constitutional validity of either any expression or a part of the provision, the Doctrine of Severability as enshrined under Article 13 may be resorted to."

94. The submission is vague: the learned Additional Solicitor General does not indicate which part or parts of Section 66A can possibly be saved. This Court in Romesh Thappar v. The State of Madras, [1950] S.C.R. 594 repelled a contention of severability when it came to the courts enforcing the fundamental right under Article 19(1)(a) in the following terms:

"It was, however, argued that Section 9(1-A) could not be considered wholly void, as, under Article 13(1), an existing law inconsistent with a fundamental right is void only to the extent of the inconsistency and no more. Insofar as the securing of the public safety or the maintenance of public order would include the security of the State, the impugned provision, as applied to the latter purpose, was covered by clause (2) of Article 19 and must, it was said, be held to be valid. We are unable to accede to this contention. Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to

cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent." (At page 603)

95. It has been held by us that Section 66A purports to authorize the imposition of restrictions on the fundamental right contained in Article 19(1)(a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. We have held following K.A. Abbas' case (Supra) that the possibility of Section 66A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void. Romesh Thappar's Case was distinguished in R.M.D. Chamarbaugwalla v. The Union of India, [1957] S.C.R. 930 in the context of a right under Article 19(1)(g) as follows:

"20. In Romesh Thappar v. State of Madras [(1950) SCR 594] , the question was as to the validity of Section 9(1-A) of the Madras Maintenance of Public Order Act, 23 of 1949. That section authorised the Provincial Government to prohibit the entry and circulation within the State of a newspaper "for the purpose of securing the public safety or the maintenance of public order." Subsequent to the enactment of this statute, the Constitution came into force, and the validity of the impugned provision depended on whether it was protected by Article 19(2), which saved "existing law insofar as it relates to any matter which undermines the security of or tends to overthrow the State." It was held by this Court that as the purposes mentioned in Section 9(1-A) of the Madras Act were wider in amplitude than those specified in Article 19(2), and as it was not possible to split up Section 9(1-A) into what was within and what was without the protection of Article 19(2), the provision must fail in its entirety. That is really a decision that the impugned provision was on its own contents inseverable. It is not an authority for the position that even when a provision is severable, it must be struck down on the ground that the principle of severability is inadmissible when the invalidity of a statute arises by reason of its contravening constitutional prohibitions. It should be mentioned that the decision in Romesh Thappar v. State of Madras [(1950) SCR 594] was referred to in State of Bombay v. F.N. Balsara [(1951) SCR 682] and State of Bombay v. United Motors (India) Ltd. [(1953) SCR 1069 at 1098-99] and distinguished."[pic]

96. The present being a case of an Article 19(1)(a) violation, Romesh Thappar's judgment would apply on all fours. In an Article 19(1)(g) challenge, there is no question of a law being applied for purposes not sanctioned by the Constitution for the simple reason that the eight subject matters of Article 19(2) are conspicuous by their absence in Article 19(6) which only speaks of reasonable restrictions in the interests of the general public. The present is a case where, as has been held above, Section 66A does not fall within any of the subject matters contained in Article 19(2) and the possibility of its being applied for purposes outside those

subject matters is clear. We therefore hold that no part of Section 66A is severable and the provision as a whole must be declared unconstitutional.

Article 14

97. Counsel for the petitioners have argued that Article 14 is also infringed in that an offence whose ingredients are vague in nature is arbitrary and unreasonable and would result in arbitrary and discriminatory application of the criminal law. Further, there is no intelligible differentia between the medium of print, broadcast, and real live speech as opposed to speech on the internet and, therefore, new categories of criminal offences cannot be made on this ground. Similar offences which are committed on the internet have a three year maximum sentence under Section 66A as opposed to defamation which has a two year maximum sentence. Also, defamation is a non-cognizable offence whereas under Section 66A the offence is cognizable.

98. We have already held that Section 66A creates an offence which is vague and overbroad, and, therefore, unconstitutional under Article 19(1)(a) and not saved by Article 19(2). We have also held that the wider range of circulation over the internet cannot restrict the content of the right under Article 19(1)(a) nor can it justify its denial. However, when we come to discrimination under Article 14, we are unable to agree with counsel for the petitioners that there is no intelligible differentia between the medium of print, broadcast and real live speech as opposed to speech on the internet. The intelligible differentia is clear - the internet gives any individual a platform which requires very little or no payment through which to air his views. The learned Additional Solicitor General has correctly said that something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the petitioners were right, this Article 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject matter of challenge in these petitions. We make it clear that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. We find, therefore, that the challenge on the ground of Article 14 must fail.

Procedural Unreasonableness

99. One other argument must now be considered. According to the petitioners, Section 66A also suffers from the vice of procedural unreasonableness. In that, if, for example, criminal defamation is alleged, the safeguards available under Section 199 Cr.P.C. would not be available for a like offence committed under Section 66A. Such safeguards are that no court shall take cognizance of such an offence except upon a complaint made by some person aggrieved by the offence and that such complaint will have to be made within six months from the date on which the offence is alleged to have been committed. Further, safeguards that are to be found in Sections 95 and 96 of the Cr.P.C. are also absent when it comes to Section 66A. For example, where any newspaper book or document wherever printed appears to contain matter which is obscene, hurts the religious feelings of some community, is seditious in nature, causes enmity or hatred to a certain section of the public, or is against national integration, such book, newspaper or document may be seized but under Section 96 any person having any interest in such newspaper, book or document may within two months

from the date of a publication seizing such documents, books or newspapers apply to the High court to set aside such declaration. Such matter is to be heard by a Bench consisting of at least three Judges or in High Courts which consist of less than three Judges, such special Bench as may be composed of all the Judges of that High Court.

100. It is clear that Sections 95 and 96 of the Criminal Procedure Code reveal a certain degree of sensitivity to the fundamental right to free speech and expression. If matter is to be seized on specific grounds which are relatable to the subject matters contained in Article 19(2), it would be open for persons affected by such seizure to get a declaration from a High Court consisting of at least three Judges that in fact publication of the so-called offensive matter does not in fact relate to any of the specified subjects contained in Article 19(2).

Further, Section 196 of the Cr.P.C. states:

"196. Prosecution for offences against the State and for criminal conspiracy to commit such offence.- (1) No Court shall take cognizance of-

(a) any offence punishable under Chapter VI or under Section 153-A, [Section 295-A or sub-section (1) of Section 505] of the Indian Penal Code, 1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in Section 108-A of the Indian Penal Code (45 of 1860), except with the previous sanction of the Central Government or of the State Government.

[(1-A) No Court shall take cognizance of-

(a) any offence punishable under Section 153-B or sub-section (2) or sub- section (3) of Section 505 of the Indian Penal Code, 1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence, except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.] (2) No court shall take cognizance of the offence of any criminal conspiracy punishable under Section 120-B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit [an offence] punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings:

Provided that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction [under sub-section (1) or sub-section (1-A) and the District Magistrate may, before according sanction under sub-section (1-A)] and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of Section

155."

101. Again, for offences in the nature of promoting enmity between different groups on grounds of religion etc. or offences relatable to deliberate and malicious acts intending to

outrage religious feelings or statements that create or promote enmity, hatred or ill-will between classes can only be taken cognizance of by courts with the previous sanction of the Central Government or the State Government. This procedural safeguard does not apply even when a similar offence may be committed over the internet where a person is booked under Section 66A instead of the aforesaid Sections.

Having struck down Section 66A on substantive grounds, we need not decide the procedural unreasonableness aspect of the Section.

Section 118 of the Kerala Police Act.

102. Learned counsel for the Petitioner in Writ Petition No. 196 of 2014 assailed sub-section (d) of Section 118 which is set out hereinbelow:

"118. Penalty for causing grave violation of public order or danger.- Any person who,-

(d) Causes annoyance to any person in an indecent manner by statements or verbal or comments or telephone calls or calls of any type or by chasing or sending messages or mails by any means; shall, on conviction be punishable with imprisonment for a term which may extend to three years or with fine not exceeding ten thousand rupees or with both."

103. Learned counsel first assailed the Section on the ground of legislative competence stating that this being a Kerala Act, it would fall outside Entries1 and 2 of List II and fall within Entry 31 of List I. In order to appreciate the argument we set out the relevant entries: "List - I

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

List - II

1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

2. Police (including railway and village police) subject to the provisions of entry 2A of List I."

The Kerala Police Act as a whole would necessarily fall under Entry 2 of List II. In addition, Section 118 would also fall within Entry 1 of List II in that as its marginal note tells us it deals with penalties for causing grave violation of public order or danger.

104. It is well settled that a statute cannot be dissected and then examined as to under what field of legislation each part would separately fall. In A.S. Krishna v. State of Madras, [1957] S.C.R. 399, the law is stated thus:

"The position, then, might thus be summed up : When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such

a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not." (at page 410)

105. It is, therefore, clear that the Kerala Police Act as a whole and Section 118 as part thereof falls in pith and substance within Entry 2 List II, notwithstanding any incidental encroachment that it may have made on any other Entry in List I. Even otherwise, the penalty created for causing annoyance in an indecent manner in pith and substance would fall within Entry 1 List III which speaks of criminal law and would thus be within the competence of the State Legislature in any case.

106. However, what has been said about Section 66A would apply directly to Section 118(d) of the Kerala Police Act, as causing annoyance in an indecent manner suffers from the same type of vagueness and over breadth, that led to the invalidity of Section 66A, and for the reasons given for striking down Section 66A, Section 118(d) also violates Article 19(1)(a) and not being a reasonable restriction on the said right and not being saved under any of the subject matters contained in Article 19(2) is hereby declared to be unconstitutional.

Section 69A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

107. Section 69A of the Information Technology Act has already been set out in paragraph 2 of the judgment. Under sub-section (2) thereof, the 2009 Rules have been framed. Under Rule 3, the Central Government shall designate by notification in the official gazette an officer of the Central Government not below the rank of a Joint Secretary as the Designated Officer for the purpose of issuing direction for blocking for access by the public any information referable to Section 69A of the Act. Under Rule 4, every organization as defined under Rule 2(g), (which refers to the Government of India, State Governments, Union Territories and agencies of the Central Government as may be notified in the Official Gazette by the Central Government)- is to designate one of its officers as the "Nodal Officer". Under Rule 6, any person may send their complaint to the "Nodal Officer" of the concerned Organization for blocking, which complaint will then have to be examined by the concerned Organization regard being had to the parameters laid down in Section 69A(1) and after being so satisfied, shall transmit such complaint through its Nodal Officer to the Designated Officer in a format specified by the Rules. The Designated Officer is not to entertain any complaint or request for blocking directly from any person. Under Rule 5, the Designated Officer may on receiving any such request or complaint from the Nodal Officer of an Organization or from a competent court, by order direct any intermediary or agency of the Government to block any information or part thereof for the reasons specified in 69A(1). Under Rule 7 thereof, the request/complaint shall then be examined by a Committee of Government Personnel who under Rule 8 are first to make all reasonable efforts to identify the originator or intermediary who has hosted the information. If so identified, a notice shall issue to appear and submit their reply at a specified date and time which shall not be less than 48 hours from the date and time of receipt of notice by such person or intermediary. The Committee then examines the request and is to consider whether the request is covered by 69A(1) and is then to give a specific recommendation in writing to the Nodal Officer of the concerned Organization. It is only thereafter that the Designated Officer is to submit the Committee's recommendation to the

Secretary, Department of Information Technology who is to approve such requests or complaints. Upon such approval, the Designated Officer shall then direct any agency of Government or intermediary to block the offending information. Rule 9 provides for blocking of information in cases of emergency where delay caused would be fatal in which case the blocking may take place without any opportunity of hearing. The Designated Officer shall then, not later than 48 hours of the issue of the interim direction, bring the request before the Committee referred to earlier, and only on the recommendation of the Committee, is the Secretary Department of Information Technology to pass the final order. Under Rule 10, in the case of an order of a competent court in India, the Designated Officer shall, on receipt of a certified copy of a court order, submit it to the Secretary, Department of Information Technology and then initiate action as directed by the Court. In addition to the above safeguards, under Rule 14 a Review Committee shall meet at least once in two months and record its findings as to whether directions issued are in accordance with Section 69A(1) and if it is of the contrary opinion, the Review Committee may set aside such directions and issue orders to unblock the said information. Under Rule 16, strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.

108. Learned counsel for the petitioners assailed the constitutional validity of Section 69A, and assailed the validity of the 2009 Rules. According to learned counsel, there is no pre-decisional hearing afforded by the Rules particularly to the "originator" of information, which is defined under Section 2(za) of the Act to mean a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person. Further, procedural safeguards such as which are provided under Section 95 and 96 of the Code of Criminal Procedure are not available here. Also, the confidentiality provision was assailed stating that it affects the fundamental rights of the petitioners.

109. It will be noticed that Section 69A unlike Section 66A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution.

110. The Rules further provide for a hearing before the Committee set up - which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under sub-section (3) of Section 69A.

111. Merely because certain additional safeguards such as those found in Section 95 and 96 CrPC are not available does not make the Rules constitutionally infirm. We are of the view that the Rules are not constitutionally infirm in any manner.

Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011.

112. Section 79 belongs to Chapter XII of the Act in which intermediaries are exempt from liability if they fulfill the conditions of the Section. Section 79 states:

"79. Exemption from liability of intermediary in certain cases.-(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner. Explanation.-For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.]"

113. Under the 2011 Rules, by Rule 3 an intermediary has not only to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2). Since Rule 3(2) and 3(4) are important, they are set out hereinbelow:- "3. Due diligence to be observed by intermediary.-The intermediary shall observe following due diligence while discharging his duties, namely:-

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that-

(a) belongs to another person and to which the user does not have any right to;

(b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically

objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

(c) harm minors in any way;

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force;

(f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(g) impersonate another person;

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in sub- rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes."

114. Learned counsel for the petitioners assailed Rules 3(2) and 3(4) on two basic grounds. Firstly, the intermediary is called upon to exercise its own judgment under sub-rule (4) and then disable information that is in contravention of sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet. Further, no safeguards are provided as in the 2009 Rules made under Section 69A. Also, for the very reasons that Section 66A is bad, the petitioners assailed sub-rule (2) of Rule 3 saying that it is vague and over broad and has no relation with the subjects specified under Article 19(2).

115. One of the petitioners' counsel also assailed Section 79(3)(b) to the extent that it makes the intermediary exercise its own judgment upon receiving actual knowledge that any information is being used to commit unlawful acts. Further, the expression "unlawful acts" also goes way beyond the specified subjects delineated in Article 19(2).

116. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69A. We have seen how under Section 69A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed - one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a

competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69A read with 2009 Rules.

117. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

118. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid.

119. In conclusion, we may summarise what has been held by us above:

Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2).

Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid.

Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

Section 118(d) of the Kerala Police Act is struck down being violative of Article 19(1)(a) and not saved by Article 19(2).

All the writ petitions are disposed in the above terms.

[1] [2]The genealogy of this Section may be traced back to Section 10(2)(a) of the U.K. Post Office (Amendment) Act, 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene, or menacing character. This Section was substantially reproduced by Section 66 of the UK Post Office Act, 1953 as follows:

66. Prohibition of sending offensive or false telephone messages or false telegrams, etc. If any person-

(a)sends any message by telephone which is grossly offensive or of an indecent, obscene or menacing character ;

(b)sends any message by telephone, or any telegram, which he knows to be false, for the purpose of causing annoyance, inconvenience or needless anxiety to any other person ; or

(c)persistently makes telephone calls without reasonable cause and for any such purpose as aforesaid, he shall be liable on summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both.

This Section in turn was replaced by Section 49 of the British Telecommunication Act, 1981 and Section 43 of the British Telecommunication Act, 1984. In its present form in the UK, it is Section 127 of the Telecommunication Act, 2003 which is relevant and which is as follows:-

127. Improper use of public electronic communications network A person is guilty of an offence if he -

sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or cause any such message or matter to be so sent.

A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he-

sends by means of a public electronic communications network, a message that he knows to be false, causes such a message to be sent; or persistently makes use of a public electronic communications network.

A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c.42)).

[3] [4] Incidentally, the Ark of the Covenant is perhaps the single most important focal point in Judaism. The original ten commandments which the Lord himself gave to Moses was housed in a wooden chest which was gold plated and called the Ark of the Covenant and carried by the Jews from place to place until it found its final repose in the first temple - that is the temple built by Solomon.

