15

CYBER LAWS

*Karnika Seth**

I INTRODUCTION

THE PAST year has brought many important judgments in the field of cyber laws. The pace at which this dynamic field of law is developing in India is indeed phenomenal. This survey discusses the recent developments in cyber laws in India, particularly the recent case law passed by Indian courts to interpret and elucidate the extant cyber law.

II ACKNOWLEDGEMENT BY E-MAIL.

In *Sudershan Cargo Pvt. Ltd.* v. M/s *Techvac Engineering Pvt Ltd.*,[1] the High Court of Karnataka considered whether e-mail/s acknowledging debt would constitute a valid and legal acknowledgement of debt though not signed as required under section 18 of the Limitation Act, 1963. The court held that an email communication is legally recognized by section 4 of the Information Technology Act, 2000 (hereinafter IT Act). The court further held that section 18 does not provide that acknowledgement has to be in any particular form or to be express. According to the court, even a statement which amounts to an acknowledgement may be sufficient, if it implies an admission of liability and it can be