[5] [6] A good example of the difference between advocacy and incitement is Mark Antony's speech in Shakespeare's immortal classic Julius Caesar. Mark Antony begins cautiously. Brutus is chastised for calling Julius Caesar ambitious and is repeatedly said to be an "honourable man". He then shows the crowd Caesar's mantle and describes who struck Caesar where. It is at this point, after the interjection of two citizens from the crowd, that Antony says-

"ANTONY- Good friends, sweet friends, let me not stir you up To such a sudden flood of mutiny.

They that have done this deed are honourable: What private griefs they have, alas, I know not, That made them do it: they are wise and honourable, And will, no doubt, with reasons answer you. I come not, friends, to steal away your hearts: I am no orator, as Brutus is;

But, as you know me all, a plain blunt man, That love my friend; and that they know full well That gave me public leave to speak of him: For I have neither wit, nor words, nor worth, Action, nor utterance, nor the power of speech, To stir men's blood: I only speak right on; I tell you that which you yourselves do know; Show you sweet Caesar's wounds, poor poor dumb mouths, And bid them speak for me: but were I Brutus, And Brutus Antony, there were an Antony Would ruffle up your spirits and put a tongue In every wound of Caesar that should move The stones of Rome to rise and mutiny. ALL- We'll mutiny."

[7] [8] In its present form the clear and present danger test has been reformulated to say that:

"The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Interestingly, the US Courts have gone on to make a further refinement. The State may ban what is called a "true threat".

"'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

"The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."

See Virginia v. Black (Supra) and Watts v. United States 22 L. Ed. 2d. 664 at 667

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SELF LEARNING STIMULATING EXERCISES

1. The Intermediaries are required to take down or block content upon notification – the court has clarified that such takedown will only be upon receipt of an order from a government agency or a court and not at the discretion of the intermediary or on receipt of request by an affected person. Don’t you think that the Court has diluted the due diligence obligation of the Intermediaries in India, to a great extent, as now Intermediaries instead of being proactive in monitoring obligations pertaining to the offensive matter on their websites, will wait for a government notification or court order to remove them from their site?

2. State does not have absolute power to restrict fundamental freedoms in cyberspace. Does it apply to information privacy also. Is the Right to information Privacy lies only against the State or does it extend against private sector too?
(Hint - *Justice K.S.Puttaswamy(Retd)* v. *Union of India*)

World Wrestling Entertainment, Inc. v. M/s Reshma Collection
FAO (OS) 506/2013 in CM Nos. 17627/2013, 18606/2013, Del(DB)

BADAR DURREZ AHMED, J

1. This appeal is directed against the order dated 04.10.2013 passed by a learned Single Judge of this Court in CS(OS) 1801/2013, whereby the plaint filed by the appellant/plaintiff was directed to be returned to the appellant/ plaintiff under Order 7 Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC'), to be presented before a court of competent jurisdiction.

2. The suit had been filed by the appellant/ plaintiff seeking permanent injunction based on alleged infringement of its copyright, infringement of its trademarks, passing off, dilution, rendition of accounts, damages and delivery up etc. It is an admitted position that the appellant/ plaintiff is a company incorporated under the laws of the State of Delaware, United States of America and that all the defendants reside in Mumbai and do not carry on business within the jurisdiction of this Court. The appellant/ plaintiff claimed that this Court has jurisdiction to entertain the said suit on account of the provisions of Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957. The specific plea with regard to jurisdiction was made in paragraph 32 of the plaint which reads as under:-

> —32. It is submitted that this Hon'ble Court has territorial jurisdiction to entertain and try the present suit under Section 134 (2) of the Trade Marks Act, 1999 and Section 62 (2) of the Copyright Act, 1957 on account of the fact the Plaintiff carries on business within the territorial limits of this Hon'ble court as briefly summarized below:

i. The Plaintiff's programmes, consisting of its various characters including John Cena, Undertaker, Triple H, Randy Orton and Batista are broadcast at Delhi, within the territorial limits of this Hon'ble Court;

ii. The Plaintiffs products, such as its merchandising goods and books, are available within the territorial limits of this Hon'ble Court;

iii. The Plaintiffs goods and services are sold to consumers in Delhi through its websites which can be accessed and operated from all over the country, including from Delhi.

The appellant/plaintiff is, *inter alia*, engaged in the development, production and marketing of television programming, pay-per-view programming, live events and the licensing and sale of branded consumer products featuring its well known World Wrestling Entertainment (WWE) brand. The WWE scratch logo and World Wrestling Entertainment are registered trademarks of the appellant/plaintiff worldwide including India. The appellant/plaintiff is also the owner of the copyright of the pictorial representations of World Wrestling Entertainment and WWE Wrestlers and the WWE

scratch logo as they appear on various publicity materials and promotional merchandise of the appellant/ plaintiff. The appellant/ plaintiff also has trademark registrations in respect of various WWE talent names and talent slogans such as JOHN CENA, BATISTA, UNDERTAKER, TRIPLE H, RANDY ORTON etc.

4. The appellant/ plaintiff offers a variety of memorabilia including, but not limited to, apparel, posters, calendars, fact books, sunglasses, water bottles, key-rings, DVD's etc. It has more than 200 licensees distributing its products in 86 countries, including India. It has been averred by the appellant/ plaintiff that it licenses out its well known trademarks and the images/characters to different parties for use on merchandise in a wide range of products.

It is the allegation of the appellant/ plaintiff that the defendants, who are stationed at Mumbai, are engaged in the business of manufacture and sale of various forms of garments and apparel, such as T-shirts, wrist bands, caps and other counterfeit goods and garments bearing the reproductions of the plaintiff's talents. According to the appellant/ plaintiff, the defendants, are infringing the appellant/plaintiff's registered trademarks. It is alleged that the apparels sold by the defendants bear the images of WWE talents and, representations of the well known WWE characters are displayed prominently on the defendant's products.

6. The learned Single Judge, by virtue of the impugned order, has, without issuing summons in the said suit, directed the return of the plaint to the appellant/ plaintiff by holding that the Delhi High Court would have no territorial jurisdiction insofar as the said suit was concerned. The learned Single Judge rejected the pleas raised on behalf of the appellant/ plaintiff that this Court had territorial jurisdiction to entertain the suit by virtue of the provisions of Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957. While doing so, the learned Single Judge placed

reliance on the decision of the Supreme Court in the case of ***Dhodha House v. S.K. Maingi: 2006 (9) SCC 41*** as also on a decision of a Division Bench of this Court in ***Archie Comic Publications, Inc. v. Purple Creations Pvt. Ltd. & Others: 172 DLT 234 (DB)***.

7. Before the learned Single Judge, it had been contended on behalf of the appellant/ plaintiff that the decisions of the Supreme Court in ***Dhodha House*** *(supra)* and this Court in ***Archie Comic*** *(supra)* were not applicable inasmuch as they did not take into account the ―new mediall of web-based business models where transactions are conducted over the internet. The learned counsel for the appellant/ plaintiff had placed reliance on ***Yahoo Inc. v. Akash Arora: 1999 (19) PTC 201***; ***Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy and Another: 2010 (42) PTC 361 (Del)***; and

Wipro Limited and Another v. Oushadha Chandrika Ayurvedic India (P) Limited and Others*: 2008 (37) PTC 269 (MAD) (DB).** It was also contended on behalf of the appellant/ plaintiff before the learned Single Judge that the question of territorial jurisdiction was a mixed question of law and fact and, therefore, the same ought to be adjudicated at the final stage of the suit and not at the preliminary stage of admission. All these pleas were rejected by the learned Single Judge by placing reliance on the decision in the case of ***Dhodha House *(supra)* which had interpreted the expression ―carries on business‖ appearing in both, Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957. The learned Single Judge observed that the sum and substance of the criteria laid down in ***Dhodha House*** *(supra)* was that an essential part of the plaintiff's business, coupled with an element of control exercised by the plaintiff, must exist in such a place where the plaintiff claims to be carrying on business either on its own or through an exclusive agent. The learned Single Judge also observed that merely because of the e-commerce models, which have become prevalent, and because of the use of the internet as a medium for doing business, the tests, which apply for determination of issues, such as, when and where the contract is made or whether the vendor carries on business at the place where the merchandise may be sold, or service may be offered, would not change and would be the same as applicable to communications over the telephone and fax. For this, the learned Single Judge made a reference to the Supreme Court decision in ***Bhagwan Goverdhandas Kedia v. Girdharilal Parshottamdas & Co****.: **AIR 1966 SC***

543.

8. With regard to the reliance placed by the appellant/ plaintiff on the decision in ***Banyan Tree*** *(supra)*, the learned Single Judge observed that the same was misplaced inasmuch as, according to him, in ***Banyan Tree*** *(supra)* the question related to the website of a defendant and not that of plaintiff as in the present case. At this juncture itself we may point out that the decision in ***Banyan Tree*** *(supra)* would not be applicable here just because the questions there pertained to a defendants website but, because (a) it specifically dealt with a case where it was admitted that the plaintiff did not carry on business within the jurisdiction of the Court, (b) it was concerned only with the provisions of Section 20(c) CPC, and (c) it was a case of passing off. In ***Banyan Tree*** *(supra)* the Division Bench did not examine the meaning and scope of the expression _carries on business' as appearing in Section 134(2) and 62(2) of the Trademarks Act, 1999 and the Copyright Act, 1957, respectively. That case was decided on the basis of the plea of _cause of action' and not on the basis of the expression _carries on business', which is the case here.

9. The learned Single Judge also held that whenever the legislature thought it necessary, it amended the laws to make provision for the ―new media‖. He observed

that while enacting the Information Technology Act, 2000 and amending other statutes, Parliament had consciously not amended the Trademarks Act, 1999 or the Copyright Act, 1957 or the Code of Civil Procedure, 1908 for expressly bringing in the concepts with regard to new media'. Consequently, it was observed by the learned Single Judge that the new media' did not change the basic concepts or legal principles which applied to trade and commerce and they continued to remain the same as applicable to the ―old media‖ i.e., telephone and fax.

For all the above reasons, the learned Single Judge rejected the plea of the appellant/ plaintiff that the Delhi High Court would have territorial jurisdiction to entertain the suit. Being aggrieved by the said decision, the appellant/ plaintiff is in appeal before us.

11. Before we proceed any further, it would be necessary to set out the provisions of Section 134 of the Trademarks Act, 1999 and Section 62 of the Copyright Act, 1957. They are as under:-

―134. Suit for infringement, etc., to be instituted before district Court.- (1) No suit –

(a) for the infringement of a registered trade mark, or

(b) relating to any right in a registered trade mark, or

(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered.

shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a ―District Court having jurisdiction‖ shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or where there are more than one such person any of them, actually and voluntarily resides or carries on business or personally works for gain.

Explanation.― For the purpose of sub-section (2), ―person‖ includes the registered proprietor and the registered user.‖ ―62. **Jurisdiction of court over matters arising under this Chapter**:- (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the direct court having jurisdiction.

(2) For the purpose of sub-section (1), a ―district court having jurisdiction‖ shall, notwithstanding anything contained in the Code of Civil Procedure, 1908(5 of 1908), or any other law for the time being in force include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceedings, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.

12. The provisions of Section 134 (2) of the Trademarks Act, 1999 and of

Section 62(2) of the Copyright Act, 1957 are material. Both the provisions are virtually identical. They are both non-obstante provisions inasmuch as it is clearly stated therein that they are ―*notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force*‖. Furthermore, the word ―include‖ is used in both the provisions so as to include a District Court within the local limits of whose jurisdiction, at the time of institution of the suit or other proceeding, the person instituting the suit or proceeding, or where there are more than one such person, any of them, actually and voluntarily resides or ―carries on business‖ or personally works for gain. Insofar as the present case is concerned, it is not claimed by the appellant/ plaintiff that it resides or personally works for gain in Delhi. It has, as pointed out above, taken the plea that it ―carries on business‖ in Delhi because, according to it, its programmes are broadcast in Delhi; its merchandise and books are available for sale in Delhi; and its goods and services are sold to customers in Delhi through its website which can be accessed in Delhi over the internet.

Therefore, the entire case turns on the meaning to be given to the expression ―carries on business‖ as appearing in the above two provisions. In ***Dhodha House*** *(supra)*, the Supreme Court, *inter alia*, considered the meaning of the expression ―carries on business‖. The following extracts from the said decision would be relevant:-

―46. The expression _carries on business‘ and the expression _personally works for gain‘ connote two different meanings. For the purpose of carrying on business only presence of a man at a place is not necessary. Such business may be carried at a place through an agent or a manager or through a servant. The owner may not even visit that place. The phrase ―carries on business‖ at a certain place would, therefore, mean having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control thereover. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within the meaning of section 9 of the Code. But it is necessary that the following three conditions should be satisfied, namely,

―(1) The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one that pays him. Thus, a trader in the mufassil who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to ―carry on business‖ in Madras. So a firm in England, carrying on business in the name of A.B. & Co., which employs upon the usual terms a Bombay firm carrying on business in the name of C.D. & Co., to act as the English firm's commission agents in Bombay, does not ―carry on business‖ in Bombay so as to render itself liable to be sued in Bombay.

The person acting as agent must be an agent in the strict sense of the term. The manager of a joint Hindu family is not an ―agent‖ within the meaning of this condition.

(3) To constitute ―carrying on business‖ at a certain place, the essential part of the business must take place in that place. Therefore, a retail dealer who sells goods in the mofussil cannot be said to ―carry on business‖ in Bombay merely because he has an agent in Bombay to import and purchase his stock for him. He cannot be said to carry on business in Bombay unless his agent made sales there on his behalf. A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts, but only collects orders which are forwarded to and dealt with in Calcutta, cannot be said to do business in Amritsar. But a Bombay firm that has a branch office at Amritsar, where orders are received subject to confirmation by the head office at Bombay, and where money is paid and disbursed, is carrying on business at Amritsar and is liable to be sued at Amritsar. Similarly a Life Assurance Company which carries on business in Bombay and employs an agent at Madras who acts merely as a Post Office forwarding proposals and sending moneys cannot be said to do business in Madras. Where a contract of insurance was made at place A and the insurance amount was also payable there, a suit filed at place B where the insurance Co. had a branch office was held not maintainable. Where the plaintiff instituted a suit at Kozhikode alleging that its account with the defendant Bank at its Calcutta branch had been wrongly debited and it was claimed that that court had jurisdiction as the defendant had a branch there, it was held that the existence of a branch was not part of the cause of action and that the Kozhikode Court therefore had no jurisdiction. But when a company through incorporated outside India gets itself registered in India and does business in a place in India through its agent authorized to accept insurance proposals, and to pay claims, and to do other business incidental to the work of agency, the company carries on business at the place of business in India. [See Mulla on the Code of Civil Procedure, 15th Edn., Vol.I, pp 246-47.]

47. A corporation in view of Explanation appended to Section 20 of the Code would be deemed to be carrying on business inter alia at a place where it has a subordinate office. Only because, its goods are being sold at a place would thus evidently not mean that it carries a business at that place.

―51. The plaintiff was not a resident of Delhi. It has not been able to establish that it carries on any business at Delhi. For our purpose, the question as to whether the defendant had been selling its produce in Delhi or not is wholly irrelevant (sic). It is possible that the goods manufactured by the plaintiff are available in the market of Delhi or they are sold in Delhi but that by itself would not mean that the plaintiff carries on any business in Delhi.

From the above extracts, it is evident that when we say that a person carries on business‖ at a place we mean that the person has an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control at that place. There is no doubt that a person may carry on business at a place not necessarily by himself but through an agent or a manager or through a servant. But, as pointed out in ***Dhodha House*** *(supra)*, three conditions have to be fulfilled: (i) the agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not as a general agent who does business for any one that pays him; (ii) the person acting as agent, must be an agent in the strict sense of the term and a manager of a Joint Hindu Family cannot be regarded as an ―agent‖ within the meaning of this condition; and (iii) to constitute ―carrying on business‖ at a certain place, the essential part of the business must be performed at that place. An illustration of which is given in the above extract itself where a Bombay firm has a branch office at Amritsar, where orders are received, subject to confirmation by the head office at Bombay, and where money is paid and disbursed. Such a firm is said to be carrying on business at Amritsar and is liable to be sued at Amritsar.

15. Mr Praveen Anand, the learned counsel appearing on behalf of the appellant/ plaintiff, submitted before us, after placing reliance on ***Exphar SA and Another v. Eupharma Laboratories Limited and Another: AIR 2004 SCC 1682*** that the use of the word _include‘ in Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957 make the provisions broader than Section 20 of the CPC. There is no dispute with this proposition. There is also no dispute with the proposition of the learned counsel for the appellant that the expression _carries on business‘ is not confined to the head office, but can also include a branch office. This proposition is based on a decision of the Madras High Court in ***Wipro Limited*** *(supra)*. But, this proposition is of no use to the appellant/ plaintiff inasmuch as it is not the case of the appellant/ plaintiff that it has any office within the territorial limits of this Court, what to speak of a branch office.

16. Faced with this eventuality, Mr Anand submitted that, in fact, there is no need to have any office at all at a particular place for establishing the fact that a person carries on business at that place. He placed reliance, once again, on ***Wipro Limited*** *(supra)*, wherein it was observed that the plain meaning of the expression ―carries on business‖ only conveys that wherever there is a business activity – be it the principal place or branch or branches – the party concerned is said to carry on business at such places. In fact, we may point out that Mr Anand need not haved laboured on this point at all because in ***Dhodha House*** *(supra)* itself, the Supreme Court had clearly observed that for the purpose of carrying on business, the presence of the person concerned at a particular place was not at all necessary and that such business could be carried on at that place through an agent or a manager or through a servant. Mr Anand also submitted that while considering the question of territorial jurisdiction at the threshold stage and particularly while considering the question of return of a plaint under Order 7 Rule 10 CPC, only the averments made in the plaint ought to be seen and, if, on a demurrer, a case for territorial jurisdiction has been made out, the plaint ought not to be returned. In our view, there is no quarrel with this proposition either.

17. The main issue before us is one of considering as to whether on the basis of the averments made in the plaint, the appellant/ plaintiff carries on business in Delhi. It is nowhere pleaded in the plaint that the appellant/ plaintiff, has an agent or a manager or a servant, through whom the appellant/ plaintiff carries on business in Delhi. As pointed out above, it is also not the appellant/ plaintiff's case that it has an office in Delhi. The question then arises as to whether the third condition specified in ***Dhodha House*** *(supra)* is satisfied or not. If we recall, in ***Dhodha House*** *(supra)*, the Supreme Court had observed that the expression _carries on business‖ , as appearing in the above two provisions, is much wider than what the expression in normal parlance connotes because of the ambit of a civil action within the meaning of Section 9 of the CPC. The Supreme Court, however, cautioned that although the expression has a very wide meaning, it is necessary that the three conditions specified in the said decision should be satisfied.

18. Insofar as the first two conditions are concerned, they relate to agents. Inasmuch as it is an admitted position that the appellant/ plaintiff has no agent in Delhi, those two conditions are clearly not fulfilled. However, it is the appellant/ plaintiff's case that it carries on business in Delhi directly inasmuch as its goods and services are sold to consumers in Delhi through its website which is accessed in Delhi. It is on this basis that the learned counsel for the appellant/ plaintiff submitted that the decision in ***Dhodha House*** *(supra)* as also in ***Archie Comic*** *(supra)* would really not be applicable in the present case as in those decisions web-based business models, which have been referred to as the _new media', were not considered. The question which then arises is whether the introduction and spread of e-commerce and business over the internet impacts the meaning of the expression _carries on business' at a certain

place. The learned Single Judge, as we have pointed out above, felt that the introduction of the new business models of doing business over the internet was not any different from the old model of doing business over the telephone or fax. He had placed reliance on the Supreme Court decision in the case of B***hagwan Goverdhandas Kedia*** *(supra)*.

19. Considering the fact that in ***Dhodha House*** *(supra),* the third condition stipulated that to constitute _carrying on business' at a certain place, the essential part of the business must take place there, it would be necessary to examine this aspect in the backdrop of business over the internet. When a transaction takes place over the internet, where is the contract concluded? This is the question which needs to be answered. In other words, at which place does the essential part of the business transaction take place? The example of the Bombay firm having a branch office at Amritsar, where orders were received, subject to confirmation by the head office at Bombay and where money was paid and disbursed, needs to be examined in the context of internet transactions. In that example, it was noted that the Bombay firm could be said to be carrying on business at Amritsar and was liable to be sued at Amritsar. In the present case, the plaintiff/ appellant is incorporated in USA. It has a website. We do not know as to where that website is hosted. The server would, in all likelihood, be in USA. It has not been pleaded that the website of the appellant/ plaintiff is hosted on a server in Delhi. Therefore, it can be safely presumed that the web server is not located in Delhi. However, if a customer in Delhi wishes to purchase an article, which is available on the website of the appellant/ plaintiff, the purchaser in Delhi accesses the said website on his or her computer in Delhi. The said purchaser places the order for the said article from his computer in Delhi. The payment is made either through a credit/ debit card or through a cash card from Delhi and ultimately the goods are delivered to the customer in Delhi. In the nature of such transactions, the question arises as to which is the place where the essential part of the business occurs?

20. We may recall that the learned Single Judge had referred to the Supreme Court decision in ***Bhagwan Goverdhandas Kedia*** *(supra)*, wherein transactions over the telephone and telegraph had been considered. It would be instructive to examine that decision of the Supreme Court . The facts before the Supreme Court in ***Bhagwan Goverdhandas Kedia*** *(supra)* were that the plaintiff therein had commenced an action in the City Civil Court at Ahmedabad against the defendant for a decree of Rs 31,150/- on the plea that the defendants had failed to supply cotton seed cake, which they had agreed to supply under an oral contract entered into on 22.07.1959, which had been negotiated between the parties through a long distance conversation over the telephone. The question arose as to whether the City Civil Court at Ahmedabad had jurisdiction to entertain the said suit. The offer to purchase cotton seed cake had emanated from the plaintiff and that offer had been accepted by the defendant. The

City Civil Court held that as the contract was concluded over the telephone, the place where the acceptance of the offer is intimated to the offeror is the place where the contract is made, and, therefore, the City Civil Court at Ahmedabad would have jurisdiction to try the suit. The matter travelled up to the Supreme Court, which, by a majority decision, upheld the conclusion of the City Civil Court at Ahmedabad by holding that : -

―The trial Court was therefore right in the view which it has taken that a part of the cause of action arose within the jurisdiction of the Civil City Court, Ahmedabad, where acceptance was Communicated by telephone to the plaintiffs. In doing so, the Supreme Court considered the relevant provisions of the Indian Contract Act, 1872 as also the common law of England. The Supreme Court also undertook to compare contracts concluded over the post and telegraph on the one hand and contracts concluded over the telephone on the other. The Supreme Court noted that acceptance and intimation of acceptance of an offer are both necessary to result in a binding contract. The Supreme Court held that in the case of a contract which consists of mutual promises, the offeror must receive intimation that the offeree has accepted his offer and has signified his willingness to perform his promise. The Supreme Court further noted that when parties are in the presence of each other, the method of communication will depend upon the nature of the offer and the circumstances in which it is made and that when an offer is orally made, acceptance may be expected to be made by an oral reply, but even a nod or other act which indubitably intimates acceptance, may suffice. Furthermore, if the offeror receives no such intimation, even if the offeree has resolved to accept the offer, a contract may not result. The Supreme Court further observed as under:-

―But on this rule is engrafted an exception based on ground of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decisions. If the parties are not in the presence of each other, and the offeror has not prescribed a mode of communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient, when the contract is made by letters sent by post..…

The exception has long been recognised in the United Kingdom and in other countries where the law of contracts is based on the common law of England. Authorities in India also exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offeror: see Baroda Oil Cakes Traders case ILR (1954) Bom 1137: (AIR) 1954 Bom 451, and cases cited therein. A similar rule has been adopted when the offer and acceptance are by telegrams. The exception to the general rule requiring intimation of acceptance may be summarised as follows. When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and

the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram. (underlining added)

21. From the above, it is clear that the general rule is that the contract is complete when the offeror receives intimation that the offeree has accepted his offer. An exception to this has been carved out in respect of contracts negotiated by postal communications or telegrams. The exception being that the bargain in such cases (post or telegram) would be struck and the contract would be complete when the acceptance of the offeree is put into a course of transmission by him by posting a letter or despatching a telegram. The Supreme Court then held as under:-

―10. It is true that the Post and Telegraphs Department has general control over communication by telephone and especially long distance telephone, but that is not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without the effective intervention of that third agency, Letters or messages cannot be transmitted. In the case of a conversation by telephone, once a connection is established there is in the normal course no further intervention of another agency. Parties holding conversation on the telephone are unable to see each other: They are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously, and communication does not depend upon an external agency.(underlining added)

It is obvious that the Supreme Court distinguished the case of a contract negotiated over the telephone from that of contracts through letters or through telegrams. Whereas in the latter, there was an intervention of an external agency, which took time to deliver the acceptance of the offer by the offeree to the offeror, in the former, the communication of the acceptance was instantaneous once the communication link had been established. The Supreme Court, by virtue of its majority decision, went on to hold as under:-

―14. Obviously the draftsman of the Indian Contract Act did not envisage use of the telephone as a means of personal conversation between parties separated in space, and could not have intended to make any rule in that behalf. The question then is whether the ordinary rule which regards a contract as completed only when acceptance is intimated should apply, or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract, and the exception to the rule imposed on grounds of commercial expediency is in-applicable.(underlining added)

22. It is interesting to note that the Supreme Court had observed that the draftsman of the Indian Contract Act could not have envisaged use of the telephone as a means of personal conversation between parties separated in space and could not have intended to make any rule in that behalf. This applies with greater vigour insofar as commerce and business over the internet is concerned. Just as in the case of telephone conversation, there is instantaneous communication, so, too, in the case of business over the internet. Therefore, the rule that applies to contracts concluded over the telephone would apply with equal vigour to contracts concluded over the internet. In other words, contracts would be completed at the place where the acceptance is communicated. In the case before the Supreme Court, the offer had emanated from the plaintiff, who was situated in Ahmedabad. The acceptance of the offer was by the defendants, who were to make the supply of cotton seed cakes to the plaintiff therein. The acceptance, since it was over the telephone, was instantaneously communicated via that technology to the plaintiff at Ahmedabad. The Supreme Court held that the cause of action would arise within the jurisdiction of the City Civil Court at Ahmedabad, where the acceptance was communicated by telephone to the plaintiff.

23. Let us now apply these principles to the type of transaction over the internet, which we have explained above. The website of the appellant/ plaintiff refers to various goods and services. It is not an offer but an invitation to an offer, just as a menu in a restaurant. The invitation, if accepted by a customer in Delhi, becomes an offer made by the customer in Delhi for purchasing the goods ―advertised‖ on the website of the appellant/ plaintiff.

When, through the mode of the software and the browser, the transaction is confirmed and payment is made to the appellant/ plaintiff through its website, the appellant / plaintiff accepts the offer of the customer at Delhi. Since the transaction between the two takes place instantaneously, the acceptance by the appellant/ plaintiff is instantaneously communicated to its customer through the internet at Delhi. Therefore, in such a case, part of the cause of action would arise in Delhi.

21. But, we are not concerned with the question of cause of action between the appellant/ plaintiff and its customers in Delhi because the defendants are not such customers and they are, in any event, all residents of Mumbai. What we are examining is whether the third condition specified in ***Dhodha House*** *(supra)* is satisfied or not. In other words, if the contracts and/ or transactions entered into between the appellant/ plaintiff on the one hand and its customers are being concluded in Delhi, can it not be said that the essential part of the business of the appellant/ plaintiff, insofar as its transactions with customers in Delhi are concerned, takes place in Delhi? The offers are made by customers at Delhi. The offers are subject to confirmation/ acceptance of the appellant/ plaintiff through its website. The money would emanate or be paid from Delhi. Can it not then be considered that the appellant/

plaintiff is, to a certain extent, carrying on business at Delhi? In our view, it would be so. Because of the advancements in technology and the rapid growth of new models of conducting business over the internet, it is possible for an entity to have a virtual presence in a place which is located at a distance from the place where it has a physical presence. The availability of transactions through the website at a particular place is virtually the same thing as a seller having shops in that place in the physical world. Let us assume for the sake of argument that the appellant/ plaintiff had a shop in Delhi from where it sold its various goods and services. In that case, it could not be denied that the plaintiff carried on business in Delhi. This is apart from the fact that the appellant/ plaintiff may also have been regarded as having voluntarily resided in Delhi. When the shop in the _physical sense' is replaced by the _virtual' shop because of the advancement of technology, in our view, it cannot be said that the appellant/ plaintiff would not carry on business in Delhi.

22. Therefore, in our view, although the learned Single Judge had made a correct reference to the decision of the Supreme Court in the case of ***Bhagwan Goverdhandas Kedia*** *(supra)*, the full ramifications of that decision were not perceived by him. When the two decisions of the Supreme Court in ***Bhagwan Goverdhandas Kedia*** *(supra)* and ***Dhodha House*** *(supra)* are considered in the manner indicated above, it would appear that, on the averments made by the appellant/ plaintiff in the plaint, the Delhi High court would, on a demurrer, have jurisdiction to entertain the suit inasmuch as the appellant/ plaintiff would be regarded as carrying on business in Delhi within the meaning of the expression under Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957. Consequently, the learned Single Judge ought not to have returned the plaint under Order 7 Rule 10 CPC. As a result, the impugned order is set aside and the suit is restored to its original number and the same be placed before the Roster Bench for further steps therein on 28.10.2014, in the first instance. This, however, would not preclude the defendants from raising the plea of jurisdiction on facts which, if raised, could be considered by the court based on the evidence and upon the law explained above. The appeal is allowed, as above.

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SELF LEARNING STIMULATING EXERCISES

1. Whether mere display of articles on website, one can presume that plaintiff, a natural person, carries on business in the jurisdiction where interactive website of plaintiff is accessible or he should also prove that some genuine transactions have taken place in the jurisdiction. (Hint – Applicability of Minimum Contacts framework]

2. Does Delhi Court has jurisdiction on the ground of " plaintiff carrying on business", where plaintiff is a company and its interactive website is accessible in Delhi, though cause of action arose in Mumbai where the company had branch office. (Hint – *Big Tree Entertainment Case*)

Satyam Infoway Ltd. v. Siffynet Solutions Pvt. Ltd.

2004 Supp(2) SCR 465

RUMA PAUL J. - Leave granted.

The principal question raised in this appeal in whether internet domain names are subject to the legal norms applicable to other intellectual properties such as trade marks? The appellant which was incorporated in 1995 registered several domain names like www.sifynet, www.sifymall.com, www.sifyrealestate.com etc. in June 1999 with the internationally recognised Registrars, viz the internet Corporation for Assigned Names and Numbers (ICANN) and the World Intellectual Property Organisation (WIPO). The word 'Sify is a coined word which the appellant claims to have invented by using elements of its corporate name, Satyam Infoway. The appellant claims a wide reputation and goodwill in the name 'Sify'.

The respondent started carrying on business of internet marketing under the domain names, www.siffynet.net and www.sijfynet.com from 5th June 2001. The respondent claims to have obtained registration of its two domain names with ICANN on 5th June, 2001 and 16th March, 2002 respectively.

Coming to know of the use of the word 'Siffy' as part of the respondent's corporate and domain name, the appellant served notice on the respondent to cease and desist from either carrying on business in the name of Siffynet Solutions (P) Ltd. or Siffynet Corporation and to transfer the domain names to the appellant. The respondent refused. The appellant filed a suit in the City Civil Court against the respondent on the basis that the respondent was passing off its business and services by using the appellant's business name and domain name. An application for temporary injunction was also filed. The City Civil Court Judge allowed the application for temporary injunction on the grounds that the appellant was the prior user of the trade name 'Sify', that it had earned good reputation in connection with the internet and computer services under the name 'Sify', that the respondent's domain names were similar to the domain name of the appellant and that confusion would be caused in the mind of the general public by such deceptive similarity. It was also found that the balance of convenience was in favour of granting an injunction in favour of the appellant.

The respondent preferred an appeal before the High Court. An interim stay of the City Civil Judge's judgment was granted. The appeal was ultimately allowed by the High Court. This order is the subject matter of challenge in this appeal. In allowing the appeal, the High Court was of the view that merely because the appellant had started the business first, no order could have been granted in its favour without considering where the balance of convenience lay. It was held that the finding that the appellant had earned a reputation and goodwill in respect of the domain name 'Sify' was not based on a consideration of the necessary factors. On the other hand, the documents on record showed that the respondent was doing business other than that done by the appellant and

since there was no similarity between the two businesses, there was no question of customers being misled or misguided or getting confused. It was held that the respondent had invested a large amount in establishing its business and that it had enrolled about 50,000 members already. It was held that the respondent would be put to great hardship and inconvenience and also irreparable injury in case the injunction order was granted. On the other hand, since the appellant had a separate trade name, namely, Satyam Infoways, no injury or hardship would be caused to the appellant if the order of injunction was not granted.

From the narration of these facts, it is clear that both the Courts below had proceeded on the basis that the principles relating to passing off actions in connection with trademarks are applicable to domain names. However, the respondent has contended that a Domain Name could not be confused with "property names" such as Trade Marks. According to the respondent, a domain name is merely an address on the internet. It was also submitted that registration of a domain name with ICANN did not confer any intellectual property right; that it is a contract with a registration authority allowing communication to reach the owner's computer via internet links channelled through the registration authority's server and that it is akin to registration of a company name which is a unique identifier of a company but of itself confers no intellectual property rights.

A "trade mark" has been defined in section 2(zb) of the Trade Marks Act, 1999 (hereafter referred to as "the Act") as meaning :

"trade mark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours".

Therefore a distinctive mark in respect of goods or services is a 'Trade mark'.

A "mark" has been defined in Section 2(m) as including "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof and a 'name' includes any abbreviation of a name (S.2(k).

"Goods" have been defined in Section 2(j) as meaning "anything" which is the subject of trade or manufacture, and "Services" has been defined in section 2(z) as meaning :

"service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising."

Analysing and cumulatively paraphrasing the relevant parts of the aforesaid definitions, the question which is apposite is whether a domain name can be said to be a word or name which is capable of distinguishing the subject of trade or service made available to potential users of the internet?

The original role of a domain name was no doubt to provide an address for computers on the internet. But the internet has development from a mere means of communication to a mode of carrying on commercial activity. With the increase of commercial activity on the internet, a domain name is also used as business identifier. Therefore, the domain name not only serves as an address for internet communication but also identifies the specific internet site. In the commercial field, each domain name owner provides information/services which are associated with such domain name. Thus domain name may pertain to provision of services within the meaning of Section 2(z). A domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise not only because it facilitates the ability of consumers to navigate the Internet to find websites they are looking for, but also at the same time, services to identify and distinguish the business itself, or its goods or services, and to specify its corresponding online internet location. Consequently a domain name as an address must, of necessary, be peculiar and unique and where a domain name is used in connection with a business, the value of maintaining an exclusive identity becomes critical. "As more and more commercial enterprises trade or advertise their presence on the web, domain names have become more and more valuable and the potential for dispute is high. Whereas large number of trademarks containing the same name can comfortably co-exist because they are associated with different products, belong to business in different jurisdictions etc., the distinctive nature of the domain name providing global exclusivity is much sought after. The fact that many consumers searching of a particular site are likely, in the first place, to try and guess its domain name has further enhanced this value"2. The answer to the question posed in the preceding paragraph is

1. Intellectual and the Internet-RODNEY D RYDER-Page 96 to 97.

2. See Information Technology Law Diane Rowland and Elizabeth Macdonald 2nd Edition p. 251. therefore an affirmative.

The next question is would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off. as the phrase "passing off itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its service in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. The action is normally available to the owner of a distinctive trademark and the person who, if the word or name is an invented one. invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing off action. It would depend upon the volume of sales and extent of advertisement.

The second element that must be established by a plaintiff in a passing off action is misrepresentation by the defendant to the public. The word misrepresentation does not

mean that the plaintiff has to prove any malafide intention on the part of the defendant. Ofcourse, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent misrepresentation would be relevant only on the question of the ultimate relief which would be granted to plaintiff. What has to be established is the likelihood of confusion in the minds of the public, (the word "public" being understood to mean actual or potential customers or users) that the goods or services offered by the defendant are the goods or the services of the plaintiff. In assessing the likelihood of such confusion the courts must allow for the "imperfect recollection of a person of ordinary memory"4 The third element of a passing off action is loss or the likelihood of it.

3 CADBURYSCEHWEPPES v. PUB SQUASH (1981) RFC 429. ERVEN WARNINA v. TOWNEND. (1980) RFC 31.

4 ARISTOC v. RYSTA. (1945) AC 68.

The use of the same or similar domain name may lead to a diversion of users which could result from such users, mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar web site which offers no such services. Such users could well conclude that the first domain name owner had mis-represented its goods or services through its promotional activities and the first domain owner would thereby lose their custom. It is apparent therefore that a domain name may have all the characteristics of a trademark and could found an action for passing off.

Over the last few years the increased user of the internet has led to a proliferation of disputes resulting in litigation before different High Courts in this country. The Courts have consistently applied the law relating to passing off to domain name disputes. Some disputes were between the trademark holders and domain name owners. Some were between domain name owners themselves. These decisions namely Rediff Communication Ltd. v. Cyberbooth and Anr., AIR (2000) Bombay 27, Yahoo Inc. v. Akash Arora, (1999) PTC 19 201, Dr. Reddy's Laboratories Ltd. v. Manu Kosuri, (2001) PTC 859 (Del.), Tata Sons Ltd. v. Manu Kosuri, (2001) PTC 432 (Del.), Acqua Minerals Ltd. v. Pramod Borse & Anr., (2001) PTC 619 (Del.), and info Edge (India) Pvt. Ltd. & Anr. v. Shailesh Gupta & Anr., (2002) 24 PTC 355 (Del.) correctly reflect the law as enunciated by us. No decision of any court in India has been shown to us which has taken a contrary view. The question formulated at the outset is therefore answered in the affirmative and the submission of the respondent is rejected.

However, there is a distinction between a trademark and a domain name which is not relevant to the nature of the right of an owner in connection with the domain name, but is material to the scope of the protection available to the right. The distinction lies in the

manner in which the two operate. A trademark is protected by the laws of a country where such trademark may be registered. Consequently, a trade mark may have multiple registration in many countries throughout the world. On the other hand, since the internet allows for access without any geographical limitation, a domain name is potentially accessible irrespective of the geographical location of the consumers. The outcome of this potential for universal connectivity is not only that a domain name would require world wide exclusivity but also that national laws might be inadequate to effectively protect a domain name. The lacuna necessitated international regulation of the domain name system (DNS). This international regulation was effected through WIPO and ICANN. India is one of the 171 states of the world which are members of WIPO. WIPO was established as a vehicle for promoting the protection, dissemination and use of intellectual property through the world. Services provided by WIPO to its member states include the provision of a forum for the development and implementation of intellectual property policies internationally through treaties and other policy instruments.5 The outcome of consultation between ICANN and WIPO has resulted in the setting up not only of a system of registration of domain names with accredited Registrars but also the evolution of the Uniform Domain Name Disputes Resolution Policy (UDNDR Policy) by ICANN on 24th October 1999. As far as registration is concerned, it is provided on a first come first serve basis.

While registration with such Registrars may not have the same consequences as registration under the Trademark Act, 1999 nevertheless it at least evidences recognised user of a mark. Besides the UDNDR Policy is instructive as to the kind of rights which a domain name owner may have upon registration with ICANN accredited Registrars. In Rule 2 of the Policy, prior to application for registration of a domain name, the applicant is required to determine whether the domain name for which registration is sought "infringes or violates someone else's rights". A person may complain before administration-dispute-resolution service providers listed by ICANN under Rule 4(a) that :

(i) a domain name is identical or confusingly similar to a trademark or service mark in which the complainant has Final Report of WIPO dt. 30.4.1999 rights; and

(ii) the domain name owner/registrant has no right or legitimate interest in respect of the domain name; and

(iii) a domain name has been registered and is being used in bad faith.

Rule 4(b) has listed by way of illustration the following four circumstances as evidence of registration and use of a domain name in bad faith.

(i) circumstances indicating that the domain name owner/ registrant has registered or the domain name owner/registrant has acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant,

for valuable consideration in excess of its documented out-of-pocket costs directly related to the domain name; or

(ii) the domain name owner/registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that it has engaged in a pattern of such conduct; or

(iii) the domain name owner/registrant has registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, the domain name owner/registrant has intentionally attempted to attract, for commercial gain internet users, to its web site or other on-line location, by creating a likelihood of confusion with the complainants mark as to the source, sponsorship, affiliation, or endorsement of the domain name owner/registrant web site or location or of a product or service on its web site or location."

The defences available to such a complaint have been particularised "but without limitation", in Rule 4(c) as follows :

(i) before any notice to the domain name owner/registrant, the use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with bonafide offering of goods or services; or

(ii) the domain name owner/registrant (as an individual, business, or other organization) has been commonly known by the domain name, even if it has acquired no trademark or service mark rights; or

(iii) the domain name owner/registrant is making a legitimate non- commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue".

These rules indicate that the disputes may be broadly categorised as : (a) disputes between trademark owners and domain name owners and (b) between domain name owners inter se. What is important for the purposes of the present appeal is the protection given to intellectual property in domain names. A prior registrant can protect its domain name against subsequent registrants. Confusing similarity in domain names may be a ground for complaint and similarity is to be decided on the possibility of deception amongst potential customers. The defences available to a compliant are also substantially similar to those available to an action for passing off under trademark law.

Rule 4(k) provides that the proceedings under the UDNDR Policy would not prevent either the domain name owner/registrant or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution, either before proceeding under ICANN's policy or after such proceeding is concluded. As far as India is concerned, there is no legislation which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself is not extra territorial and may not allow for adequate protection of domain names, this does not mean

that domain names are not to be legally protected to the extent possible under the laws relating to passing off.

This bring us to the merits of the dispute between the parties. As we have already said, a passing off action is based on the goodwill that a trader has in his name unlike an action for infringement of a trademark where as trader's right is based on property in the name as such. Therefore unless goodwill can be established by the appellant by showing that the public associates the name 'Sify' with the services provided by the appellant, it cannot succeed.

The appellant's claim to be a leading information technology services company and one of the largest internet services providers in the country has not been seriously disputed by the respondent nor is there any challenge to the appellant's claim that it has more than 5 lac subscribers, 480 Cyber cafes, and 54 points of presence all over India. That it is the first Indian internet company to be listed in 1999 with NASDAQ where it trades under the tradename 'Sify' was given extensive coverage in leading national Newspapers. The appellant has brought on record the stringent conditions and deposit of a large fee for having a trade name included in the NASDAQ International market. The appellant has complied with the conditions for listing. The appellants have claimed that its shares are since 1999 actively traded in on a daily basis on the NASDAQ. It is also claimed that the appellant has widely used the word Sify as a trade name/domain name for its software business and services. The appellant's website www.sify.com is claimed to be a comprehensive internet site with a gamut of subjects to choose from. It has brought out brochures and issued advertisements offering services in the internet under the name 'Sify'. It has submitted its sale figure and expenses incurred on advertisement and market promotion of its business under the trademark Sify. It is also claimed that apart from the fact that the appellant is popularly known as Sify, it has also applied for registration of more than 40 trademarks with the prefix Sify under the Trade and Merchandise Marks Act. 1958 (since replaced by the Trade Marks Act, 1999). In support of its claim of goodwill in respect of the name of 'Sify', the appellant had brought on record press clippings of articles/newspapers in which the appellant has been referred to as 'Sify'. For example, a news item published in Hindu on 5th May 2000 talks of "Sify plans of internet gateways". Another article published in the Business Standard on 11th May 2000 says "Sify chief sees strong dotcom valuations rising". There are several other publications filed along with the plaint all of which show that the appellant was referred to as 'Sify'. That the listing of the appellant with NASDAQ in 1000 under the trade name 'Sify' was featured on several newspapers has been established by copies of the news items. Documents have also been produced to show that the appellant had been awarded prizes in recognition of achievements under the tradename 'Sify'. For example, the Golden Web Award for the year 2000 was awarded to the appellant's corporate site www.sifycorp.com. A number of advertisements in connection with "e-market services from Sify". "Messaging solutions from Sify" have also been filed. It is unfortunate that none of these documents were even noticed by the High Court. We have, therefore, been constrained to

appreciate the evidence and on doing so, we have reached, at least prima facie conclusion that the appellant has been able to establish the goodwill and reputation claimed by it in connection with the tradename 'Sify'.

Apart from the close visual similarity between 'Sify' and 'Siffy', there is phonetic similarity between the two names. The addition of 'net' to 'Siffy' does not detract from this similarity.

According to the respondent the word "Siffynet" which features both as its corporate name and in its domain names was derived from a combination of the first letter of the five promoters of the respondent, namely Saleem, Ibrahim, Fazal, Fareed and Yusuf, and the word "net" implies the business of the respondent. The stand taken by the respondent is that it was not aware of the appellant's trade name and trading style 'Sify'. This is not credible for several reasons. In answer to the legal notice issued by the appellant no such case was made. The refusal of the respondent to comply with the demand notice issued by the appellant was based only on an alleged difference between the trade name, 'Sify' and 'Siffynet' and a claimed difference in the field or operation. The High Court has not also found that the respondent-company was unaware or ignorant of the use of the trade name 'Sify' by the appellant. The reason put forward by the respondent for the choice of the word 'Siffy' as part of its corporate and domain names appears from the second written statement filed by the respondent before the trial Court where it has been said that the respondent company was the brain child of its founder Director, Mr. Bawa Salim and that the word 'Siffy' was invented from the first letters of the five persons involved in the setting up of the respondent company. But only four names were given. The fifth name was given in the counter affidavit filed in this Court. In the first written statement and the first answer to the interlocutory application of the appellant verified by Bawa Salim was Managing Director of the respondent, no such case as has been put forward now regarding the choice of the name "Siffy" was made out. In fact in the original written statement, the respondent had stated that though its domain name "was got registered in the name of one Mr. C.V. Kumar, now the said person does not have any connection with this defendant since the second defendant is no longer in existence as a partner(sio)". Thus, it appears that the respondent may originally have been a firm because C.V. Kumar, in whose name 'Siffynet' was registered, has been described as a partner. Even if this inference is incorrect and the respondent was always a company, we are still not convinced as to the reason why the name "Siffy" was chosen by the respondent. If the originators of the company were the five persons viz. Salim, Ibrahim, Fazal, Fareed and Yousuf why was the domain name of the respondent already registered as 'Siffynet' in the name of Mr. C.V. Kumar? Furthermore, the list of names provided by the respondent to support its case that 'Siffy' as an original acronym was based on the initial letters of the respondent company's promoters seems unsupported by any evidence whatsoever. No document apart from a bare assertion that the five named individuals had any special collective role in the origination or promotion of the business has been filed. The appellant's internet based business was, from 1999, high profile. The evident media

prominence to 'SIFY' and large subscriber base could have left the respondent in no doubt as to its successful existence prior to the adoption of Siffy as part of its corporate name and registration of Siffynet and Siffy.com as its domain names. It would therefore appear that the justification followed the choice and that the respondent's choice of the word "Siffy" was not original but inspired by the appellant's business name and that the respondent's explanation for its choice of the word "Siffy" as a corporate and domain name is an invented post-rationalisation.

What is also important is that the respondent admittedly adopted the mark after the appellant. The appellant is the prior user and has the right to debar the respondent from eating into the goodwill it may have built up in connection with the name.

Another facet of passing off is the likelihood of confusion with possible injury to the public and consequential loss to the appellant. The similarity in the name may lead an unwary user of the internet of average intelligence and imperfect recollection to assume a business connection between the two. Such user may, while trying to access the information or services provided by the appellant, put in that extra 'f' and be disappointed with the result. Documents have been filed by the respondent directed at establishing that the appellant name Sify was similar to other domain names such as Scifinet, Scifi.com etc. The exercise has been undertaken by the respondent presumably to show that the word 'Sify' is not an original word and that several marks which were phonetically similar to the appellants' trade name are already registered. We are not prepared to deny the appellant's claim merely on the aforesaid basis. For one, none of the alleged previous registrants are before us. For another, the word 'sci- fi is an abbreviation of 'science fiction' and is phonetically dissimilar to the word Sify. (See Collins Dictionary of the English Language).

The respondent then says that confusion is unlikely because they operate in different fields. According to the respondent their business is limited to network marketing unlike the appellant which carries on the business of software development, software solution and connected activities. The respondent's assertion is factually incorrect and legally untenable. A domain name, is accessible by all internet users and the need to maintain an exclusive symbol for such access is crucial as we have earlier noted. Therefore a deceptively similar domain name may not only lead to a confusion of the source but the receipt of unsought for services. Besides the appellants have brought on record printouts of the respondent's website in which they have advertised themselves as providing inter alia software solution, integrating and management solutions and software development covering the same field as the appellant. To take a specific example, the respondent's brochure explicitly offers Intranet and Extranet solutions which are also explicitly offered by the appellant. There is clearly an overlap of identical or similar services. It may be difficult for the appellant to prove actual loss having regard to the nature of the service and the means of access but the possibility of loss in the form of diverted customers is more than reasonably probable.

The last question is - where does the balance of convenience lie? Given the nature of the business, it is necessary to maintain the exclusive identity which a domain name requires. In other words, either 'Sify' or 'Siffy' must go. Apart from being the prior user, the appellant has adduced sufficient evidence to show that the public associates the trade name SIFY with the appellant. The respondent on the other hand has produced little proof to establish the averments in support of its case that it had a membership of 50,000. We are unable to hold, while not commenting on the authenticity of the bills relied on by the respondents, as the High Court has done, that the bills by themselves show that the respondent "has been carrying on conferences at different places and enrolling members who would be transacting with them in the business and like that they have enrolled about 50,000 members already". Similarly, several Bills raised in the name of the respondent in respect of different items do not by themselves establish that the members of the public have come to associate the word "Siffy" only with the respondent. Weighed in the balance of comparative hardship, it is difficult to hold that the respondent would suffer any such loss as the appellant would unless an injunction is granted. The respondent can carry on its business and inform its members of the change of name. We are conscious of the fact that the grant of an interlocutory order may disrupt the respondent's business. But that cannot be seen as an argument which should deter us from granting relief to the appellant to which we are otherwise satisfied it is entitled.

The High Courts' finding that no prejudice would be caused to the appellant because it had another domain name was a consideration which might have been relevant if there was a case of bonafide concurrent use and where the right to use was co-equal. The doubtful explanation given by the respondent for the choice of the word "Sify" coupled with the reputation of the appellant can rationally lead us to the conclusion that the respondent was seeking to cash in on the appellant's reputation as a provider of service on the internet. In view of our findings albeit prima facie on the dishonest adoption of the appellant's tradename by the respondent, the investments made by the appellant in connection with the trade name, and the public association of the tradename Sify with the appellant, the appellant is entitled to the relief it claims. A different conclusion may be arrived at if evidence to the contrary is adduced at the trial. But at this stage and on the material before the Court, we are of the view that the conclusion of the High Court to the contrary was unwarranted.

The appeal is accordingly allowed. The decision of the High Court is set aside and that of the City Civil Court affirmed. There will be no order as to costs.

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Banyan Tree Holding (P) limited v. A. Murali Krishna Reddy

CS (OS) No. 894/2008, Del(DB)

S. Muralidhar J.:

The learned single Judge has by an order dated 11.8.2008 referred for the decision of the Division Bench of this Court questions concerning the jurisdiction of this Court to entertain the present suit.

2. The factual background in which the questions arise requires to be briefly recapitulated. A peculiar feature of the present suit which is an action for passing of is that neither the plaintiff nor the Defendants is located within the territorial jurisdiction of this Court. The Plaintiff is a company having its registered office at Singapore whereas the Defendants 1 and 2 are at Hyderabad. Defendant no. 1 is the promoter of the Defendant no. 2 company.

The Case of the Plaintiff

The Plaintiff claims that it is part of a group of companies involved in the hospitality business. Since 1994 it adopted and used the word mark „Banyan Tree" and also the banyan tree device. It is claimed that on the account of the extensive and continuous use by the Plaintiff of the said mark and device in relation to its business, they have acquired secondary meaning, have become highly distinctive and have come to be associated with the Plaintiff and its sister concerns. The Plaintiff maintains the websites www.banyantree.com and www.banayantreespa.com since 1996. The said websites are accessible in India.

4. It is not in dispute that the Plaintiff does not hold a registration for the said mark and device in India. Its application for registration is stated to be pending. Since the year 2002, the Plaintiff has, in collaboration with the Oberoi Group, been operating 15 spas across India. In October 2007, the Plaintiff learnt that the Defendants had initiated work on a project under the name „Banyan Tree Retreat". The Plaintiff has averred that the word mark and the device adopted by the Defendants in relation to their retreat is deceptively similar to that of the Plaintiff. The Plaintiff states that the Defendants have advertised their project on their website www.makprojects.com/banyantree. The Plaintiff alleges that the use of the said mark and device by the Defendants was dishonest and was an attempt to encash on the reputation and goodwill of the Plaintiff and was calculated to cause confusion and deception among the public by passing off the services of the Defendants as that of the Plaintiff. Accordingly, the present suit was filed by the Plaintiff for an injunction to restrain the Defendants from the use of the said mark and device.

5. The learned single Judge has, in the referral order dated 11.8.2008, noticed that the plaintiff has in para 30 of the plaint claimed that this Court has the territorial jurisdiction under Section 20 of the Code of Civil Procedure, 1908 (CPC) to entertain the suit. According to the Plaintiff the Defendants solicit business through use of the impugned mark “BANYAN TREE RETREAT” and the Banyan device in Delhi. It is stated that “the

Defendants have presence in Delhi through their website http://www.makprojects.com/banyantree.htm which is accessible in Delhi." It is further contended that "the said website is not a passive website. It not only provides contact information but also seeks feedback and inputs from its customers through an interactive web-page." Further, the Plaintiff submits that the services of the Defendants are being offered to the customers in Delhi "also because of the ubiquity, universality and utility of the features of the Internet and the World Wide Web and hence the cause of action has arisen within the jurisdiction of this Court."

The referral order

6. In the referral order, the learned single Judge has examined the above claim of the Plaintiff as to the territorial jurisdiction of this Court on account of the Defendants hosting a website which is accessible in Delhi and through which not only information can be obtained by a viewer sitting in Delhi but also a feedback and input can be sent to the Defendants through the said web-page. After noticing the developments in the law in India, Canada, USA

and England, the learned single Judge has formulated the following questions for consideration by the Division Bench:

"1. Whether this court can entertain the present suit, having regard to the averments and documents, in the context of special provisions in to the Trademark and Copyrights Act, which do not provide for exercise of jurisdiction based on internet or web-presence of such alleged infringers, even while making explicit departure from the general law as to territorial jurisdiction;

Whether the court can entertain the present suit, in the absence of a long arm statute, having regard to the existing state of law, particularly Section 20, CPC, and the impact, if, any of the Information Technology Act, 2009 on it;

3. Applicable standards for entertaining a suit, based on use of a trademark by a Defendant, on its website, or infringement or passing off of the plaintiff"s trademark, in such website and the relevant criteria to entertain such suits;

4. Applicable standards and criteria where the plaintiff relies exclusively on "trap orders" or transactions, in relation to passing off, or trademark infringement cases, as constituting "use" or cause of action, as the case may be."

The questions as reframed

7. Having considered the submissions of Mr. Praveen Anand, learned counsel for the Plaintiff, we consider it appropriate to reframe the questions referred to us for our opinion as under:

(i) For the purposes of a passing off action, or an infringement action where the Plaintiff is not carrying on business within the jurisdiction of a court, in what

circumstances can it be said that the hosting of a universally accessible website by the Defendants lends jurisdiction to such Court where such suit is filed ("the forum court")?

(ii) In a passing off or infringement action, where the defendant is sought to be sued on the basis that its website is accessible in the forum state, what is the extent of the burden on the Plaintiff to prima facie establish that the forum court has jurisdiction to entertain the suit?

(iii) Is it permissible for the Plaintiff to establish such prima facie case through "trap orders" or "trap transactions"?

8. At the outset it needs to be noted that the present suit is not one for infringement by the Defendants of the Plaintiff"s trademark and the Plaintiff carries on business within the jurisdiction of the court. If it were, then in terms of Section 134 (2) of the Trademarks Act 1999 (TM Act) this court would have jurisdiction to entertain the suit although the defendants do not reside or carry on business within its jurisdiction. Section 134 (2) of the TM Act (like and Section 62 (2) of the Copyright Act 1957) is therefore a „long arm" provision in a limited sense, confined to infringement actions by Plaintiffs carrying on business within the jurisdiction of the forum court. The present suit is an action for passing off in which neither the Plaintiff nor any of the Defendants voluntarily resides or carries on business within the local limits of Delhi. Consequently, neither Section 20 (a) nor Section 20(b) CPC applies. The Plaintiff seeks to find the territorial jurisdiction of this Court in terms of Section 20(c) CPC. In other words, according to the Plaintiff the cause of action, wholly or in part, arises within the jurisdiction of this Court. This, according to the Plaintiff is on account of two factors. One, that the website of the Defendants is accessible in Delhi; it is not a passive website but used for soliciting business in Delhi. Second, that there was at least one instance of the Defendants" brochure being sent to a Delhi resident for the purposes of sale of property.

Submissions of counsel

9. As regards the accessibility of the Defendants" website in

Delhi, the learned counsel for the Plaintiff emphasized that (a) the nature of the website, (b) the intention of the website"s host to market its products in Delhi and (c) the effect of such action by the Defendants in Delhi, are the three factors that have to be accounted for in determining whether this court has territorial jurisdiction. As regards the nature of the website, counsel for the Plaintiff submits that it could be passive, interactive or active. The case of the Plaintiff is that a mere advertisement on the website, without any move by the Defendants to block access to Delhi viewers through a device of "purposeful avoidance" would be a case of "passive plus." It is contended that all the viewers outside Andhra Pradesh where the Defendants are located are, in the absence of such blocking of access, targeted by the Defendants. According to the Plaintiff where the website is passive, in the absence of any intention to market, which absence of intention is express, the forum court would have no jurisdiction. If the intention to market its product is not

discernible on account of non-application of mind by the website owner, the forum court might still have jurisdiction where there is an effect on the market in the forum state.

10. As regards an interactive website, it is submitted that for jurisdiction of the forum court to get attracted, there should be an intention on the part of the website owner to target potential customers in the forum state. This intention can be presumed unless the website owner demonstrates "purposeful avoidance" by placing filters or blocking off the website to viewers outside the state within whose territory he is located. Where the owner has not applied his mind to target a specific city, region or state, but if some „effect" is nevertheless felt in the forum state, the forum court would have jurisdiction. It is submitted that when there is no intention to target a specific city or a customer and there is no effect on the market, the forum court would have no jurisdiction. Learned counsel for the Plaintiff has relied on a large number of judicial precedents, including those of foreign courts, in support of his plea that this court has jurisdiction to entertain the suit. These will be discussed presently. The questions that arise are examined with reference to the development of the law in common law jurisdictions particularly the U.S.A., the U.K., Canada, Australia and India.

Question (i): Jurisdiction of a forum court in suits involving internet related disputes

The law in the U.S.A.

Purposeful availment as a test

11. Among the early decisions, is one of the U.S. Supreme Court in ***International Shoe Co. v. Washington 326 U.S. 340 (1945)*** where a two-part test for determining jurisdiction of the forum court over a defendant not residing or carrying on business within its jurisdiction was evolved. It was held that in such instance the Plaintiff had to show that the defendant has sufficient "minimum contacts" in the forum state. In other words, the defendant must have purposefully directed its activities towards the forum state or otherwise "purposefully availed" of the privilege of conducting activities in the forum state. Further, the forum court had to be satisfied that exercising jurisdiction would comport with the traditional notions of fair play and substantial justice. This law was further developed in later cases.

12. In ***Burger King Corp v. Rudzewicz 471 U.S. 462 (1985)*** the Appellant Burger King Corp. had its principal offices in Miami. It entered into a franchise agreement with the defendant who opened a restaurant pursuant thereto in Michigan. The defendant defaulted in making the monthly payments. The Plaintiff terminated the franchise agreement and ordered the defendant to vacate the premises. When the defendant refused, the Plaintiff sued him in Miami. Florida had a long arm statute that extended jurisdiction to any person, whether or not a resident of that state, who committed a breach of a contract in the state by failing to perform acts that the contract required to be performed there. The District Court held that the defendant franchisee was subject to the personal jurisdiction of the court in Miami. The Court of appeals reversed and the Plaintiff appealed to the Supreme Court. Reversing the Court of Appeals and restoring the judgment of the District

Court, the Supreme Court held that the defendant did not have to be physically present within the jurisdiction of the forum court and that the forum court may exercise jurisdiction over a non-resident "where an alleged injury arises out of or relates to actions by the Defendant himself that are "purposefully directed towards residents of the forum State. It was held that "purposeful availment" would not result from "random" or "fortuitous" contacts by the defendant in the forum state requires the plaintiff to show that such contracts resulted from the "actions by the defendant himself that created a substantial connection with the forum State." He must have engaged in "significant activities" within the forum state or have created "continuing obligations" between himself and residents of the forum state. It was held on facts that the 20 year relationship that the defendant had with the Plaintiff "reinforced his deliberate affiliation with the forum state and the reasonable foreseeability of litigation there."

13. In ***Asahi Metal Industries v. Superior Court 480 U.S. 102 (1987)*** a Japanese company sold assemblies manufactured by it to a company in Taiwan which in turn incorporated them into the finished tyres and sold them worldwide including the US where 20 per cent of its sales took place in California. A product liability suit was brought in the Superior Court in California against the Taiwanese company arising from a motorcycle accident caused as a result of a defect in the tyre. The Taiwanese company in turn filed a counter claim against the Japanese company. The order of the Superior Court declining to quash the summons issued to the Japanese company was reversed by the State Court of Appeal. However, the Supreme Court of California in an appeal by the Taiwanese company reversed and restored the order of the Superior Court. The U.S. Supreme Court reversed the State Supreme Court and held that exercise of personal jurisdiction over the Japanese company would be "unreasonable and unfair, in violation of the Due Process Clause." Further it was held that "the mere placement of a product into the stream of commerce" was not an act "purposefully directed towards the forum State" and would not result in a "substantial connection" between the defendant and the forum state necessary for a finding of minimum contacts.

14. As regards cases involving torts committed in relation to the internet, the early decisions on the point handed down by the District courts in the U.S.A. appeared to permit a forum state to exercise jurisdiction even where the website was a passive one. In ***Inset Systems Inc. v. Instruction Set Inc. 937 F.Supp. 161 (D.Conn.1996),*** the Defendant had displayed on its website used for advertising its goods and services, a toll-free telephone number "1-800-US-INSET." The Plaintiff, a company in Connecticut brought an infringement action against the Defendant in a court in Connecticut, which in any event had a long arm statute. The District court held that the Defendant had "purposefully availed itself of doing business in Connecticut because it directed its advertising activities via the Internet sites and toll-free number toward the State of Connecticut (and all states); Internet sites and toll-free numbers are designed to communicate with people and their businesses in every state; an Internet advertisement

could reach as many as 10,000 Internet users within Connecticut alone; and once posted on the Internet, an advertisement is continuously available to any Internet user".

15. However, the approach in ***Bensusan Restaurant Corp. v. King, 937 F. Supp.295 (S.D.N.Y. 1996)*** was different although New York too had a long arm statute. The Defendant there had a small jazz club known as "The Blue Note" in Columbia, Missouri and created a general access web-page giving information about the said club as well as a calendar of events and ticketing information. In order to buy tickets, web browsers had to use the names and addresses of ticket outlets in Columbia. Bensusan (the Plaintiff therein) was a New York corporation that owned "The Blue Note," a popular jazz club in the heart of Greenwich Village in New York. It owned the rights to the "The Blue Note" mark. It accordingly sued the Defendant for trademark infringement in New York. It was noticed that New York had a long arm statute. The New York court held that the Defendant had not done anything „to purposefully avail himself of the benefits of New York. Like numerous others, the Defendant had "simply created a web site and permitted anyone who could find it to access it. **Creating a site, like placing a product into the stream of commerce, may be felt nationwide or even worldwide but, without more, it is not an act purposefully directed towards the forum state**". (emphasis supplied)

16. In ***Ballard v. Savage 65 F.3d 1495 (1995)*** it was explained that the expression "purposefully availed" meant that "the Defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents". It was further explained that "it was not required that a Defendant be physically present within, or have physical contacts with, the forum, provided that his efforts „are purposefully directed" toward forum residents". In ***CompuServe, Inc. v. Patterson, 89 F.3d 1257(6th Cir. 1996)*** it was found that the Defendant had chosen to transmit its products from Texas to CompuServe"s system, and that system provided access to his software to others to whom he advertised and sold his product. It was held that Patterson had "purposefully availed himself of the privilege of doing business". In ***Maritz, Inc. v. CyberGold, Inc., 947 F.Supp. 1328 (E.D.Mo.) (1996)*** where browsers who came on to its website were encouraged by the Defendant CyberGold to add their address to a mailing list that basically subscribed the user to the service, it was held that the Defendant had obtained the website "for the purpose of and in anticipation that, internet users, searching the internet for websites, will access CyberGold"s website and eventually sign up on CyberGold"s mailing list." Therefore, although CyberGold claimed that its website was a passive one, it was held that through its website, "CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally."

17. In ***Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002)*** the Court of Appeals held that the purposeful availment requirement is satisfied "if the web site is interactive to a degree that reveals specifically intended interaction with residents of the state". In that case, the Plaintiff (Neogen), a Michigan Corporation, was in the business of developing and marketing a range of health care, food, and animal-related

products and services, including certain diagnostic test kits. It filed a suit in the Michigan District Courts alleging, *inter alia*, trademark infringement against the Defendant (Neo Gen Screening), a Pennsylvania Corporation performing diagnostic testing of blood samples from newborn infants. The District Court dismissed the suit for lack of personal jurisdiction. The Court of Appeals held that the maintenance of the Defendant"s website, in and of itself, does not constitute purposeful availment of the privilege of acting in Michigan. It observed that "the level of contact with a state that occurs simply from the fact of a website"s availability on the Internet is therefore an attenuated contact that falls short of purposeful availment." However, the Court in that case did not decide the question that whether the Defendant"s website alone would be sufficient to sustain personal jurisdiction in the forum State as it held that "the website must be considered alongside NGS's [Neo Gen Screening"s] other interactions with Michigan residents. Most significantly, when potential customers from Michigan have contacted NGS to purchase its services, NGS has welcomed their individual business on a regular basis". The Court further observed that "although customers from Michigan contacted NGS, and not the other way around, NGS could not mail test results to and accept payment from customers with Michigan addresses **without intentionally choosing to conduct business in Michigan.**" It was in this context that the Court of Appeals reversed the finding of the District Court and remanded the matter.

The „Zippo" sliding scale test

18. The *"sliding scale"* test for determining the level of interactivity of the website, for the purposes of ascertaining jurisdiction of the forum state, was laid down in ***Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa.1997)***. The Plaintiff Zippo Manufacturing was a Pennsylvania corporation making cigarette lighters. The Defendant was a California corporation operating an internet website and an internet news service. It had its offices only in California. Viewers who were resident of other states had to go on the website to subscribe for the Defendant"s news service by filling out an on-line application. Payment was made by credit card over the internet or telephone. Around 3,000 of the Defendant"s subscribers were residents of Pennsylvania who had contracted to receive the Defendant"s service by visiting its website and filling out the on-line application. Additionally the Defendant entered into agreements with seven internet access providers in Pennsylvania to permit their subscribers to access the Defendant"s news service. The Defendant was sued in a Pennsylvania court for trademark dilution, infringement and false designation. After discussing the development of the law till then, the District Court first observed:

"The Constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant. *Mellon, 960 F.2d at 1221*. General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engage3d in "systematic and continuous" activities in the forum state *Helicopteos Nacionales de Colombia, S.A. v. Hall, 466 US 408.* In the absence of general

jurisdiction, **specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the „minimum contacts" framework**" of *International Shoe Co. v. Washington, 326 US 310* and its progeny *Mellon, 960 F.2d at 1221*" (emphasis supplied)

19. The ***Zippo*** court then noted that "a three pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is appropriate: (1) the defendant must have sufficient "minimum contacts" with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable." The court in ***Zippo*** classified websites as (i) passive, (ii) interactive and (iii) integral to the defendant"s business. On facts it was found that the Defendant"s website was an interactive one. Accordingly it was held that the court had jurisdiction to try the suit. The ***Zippo*** court"s observation that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet" has been compared by that court to a "**sliding scale**".

20. In ***Cybersell, Inc. v. Cybersell. Inc***. ***130 F.3d 414 (1997)***, the facts were that an Arizona Corporation that advertised for commercial services over the internet under service mark "Cybersell", brought an infringement action against Florida Corporation which offered web-page construction services over the Internet. As part of its marketing effort, the forum Cybersell Inc in Florida created a web-page at http://www.cybsell.com/cybsell/index.htm. The same page had a logo at the top with "CyberSell" over a depiction of the planet earth, with the caption underneath "Professional Services for the World Wide Web" with a local phone number and hypertext link allowing the browser to introduce herself. That link invited a company not on the web but interested in getting on the web-to "Email us to find out how!." A hypertext link allowed a user to move directly from one web location to another by using the mouse to click twice on the colored link. Arizona had a long arm statute that permitted a court to exercise personal jurisdiction over parties whether found within or outside the state to the maximum extent permitted by the court in United States. A reference was made to the decision of the Arizona Supreme Court in ***Uberti v. Leonardo,*** 181 Ariz. 565 in which it was held that "Arizona will exert personal jurisdiction over a non resident litigant to the maximum extent allowed by the federal constitution". The Arizona Court of Appeals adopted a three part test to determine whether the district court could exercise specific jurisdiction over the non-resident Defendant: (1) the non-resident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections; (2) the claim must be one which arises out of the results from the defendant"s forum-related activities; and (3) exercise of jurisdiction must be reasonable. It was held by the Court of Appeals that all that Cybersell FL (the Florida Corporation) "did was post an essentially passive home

page on the web, using the name "CyberSell," which Cybersell AZ (the Arizona Corporation) was in the process of registering as a federal service mark. While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents". It was further noticed that "**the interactivity of its web page is limited to receiving the browser"s name and address and an indication of interest-signing up for the service is not an option, nor did anyone from Arizona do so. No money changed hands on the Internet from (or through) Arizona**". It was held that "Cybersell FL"s contacts are insufficient to establish "purposeful availment".

21. There have been difficulties experienced in the application of the *Zippo* sliding scale test in terms of which the assertion of a court"s jurisdiction depended upon the "level of interactivity and commercial nature of the exchange of information" as a result of the use of the website. The courts have been finding it problematic in determining the degree of interactivity that should suffice for jurisdiction to be attracted. Mere ability to exchange files with users through the internet has been held not to be sufficiently „interactive" for the forum court to assume jurisdiction (***Desktop Technologies v. Colourworks Reproduction & Designs Inc 1999 WL 98572 (E.D.Pa. 1999)***. In ***People Solutions v. People Solutions 2000 WL 1030619 (N.D.Tex., 2000),*** although it was possible for customers visiting the Defendant"s website to download information, obtain product brochures and order products on-line, the court refused to assert jurisdiction since the Plaintiff failed to show that Defendant had sold its products or contracted for services with any person in the forum state through the website. Again in ***Mink v. AAAA Development 190 F.3d 333 (5th Cir. 1999)*** although the Defendant"s website offered printable mail-in order forms that could be downloaded, provided a toll-free number, a mailing and an e-mail address, the forum court declined to exercise jurisdiction since in fact no orders were placed using the website. The levels of interactivity now demanded are of a much higher order. In ***Winfield Collection v. McCauley 105 F.Supp.2d 746 (E.D.Mich,2000)*** the website provided an interactive mechanism of doing on-line business and the Plaintiff showed that auction sales were conducted over the net with bidders in Michigan. Nevertheless jurisdiction was declined because the Defendant was not shown as having "actively and intentionally doing business with customers in Michigan." It was held that the form of on-line sale made it impossible for the Defendant"s website to target the users of any particular state and therefore other than the court of the state where the principal place of the business of the Defendant was located, other state courts could not exercise jurisdiction. Since over the years, most websites are interactive to some degree, there has been a shift from examining whether the website is per se passive or active to examining the nature of the activity performed using the interactive website.

The „Effects" test

22. The difficulty experienced with the application of the *Zippo* sliding scale test, has paved way for the application of the „effects" test. The courts have thus moved from a „subjective territoriality" test (that a court will regulate an activity only if it is shown having originated in its territory – exemplified by the decision in ***Louis Feraud Int'l SARL v. Viewfinder Inc 406 F Supp 2d 274 (SDNY 2005)]*** to an „objective territoriality" or „effects" test in which the forum court will exercise jurisdiction if it is shown that effects of the Defendant"s website are felt in the forum state. In other words it must have resulted in some harm or injury to the Plaintiff within the territory of the forum state. Since some effect of a website is bound to be felt in several jurisdictions given the nature of the internet, courts have adopted a „tighter" version of the „effects" test, which is intentional targeting. Thomas Schultz in his illuminative piece "**Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface**" ***EJIL 2008 19 (779)*** points out that the dynamics of jurisdiction is reasonableness and fairness. Schultz concludes that both the subjective territoriality and objective territoriality or the „effects" test, if construed too broadly, are bound to be unfair and unreasonable. According to Schultz, a middle path had to be chosen between the too narrow („subjective territoriality") and too broad („effects") jurisdictional bases for better managing trans-border externalities. This middle path was „targeting". Schultz defines targeting to mean "in essence that the activity must be intended to have effects within the territory of the state asserting jurisdiction." According to another scholar, Professor Michael Geist ("Is There a There There? Towards Greater Certainty for Internet Jurisdiction" *16 Berkeley Tech LJ (2001) 1345 at 1357*) the principle of targeting is to "identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction." Targeting is described as "something more than effects, but less than physical presence." We now examine the decisions in which the above tests were evolved.

23. The "effects" test was first evolved in ***Calder v. Jones, 465 U.S. 783 (1984)***. The Plaintiff there was a resident of California who commenced a libel action in a California court against the *National Enquirer* based on an article that it printed and circulated in California. Apart from the *Enquirer* and its local distribution company, its editor and the author of the article were all in Florida. Affirming the assertion by the California court of personal jurisdiction over the defendants, the Supreme Court held:

"The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. **Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California**."

On facts it was held that the author and editor "expressly aimed" their tortuous actions at California and that "they knew" that the article would have a devastating impact on the

respondent and that they should have reasonably anticipated that the brunt of that injury would be reasonably felt by the defendant in the State in which she lived and worked.

24. The "effects" test propounded in ***Calder*** has been applied with mixed results. One of the most discussed decisions of a French court where the „effects" doctrine was applied is the Yahoo! Case (***UJEF et LICRA v. Yahoo! Inc. et Yahoo France, Tribunal de Grande Instance de Paris, No RG:00/0538, May 22, 2000 and November 22, 2000)***. A French Jew while surfing on the net came across Nazi memorabilia being offered for sale on a web page hosted by Yahoo!. Offering Nazi memorabilia for sale was an offence under the French Penal law. Although the website of Yahoo! France did not host a similar web page, it could be viewed on Yahoo! Website hosted from the U.S. by anyone in France. LICRA, an organization fighting racism and anti-Semitism, and the Union of Jewish students in France (UJEF) sued Yahoo! And Yahoo! France in the court in France. The French court ordered the US Internet portal to block access to its US website from France, in order to prevent internet users in France from accessing the objectionable items offered for auction sale on that site. It found that this was technologically feasible through a series of devices for which it examined experts. It thus rejected Yahoo!"s argument that the French court"s order was not capable of being implemented beyond the borders of France. The French court essentially applied the „effects" test to assert jurisdiction. It held that by "permitting visualization in France of nazi objects and eventual participation of a surfer established in France in the exposition/sale of such objects" Yahoo! had committed a wrong within the territory of France. Although the website was capable of being viewed from anywhere in the world, the French court concluded that it had caused harm to the two claimants located in France. The mere downloadability of the objectionable information/material did not alone determine the question of jurisdiction. The French court also considered the effect it would have on the public at large in France who could access Yahoo!"s website and who were targeted. This the Court concluded from the fact that Yahoo! Inc. U.S.A displayed advertisements in French to visitors at the US based server and Yahoo! France provided a link to the U.S. based Yahoo! Server that Yahoo! Inc. did intend its services to reach persons in France and intended to profit for the visitors from France to its U.S. based website. (There was a second phase of this litigation in the courts in California where Yahoo! sued LICRA and UJEF on the ground that the order of the French court was unenforceable in the U.S.A. However, that is not being discussed as not being relevant to the questions that arise for consideration in the instant case).

25. While courts have more readily applied the „effects" test in defamation cases [see ***Remick v. Manfredy, 238 F.3d 248 (2001); Noonan v. Winston Comp., 135 F.3d 85, 91 (1998)***]; ***Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002)*** there have been problems in its application to trademark infringement cases. For instance, the Court of Appeals in ***Cybersell*** held that the "effects" test did not apply with the same force to Cybersell AZ as it would to an individual, because a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does." Cybersell FL"s web page

simply was not aimed intentionally at Arizona knowing that harm was likely to be caused there to Cybersell AZ". In ***Digital Equipment Corp. v. Alta Vista Technology 969 F.Supp 456 (Mass., 1997)*** the Plaintiff, a Massachusetts company sued the Defendant which was its licensee alleging infringement of its mark. Although the Defendant argued that it had structured its affairs to avoid the forum state, the court found that the Defendant"s use of its website to infringe the Plaintiff"s mark did have effects in the forum state and its purpose may be said to targeting the forum state and its citizens. In ***Nissan Motor Co. v. Nissan Computer Corp.89 F. Supp. 2d 1154 (C.D. Cal.,2000)*** although the Defendant did not sell goods to its consumers on its websites (which were registered under the domain names nissan.com and nissan.net) it had intentionally changed the content of its web site to exploit the goodwill of the Plaintiff (a leading car manufacturer) by profiting from confusion among the consumers. It was therefore held to have "deliberately and substantially directed its activity toward the forum state."

26. The courts in the U.S.A. have adopted a combination of the "***Zippo*** sliding scale test" and the ***Calder*** "effects" test in examining whether the forum court has jurisdiction in a case involving infringement by use of the internet. Recently in ***Toys "R" US, v. Step Two, 318 F.3d 446 (2003)***, the US Court of Appeals revisited the issue. In that case, the Plaintiff, Toys "R" Us (Toys), a Delaware corporation with its headquarters in New Jersey, owned retail stores worldwide where it sold toys, games, and numerous other products. In August 1999, Toys acquired Imaginarium Toy Centers, Inc., which owned and operated a network of "Imaginarium" stores for the sale of educational toys and games. In this process, Toys also acquired several Imaginarium trademarks. The Defendant, Step Two, a Spanish corporation owned or franchised toy stores operating under the name "Imaginarium" in Spain and nine other countries. It had registered the Imaginarium mark in several countries where its stores were located. At the time of trial, there were 165 Step Two Imaginarium stores having the same unique facade and logo as those owned by Toys, and selling the same types of merchandise as Toys sold in its Imaginarium stores. However, Step Two did not operate any stores, maintain any offices or bank accounts, or had any employees anywhere in the United States. In 1995, Imaginarium Toy Centers, Inc. (which Toys later acquired) registered the domain name <imaginarium.com> and launched a web site featuring merchandise sold at Imaginarium stores. In 1996, Step Two registered the domain name <imaginarium.es>, and began advertising merchandise that was available at its Imaginarium stores. In April 1999, Imaginarium Toy Centers registered the domain name <imaginarium.net>, and launched another web site where it offered Imaginarium merchandise for sale. In June 1999, Step Two registered two additional "Imaginarium" domain names, <imaginariumworld.com> and <imaginarium-world.com>. In May 2000, Step Two registered three more domain names: <imaginariumnet.com>, <imaginariumnet.<page>net>, and <imaginariumnet.org>. Toys brought action against Step Two alleging that Step Two used its Internet web sites to engage in trademark infringement, unfair competition, misuse of the trademark notice symbol, and unlawful "cybersquatting". The District Court of New Jersey denied Toys' request for jurisdictional discovery and, simultaneously,

granted Step Two's motion to dismiss for lack of personal jurisdiction. However, the Court of Appeals held that the record did not support the finding that the Defendant Step Two knowingly conducted business with residents of New Jersey. It reversed and remanded the case for limited jurisdictional discovery relating to Step Two's business activities in the United States. The Court emphasized that "the mere operation of a commercially interactive website should not subject the operator to jurisdiction anywhere in the world. **Rather, there must be evidence that the Defendant "purposefully availed" itself of conducting activity in the forum state, by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficient other related contacts**".

27. Thomas Schultz (supra) points out that since the concept of „targeting" does not have an inherently precise meaning, „what it means to target seems to be very much up for grabs." He suggests that positive actions by a Defendant to "direct activities towards specific states may also constitute the threshold of what amounts to targeting." It could be the language or a currency used on the website, the language in which the terms and conditions of use are drafted. Schultz also challenges the notions that the internet is inherently incapable of being regulated or that it is „global" or „borderless" as is largely believed. He points out that while there has been a "horizontal fragmentation" of the internet by constitution of legal systems which are transnational and largely autonomous of state control (he cites the example of e Bay"s dispute resolution mechanism) there is also "vertical fragmentation" of the internet by states exercising greater controls over web based information flows within (and into) their territory based on local values and preferences. The latter has been triggered by a variety of factors including libel originating in distant countries, online casinos, domain name cyber squatting, hate speech websites and so on. He predicts that this inevitably leads to "carving up of the internet" for the purposes of regulation and control.

28. To summarise the position in the US, in order to establish the jurisdiction of the forum court, even when a long arm statute exists, the Plaintiff would have to show that the Defendant "purposefully availed" of jurisdiction of the forum state by "specifically targeting" customers within the forum state. A mere hosting of an interactive web-page without any commercial activity being shown as having been conducted within the forum state, would not enable the forum court to assume jurisdiction. Even if one were to apply the „effects" test, it would have to be shown that the Defendant specifically directed its activities towards the forum state and intended to produce the injurious effects on the Plaintiff within the forum state. We now take a brief look at the decisions in other common law jurisdictions.

Canada

29. In ***Morguard Investments Ltd. V. De Savoye, [1990] 3 SCR 1077*** the Canadian Supreme Court emphasized the "real and substantial connection" as a test for determining jurisdiction. It was observed as follows:

"It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties."

30. In ***Pro-C Ltd. v. Computer City Inc. (2000) OJ No. 2823 (Ont. Sup.Ct.), 7 CPR (4th) 193*** it was held that the listing of Canadian retail outlets on the Defendant"s website coupled with there being a de facto "common market" between Canada and the U.S. meant that Candian consumers were being targeted and therefore the Ontario court in Canada would have jurisdiction to try the trademark infringement action against the Defendant located in the U.S.A.

31. In ***Patrick Desjean v. Intermix Media Inc. 2006 FC 1395***, the Defendant, a Delaware Corporation with its principal office in Los Angeles, used to offer ostensible free software programs. When the Plaintiff, a resident of Canada, installed a free Intermix Screensaver or game from "www.mycoolscreen.com", he also unwittingly installed one or more spyware programs. Thereafter the Plaintiff brought an action against the Defendant in Canada for violating the misleading representations provisions of the Competition Act, 1985 (of Canada). The Federal Court of Ottawa, after referring to the decision of the Ontario Court of Appeal in ***Muscutt v. Courcelles (2002) 213 DLR (4th) 577***, took the following eight factors into account while determining whether it had jurisdiction: (1) The connection between the forum and the Plaintiff"s claim; (2) The connection between the forum and the Defendant; (3) Unfairness to the Defendant in assuming jurisdiction; (4) Unfairness to the Plaintiff in not assuming jurisdiction; (5) Involvement of other parties to the suit; (6) The Court"s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (7) Whether the case is interprovincial or international in nature; (8) Comity and standards of jurisdiction, recognition and enforcement prevailing elsewhere. The Court observed that the Defendant had no office in Canada although in the past it subsidized office space for contractors working on two websites purchased by Intermix. Intermix had no server in Canada and www.mycoolscreen.com also was not hosted on servers located in Canada but on a server in California. It was also observed that 66% of downloads from either the Defendant"s websites or third parties distributing the Defendant"s applications were made by American users and the remaining were made throughout the world. Canada accounted for only 2.5% to 5.3% of downloads. On the basis of these facts, the Federal Court held that the Canadian courts had no jurisdiction over the Defendant since there was no substantial connection between the Defendant and the forum.

United Kingdom

32. In ***1-800 Flowers Inc v. Phonenames [2002] FSR 12 CA***, the Defendant was a UK based phonebook company and the Plaintiff was engaged in the business of delivery of flowers. Customers across the world could access the Plaintiff"s website to place orders for flowers. There was, however, no evidence to show that UK residents had placed orders on its website. It was argued that because the website was accessible from the UK and the UK residents could place orders online, the use by the Defendant of the mark 1-

800 on its website amounted to use in the UK. It was held in the first appeal by the Bench that "mere fact that websites could be accessed anywhere in the world did not mean, for trade mark purposes, that the law should regard them as being used everywhere in the world". The intention of the website owner and what the reader will understand if he accesses the website was held to be relevant. The Court of Appeals also rejected the argument. Justice Buxton, in a concurring opinion pointed out as under:

"I would wish to approach these arguments, and particularly the last of them, with caution. There is something inherently unrealistic in saying that A "uses" his mark in the United Kingdom when all that he does is to place the mark on the internet, from a location outside the United Kingdom, and simply wait in the hope that someone from the United Kingdom will download it and thereby create use on the part of A. By contrast, I can see that it might be more easily arguable that if A places on the internet a mark that is confusingly similar to a mark protected in another jurisdiction, he may do so at his peril that someone from that other jurisdiction may download it; though that approach conjured up in argument before us the potentially disturbing prospect that a shop in Arizona or Brazil that happens to bear the same name as a trademarked store in England or Australia will have to act with caution in answering telephone calls from those latter jurisdictions. However that may be, the very idea of "use" within a certain area would seem to require some active step in that area on the part of the user that goes beyond providing facilities that enable others to bring the mark into the area. Of course, if persons in the United Kingdom seek the mark on the internet in response to direct encouragement or advertisement by the owner of the mark, the position may be different; but in such a case the advertisement or encouragement in itself is likely to suffice to establish the necessary use."

Australia

33. As far as Australian High Court is concerned, its judgment in ***Dow Jones & Company Inc. v. Gutnick, (2002) HCA 56 (10 December 2002)*** is instructive of the application of the „effects" test. Dow Jones & Company Inc, a corporation registered in the US had published material on the Internet that was allegedly defamatory of Mr. Gutnick who sued in the Supreme Court of Victoria to recover damages to vindicate his reputation. The Victorian law was treated as a long arm rule which provided for jurisdiction based upon the mere happening of damage within a jurisdiction. The High Court held that the primary judge was correct in deciding the issue of jurisdiction in favour of the Plaintiff. Since the long arm was found to be valid and applicable, the arguments that the Defendant had minimal commercial interest in the sale of its magazine in Victoria and that it had published them principally for the benefit of US readers was considered irrelevant. However, what is important to note is that the state of Victoria in the said case did have a long arm law which was held to be valid and which permitted extension of jurisdiction.

India

34. Finally, the decisions of our court. At one end of the spectrum we have decision of the learned single Judge of this Court in ***Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited 2003 (27) PTC 265 (Del)***. That was a passing-off action where the Defendant was carrying on business from Bombay. The Defendant had managed to get a registration of domain name www.casioindia.com and Defendant no. 2 was the Registrar with whom the domain name had been registered. The Plaintiff, on the other hand, claimed to be a 100% subsidiary of Casio Computer Ltd., Japan (Casio Japan) which was the registered owner of the trade mark „Casio" in India used for a large number of electronic and other products. He had also obtained the registration of large number of domain names in India like CasioIndia Company.com, CasioIndia.org, CasioIndia.net as well as Casio India.info, CasioIndia.Biz and CasioIndia Co. Defendant no. 1 had managed to get the registration of the aforementioned domain names during the time when it held a distributorship agreement with the Plaintiff. It was held by the learned single Judge after referring to the decisions in ***Rediff Communication Ltd. V. Cyber Booth, AIR 2000 Bombay 27*** and the High Court of Australia in ***Dow***

Jones & Co. Inc. v. Gutnick (supra) that "once access to the impugned domain name website could be had from anywhere else, the residence of the Defendant". According to the learned single Judge since a mere likelihood of deception, whereby an average person is likely to be deceived or confused was sufficient to entertain an action for passing off, it was not at all required to be proved that "any actual deception took place at Delhi. Accordingly, the fact that the website of Defendant no. 1 can be accessed from Delhi is sufficient to invoke the territorial jurisdiction of this Court …"

35. A different approach was adopted in a later judgment by another learned single Judge of this Court in ***(India TV) Independent News Service Pvt. Limited v. India Broadcast Live Llc And Ors., 2007 (35) PTC 177 (Del.)***. The facts in brief of that case were that the Plaintiff company ran a Hindi news channel "INDIA TV" which was launched in March 2004. The Plaintiff claimed to have adopted the mark "INDIA TV" since 01.12.2002. The Plaintiff had applied for the registration of the said mark and the said applications were published in the trademarks journal. The Plaintiff was also the owner of the domain name "INDIA TV" which domain name was registered on 18.11.2003. The channel was made available for live viewing on the said website. Defendant nos. 1 and 2 hosted a website "indiatvlive.com" which the Plaintiff came across in January 2007 while carrying out an internet search. The website contained the words "INDIA TV" which were displayed prominently inside the sketch of a television. A passing off action was initiated to injunct the Defendant no. 2 from using the domain name www.indiatvlive.com. While the suit was pending, Defendant no. 1 was proceeding with the action instituted by it in the Arizona District Court in US, where the Defendants were located, against the Plaintiff in respect of "reverse domain name hijacking" seeking a declaration of non-infringement of the Plaintiff"s mark by Defendant no. 1. The Plaintiff then applied to this Court stating that the Defendant had suppressed the fact of having filed the aforesaid action in Arizona

and prayed for an injunction against Defendant from proceeding with the said action in the Arizona courts particularly since the suit of this court was prior action. In resisting the said application, the Defendant no. 1 took stand that this court was not a court of competent jurisdiction not being the appropriate forum/forum conveniens. Inasmuch as Defendants did not reside or work for gain in India, it was only the District Court Arizona that was the appropriate forum/forum conveniens to decide the dispute.

36. It was argued before the court that in order to attain personal jurisdiction i.e. the jurisdiction over the person of a Defendant in contrast to the jurisdiction of a court over a Defendant"s property or his interest therein, there should be a long-arm statute on the basis of which the court could exercise jurisdiction over any individual located outside the state. As regards the Internet, it was argued that it was not enough to establish that there was a passive website. The court referred to the "purposeful availment test" and the three factors highlighted in ***Cybersell***. The learned single Judge then noticed that India did not have a long arm statute which dealt with the jurisdiction as regards non-resident Defendants. Therefore it had to be examined whether the Defendant"s activities "have a sufficient connection with the forum state (India); whether the cause of action arises out of the Defendant"s activities within the forum and whether the exercise of jurisdiction would be reasonable." In paras 46 and 47, it was observed as under:

"46. I am in agreement with the proposition that the mere fact that a website is accessible in a particular place may not itself be sufficient for the courts of that place to exercise personal jurisdiction over the owners of the website. However, where the website is not merely 'passive' but is interactive permitting the browsers to not only access the contents thereof but also subscribe to the services provided by the owners/operators, the position would be different. However, as noticed in the judgment in *CyberSell Inc.* case (supra), even where a website is interactive, the level of interactivity would be relevant and limited interactivity may also not be sufficient for a court to exercise jurisdiction. In Panavision International LP case (supra), it was found that the registration of the Plaintiff's mark as a domain name by the Defendant had the effect of injuring the Plaintiff in California and therefore the court had jurisdiction. In *Compuserve* case (supra) again it was found that the Defendant had contacted Ohio to sell his computer software's in the Plaintiffs Ohio based systems and sent his goods to Ohio further for their ultimate sale and thus those courts had jurisdiction.

47.In the present case, the website "indiatvlive.com" of Defendant No. 1 is not wholly of a 'passive' character. It has a specific section for subscription to its services and the options (provided on the website itself) for the countries whose residents can subscribe to the services include India. The services provided by Defendant No. 1 can thus be subscribed to and availed of in Delhi (India) i.e. within the jurisdiction of this court."

37. After referring to the articles posted on the net the learned Single Judge concluded in ***India TV*** that the "Defendant No. 1 intended to target expatriate Indians as well as Indians within the country." Further the stand taken by Defendant No. 1 in its written statement was that it had a global presence including in India. It claimed to be the

first IPTV delivery system of Indian content from India. The website of Defendant No. 1 was launched in India as well as in Los Angeles. It was accordingly held that "Defendant No. 1 company has sufficient connection with India." As regards the effects test, it was held that since the Plaintiff channel was an Indian news channel intended for Indian audiences, any damage alleged to have been caused or alleged to be likely to arise to the goodwill, reputation etc of the Plaintiff would be in India. However, the alleged damage that may have arisen or may be likely to arise to the Plaintiff would be as a consequence of the fact that the impugned website is accessible in India and the services provided can be availed of in India. Consequently, it was held that "the Defendant is carrying on activities within the jurisdiction of this court; has a sufficient contacts with the jurisdiction of the court and the claim of the Plaintiff has arisen as a consequence of the activities of Defendant no. 1 within the jurisdiction of this court".

38. Having surveyed the law as it has developed in different jurisdictions, this Court is of the view that the essential principles developed as part of the common law can be adopted without difficulty by our courts in determining whether the forum court has jurisdiction where the alleged breach is related to an activity on the internet. At the outset, this court does not subscribe to the view that the mere accessibility of the Defendants" website in Delhi would enable this Court to exercise jurisdiction. A passive website, with no intention to specifically target audiences outside the State where the host of the website is located, cannot vest the forum court with jurisdiction. This court is therefore unable to agree with the proposition laid down in ***Casio***. The said decision cannot be held to be good law and to that extent is overruled.

39. ***India TV*** appears to be somewhat closer to the development of law in this regard since the decision in ***Casio***. In ***India TV***, the learned single Judge impliedly doubted the correctness of the decision in ***Casio***. The learned single Judge in ***India TV*** acknowledged that a mere accessibility of website may not be sufficient to attract jurisdiction of the forum court. This, in the considered view of this Court, is the correct position in law.

40. There was no occasion for this court even in ***India TV*** to examine the finer aspects of the question of jurisdiction based on the nature of the website, the intention of the host of the website to specifically target viewers outside its jurisdiction, and the effect of hosting such website on audiences outside such state. It appears to this court that for the purposes of a passing off action or an action for infringement where the Plaintiff is not carrying on business within the jurisdiction of the forum court, and where there is no long arm statute, the Plaintiff would have to show that the Defendant purposefully availed itself of the jurisdiction of the forum court. It is not enough merely to show that the website hosted by the Defendant is an interactive one. It would have to be shown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user.

41. This court is not able to accept the submission of the learned counsel for the Plaintiff that the test of "purposeful availment" must be replaced by the test of "purposeful avoidance". While the Defendant may in his defence show how he avoided the forum

state, the initial burden is on the Plaintiff to show that the Defendant "purposefully availed" itself of the jurisdiction of the forum court. The issue of incorporating filters to block access to the website by viewers located outside the forum state will have to be considered while deciding if the Defendant had "purposefully avoided" the forum state. However, that question will arise only if the Plaintiff has been able to show that the website of the Defendant is interactive and permits commercial transactions to be concluded by the Defendant with a user of the website.

42. This Court holds that jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state. The degree of the interactivity apart, the nature of the activity permissible and whether it results in a commercial transaction has to be examined. For the „effects" test to apply, the Plaintiff must necessarily plead and show prima facie that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state. For the purposes of a passing off or an infringement action (where the plaintiff is not located within the jurisdiction of the court), the injurious effect on the Plaintiff"s business, goodwill or reputation within the forum state as a result of the Defendant"s website being accessed in the forum state would have to be shown. Naturally therefore, this would require the presence of the Plaintiff in the forum state and not merely the possibility of such presence in the future. Secondly, to show that an injurious effect has been felt by the Plaintiff it would have to be shown that viewers in the forum state were specifically targeted. Therefore the „effects" test would have to be applied in conjunction with the "sliding scale" test to determine if the forum court has jurisdiction to try a suit concerning internet based disputes.

43. The question no. (i) is accordingly answered.

Question (ii): In a passing off or infringement action, where the defendant is sought to be sued on the basis that its website is accessible in the forum state, what is the extent of the burden on the Plaintiff to prima facie establish that the forum court has jurisdiction to entertain the suit?

44. This brings us to the question as to the extent of burden of proof on the Plaintiff to prima facie show that the Defendant has purposefully availed of the jurisdiction of this court. In the present case, it is argued that by enabling customers to go on the website and get a copy of its brochure and make enquiries, the Defendant must be held to have purposefully availed of the jurisdiction of this court. The question that arises is for the purposes of Section 20 (c) CPC, in such circumstances, is what is the extent of the burden on the Plaintiff to show prima facie that a part of the cause of action arose within the jurisdiction of the forum court.

45. This court holds that in order to prima facie establish that the Defendant purposefully availed of the jurisdiction of this court, the Plaintiff would have to show that the Defendant engaged in some commercial activity in the forum State by targeting its website specifically at customers within that State. This is consistent with the law laid

down in ***Cybersell*** and reiterated later in ***Toys R Us***. It is also consistent with the application of the „tighter" version of the „effects" test which is „targeting". In any action for passing off or infringement, it would have to be shown that the Defendant by using its mark intended to pass off its goods as that of the Plaintiff"s. A mere hosting of a website which can be accessible from anyone from within the jurisdiction of the court is not sufficient for this purpose. Also a mere posting of an advertisement by the Defendant depicting its mark on a passive website which does not enable the Defendant to enter into any commercial transaction with the viewer in the forum state cannot satisfy the requirement of giving rise to a cause of action in the forum state. Even an interactive website, which is not shown to be specifically targeted at viewers in the forum state for commercial transactions, will not result in the court of the forum state having jurisdiction. In sum, for the purposes of Section 20 (c) CPC, in order to show that some part of the cause of action has arisen in the forum state by the use of the internet by the Defendant, the Plaintiff will have to show prima facie that the said website, whether euphemistically termed as "passive plus" or "interactive", was specifically targeted at viewers in the forum state for commercial transactions. The Plaintiff would have to plead this and produce material to prima facie show that some commercial transaction using the website was entered into by the Defendant with a user of its website within the forum state and that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state. Question no. (ii) is answered accordingly.

Question (iii) Is it permissible for the Plaintiff to establish such prima facie case through "trap orders" or "trap transactions"?

46. It may be recalled that the Plaintiff has to show that a part of the cause of action in a suit for passing off or infringement has arisen within the jurisdiction of the forum court. Relevant to this, it would have to be shown by the Plaintiff that the Defendant "availed" of the jurisdiction of the forum court by commercially transacting with a viewer located in the forum state through the internet. The question is whether this transaction can be a „trap

transaction" that is engineered by the Plaintiff itself, particularly when it is not otherwise shown that the Defendant intended to specifically target customers in the forum state.

47. Courts in foreign jurisdictions have underlined the need for fairness and certainty while accepting evidence in the form of trap orders. In ***California Fig Syrup Company v Taylor's Drug Company Ltd (1897) 14 RPC 564 (Court of Appeal, UK)***, the Plaintiff"s trade name was „California Syrup of Figs" and the Defendant"s trade name was „American Syrup of Figs". The Plaintiffs sought trap orders for „California American Syrup", thereby creating ambiguity as to the name under which the defendant was selling its own syrup of figs product. ***Carr & Sons v Crisp & Co Ltd (1902) 19 RPC 497 (High Court of Justice, Chancery Division)*** was another case where there was ambiguity as to what was actually said at the time of the trap purchase, coupled with difficulties of subsequent recall. The Court observed that it would be wise on the part of the person setting the trap to send a written order in order to avoid ambiguity.

48. ***In Fox's Glacier Mints Ltd v Joblings (1932) 49 RPC 352***, ***(High Court of Justice, Chancery Division)***, there was a possibility that requests for „Glacier" mints were misunderstood or not heard, particularly as there was a common use of the word „glassy" for sweets of that kind in the relevant market (the city of Leicester). In ***C Stillitz (a Firm) v Jones & Higgins Ltd (1943) 60 RPC 15 (High Court of Justice, Chancery Division)***, there was a conflict in evidence as to what happened in the making of the trap purchases. In ***Cellular Clothing Coy Ltd v G White &***

Coy Ltd (1952) 70 RPC 9 (High Court of Justice, Chancery Division), two trap orders were successfully obtained through purchases in a shop, but no notice was given to the Defendants of what had happened before issuing proceedings. Therefore, there was no certainty as to whether the shop assistants in question were really made aware of what was being asked for. The Court emphasised the need to either support the trap orders by written evidence or atleast bring them to the notice of the person who was trapped. In the view of the court (Harman J), this was „exactly the way in which trap orders should not be given" and that „such fragile evidence with no confirmation and which has been sedulously concealed from the Defendants" could not be relied upon to support a claim for injunctive relief.

49. In ***C C Wakefield & Co Ltd v Purser (1934) 51 RPC 167 (High Court of Justice, Chancery Division)***, there was evidence of one isolated instance of passing off, but it was still held that this was insufficient for the purposes of an injunction to restrain continuing conduct that was alleged to be occurring, unless it could be shown that there was some kind of intentional conduct involved. In this regard, the following comments of Farwell J underline the fairness considerations involved in evidence of trap purchases, while noting that such orders may often be a necessary means of proof:

"Test orders or, as the Defendant prefers to call them, trap orders are in a case of this kind, it seems to me, quite essential. I fail to see how the Plaintiffs can safeguard themselves or the public without having regard to such methods of testing the matter as is used in the present case; but, trap orders or test orders, whichever they may be called, are scrutinised by the Courts with some jealousy, and rightly so, because, if as the result of a trap order or a test order, a person is to be charged with the very serious offence of fraudulently misrepresenting the goods which he is supplying to the public, to the detriment of the public as well as of the Plaintiffs, the Court must be satisfied that the offence has been proved strictly. Further, if a person is resorting to a test order or a trap order, even in a case of this kind, where the necessity for such a device may be a real one, that person is bound to carry out the proceeding with the utmost fairness to the prospective defendant to the action. It is essential, if the plaintiff is to succeed in the action which he ultimately brings, that he should be able to satisfy the Court that he has acted throughout with the utmost fairness to the defendant and given him every reasonable chance of investigating the matter for himself, so that he may be in a position to put forward in the action, if one follows, any and every defence properly open to him.

His Lordship"s concern was not to grant an injunction unless satisfied that the conduct was likely to continue. On the basis of an isolated instance of passing off, he was not prepared to do so, unless satisfied that the defendant had been intentionally seeking to pass off the plaintiff"s product (which he was not)."

50. ***Showerings Ltd v Fern Vale Brewery Coy Ld. [1958] RPC 484 (High Court of Justice, Chancery Division)*** was a case involving passing off constituted by several trap purchases (asking for the Plaintiff"s „Babycham" perry at the same public house and being supplied with another perry drink). Danckwerts J rejected criticisms that were made of the Plaintiff"s trap orders here, noting that they were not based on one isolated instance and that the Plaintiffs had „tested" the matter by several visits to see „whether there was simply one mistake or a regular practice"; it was only after these inquiries, that a letter was written and action subsequently launched. As this was in fact a motion for committal of the defendant for contempt in relation to an earlier order of the court, the court did not order committal because the defendant had acted honestly and the passing off was the fault of his servants who were, in the Court"s view, unfortunately persons of „extremely low intelligence".

51. Similar judicial remarks about the need for fairness in the use of trap orders, and the giving of notice to defendants so that they can investigate alleged breaches, are to be found in several Australian cases: see, for example, ***OT Co v Muir (1914) 31 WN (NSW) 87, 88 (Harvey J) and Bryant v Keith Harris & Co Ltd (1908) 33 ALR 437, 450-452 (Lockhart J)***

52. In ***Marie Claire Album SA v Hartstone Hosiery Ltd [1993] FSR 693 (Chancery Divison)***, a trap order had been made by the Plaintiff"s solicitors for hosiery sold under the name „Marie Claire" (the plaintiffs published a women"s magazine under that name). The Defendant challenged the way in which this had been done by the Plaintiff"s solicitors (this included arranging the meeting at which the order was given and the making of a tape recording of the discussions), and there had also been a complaint to the Solicitors" Complaints Bureau. Chadwick J observed that "if it is the law that a plaintiff is entitled to misrepresent himself as a bona fide customer in the guise of executing a trap order then his solicitor must be entitled, first, to advise him that this is so and secondly, to set up the arrangements which enable the trap order to be executed effectively. It is but a short step from that for the solicitor to be present at the execution of the trap order, if only to ensure that a proper record is made of what occurs."

53. In ***Hilti AG v. Ucan Development Limited [1963] 7 RPC 160 (High Court of Justice, Chancery Division)***, the Court, while considering the likelihood of repetition and the danger of further instances of passing off, was concerned with only one transaction, which was a trap order. The Court refused to grant an interlocutory injunction on the basis of an isolated instance. Even in cases where no trap purchase was involved, the Courts have not granted relief where only an isolated instance was shown.

[See: Rutter and Co. v. Smith (1901) 18 RPC 49 (High Court of Justice, Chancery Division); John Knight & Sons v. Crisp (1904) 21 RPC 671 (High Court of Justice, Chancery Division); Burberrys v. Watkinson (1906) 23 RPC 141 (High Court of Justice, Chancery Division); Armstrong Oiler Company Ld v. Patent Axlebox and Foundry Company (1910) 27 RPC 362 (High Court of Justice, Chancery Division)]. In any event, to show that the Defendant was „availing" a jurisdiction, a series of transactions by way of commercial dealings would have to be shown to have taken place within the forum state.

54. Although evidence of trap orders has been accepted by courts in both trade mark infringement and passing off cases, [See ***Bostitch Inc v McGarry & Cole Ltd[1964] RPC 173; Thomas French & Sons Ltd v John Rhind & Sons Ltd [1958] RPC 82; Pearson Brothers v Valentine & Co (1917) 34 RPC 267; Procea Products Ltd v Evans & Sons Ltd (1951) 68 RPC 210***] the nature of business transacted through an internet website and the nature of goods or services offered by the Defendant would be relevant. This would involve two levels of examination. The nature of goods or services offered would be relevant to determine as to their feasibility of being ordered on the internet by the customers. For example, goods like books, DVDs and cosmetic products can be easily ordered by the customers on the Internet. But goods like cars and furniture would be less obvious candidates to be ordered online as the customers, in general, would like to purchase these goods after actually visiting the shops and seeing them. Similarly, services are another instance where online ordering may not be feasible. For example, food services offered by restaurants, etc. However, professional services such as legal or accounting services may be provided online to the clients. ***(***See ***Sam Ricketson*****, *Trademark Liability Issues Arising out of Internet Advertising*, Legal Studies Research Paper No. 207, January 2007, Melbourne Law School available at <http://ssrn.com/abstract=958858>)**

In ***Walt Disney Productions Ltd. v. Gurvitz, [1982] F.S.R.*** the question was whether an illegal sale of a video which constituted a trap order could be relied upon for the purposes of demonstrating contempt of court. It was held that since the case involved a breach of undertaking given to the Court by the Defendant, he would still be liable. In ***Ward Group Pty Ltd v. Brodie & Stone Plc, (2005) FCA (22 April 2005)***, the Federal Court of Australia held that the making of trap purchases would not confer jurisdiction on the court. It was held that:

"the use of a trade mark on the Internet, uploaded on a website outside of Australia, without more, is not a use by the website proprietor of the mark in each jurisdiction where the mark is downloaded. However, as explained above, if there is evidence that the use was specifically intended to be made in, or directed or targeted at, a particular jurisdiction then there is likely to be a use in that jurisdiction when the mark is downloaded. Of course, once the website intends to make and makes a specific use of the mark in relation to a particular person or persons in a jurisdiction there will be little difficulty in

concluding that the website proprietor used the mark in that jurisdiction when the mark is downloaded."

A reference was made to the Section 9 of the Trade Mark Act of Australia which gave rise to the question whether the Plaintiff had consented to the application of the mark in the sense of the use of its physical manifestation in Australia by the website proprietors. It was sought to be contended by the Plaintiff that trap purchases had never been regarded as consent by the trap purchasers to the infringing use. Rather, they are often a necessary step to establish that use. It was explained by the High Court that "why trap purchases were not generally considered a consent to infringing use is that the infringing conduct is usually already occurring when the goods bearing the infringing mark are advertised or offered for sale to the public in the jurisdiction. In that situation the trap purchase is made to establish that fact, and cannot be seen to be consent to the infringements that are occurring". However, the above situation was distinguished from one where "goods bearing the mark are being offered for sale by an overseas vendor to the world at large and a trap purchase is made by a purchaser in Australia, who not only procures the sale and delivery of the goods in Australia but also procures the sole use of the infringing mark by the overseas vendor in Australia. In that situation, but for the trap purchase, no use of the mark in Australia would have occurred. In those circumstances it was held that it would be difficult for the trap purchaser, whose conduct was the sole cause of the use of the infringing mark in Australia, to contend that it has not consented to that use". It was accordingly held that the trap purchase would not confer jurisdiction on the court.

57. Reverting to the present case, the position that emerges from the above judicial decisions is that while in trade mark and infringement cases, trap orders or trap transactions may be used as evidence, the fairness of such transactions is a relevant factor to be considered. Other relevant factors would be the nature of goods or services offered for purchase on the internet. If they require the customer to further physically verify their quality then the mere purchase of such goods through a trap transaction may not be treated as being sufficient evidence of infringement. The facts of each case will determine whether the trap transaction is a fair one and has resulted in a purchase on the internet of goods or services. A lone trap transaction will not be sufficient evidence of infringement or passing off. For the purposes of establishing that a part of the cause of action arose within the jurisdiction of the court, the Plaintiff would have to show that the Defendant has purposefully availed of the jurisdiction of the forum court by entering into a commercial transaction with an internet user located within the jurisdiction of the forum court. This cannot possibly be a solitary trap transaction since that would not be an instance of "purposeful" availment by the Defendant. It would have to be a real commercial transaction that the Defendant has with someone not set up by the Plaintiff itself. If the only evidence is in the form of a series of trap transactions, they have to be shown to be obtained using fair means. The Plaintiff seeking to establish jurisdiction on

the basis of such trap transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test. Question (iii) is answered accordingly.

Summary

58. We summarise our findings on the questions referred for our opinion as under:

Question (i): *For the purposes of a passing off action, or an infringement action where the Plaintiff is not carrying on business within the jurisdiction of a court, in what circumstances can it be said that the hosting of a universally accessible website by the Defendants lends jurisdiction to such Court where such suit is filed ("the forum court")?*

Answer: For the purposes of a passing off action, or an infringement action where the Plaintiff is not carrying on business within the jurisdiction of a court, and in the absence of a long-arm statute, in order to satisfy the forum court that it has jurisdiction to entertain the suit, the Plaintiff would have to show that the Defendant *"purposefully availed"* itself of the jurisdiction of the forum court. For this it would have to be prima facie shown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the **specific targeting** of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state.

Question (ii): *In a passing off or infringement action, where the defendant is sought to be sued on the basis that its website is accessible in the forum state, what is the extent of the burden on the Plaintiff to prima facie establish that the forum court has jurisdiction to entertain the suit?*

Answer: For the purposes of Section 20 (c) CPC, in order to show that some part of the cause of action has arisen in the forum state by the use of the internet by the Defendant the Plaintiff will have to show prima facie that the said website, whether euphemistically termed as "passive plus" or "interactive", was specifically targeted at viewers in the forum state for commercial transactions. The Plaintiff would have to plead this and produce material to prima facie show that some commercial transaction using the website was entered into by the Defendant with a user of its website within the forum state resulting in an injury or harm to the Plaintiff within the forum state.

Question (iii): *Is it permissible for the Plaintiff to establish such prima facie case through "trap orders" or "trap transactions"?*

Answer: The commercial transaction entered into by the Defendant with an internet user located within the jurisdiction of the forum court cannot possibly be a solitary trap transaction since that would not be an instance of "purposeful" availment by the Defendant. It would have to be a real commercial transaction that the Defendant has with someone not set up by the Plaintiff itself. If the only evidence is in the form of a series of trap transactions, they have to be shown as having been obtained using fair means. The Plaintiff seeking to establish jurisdiction on the basis of such trap transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to

prima facie show that the trap transactions relied upon satisfy the above test. For determining if on the facts of the present suit, the Plaintiff has been able to show prima facie that this court has the jurisdiction to entertain the suit, it is placed again before the learned single Judge who will first determine that question in light of the law laid down in this judgment.

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SELF LEARNING STIMULATING EXERCISE

1. Can Delhi court assume jurisdiction if the defendant in above case provided spa services in Hyderabad, and instead of booking orders directly, enters into a contract with an online platform X, to book orders in Delhi through its website for spa services in Hyderabad . The plaintiff has registered office in Tokyo. In other words, does cause of action arises in Delhi. (Hint – *Impresario Entertainment Case*)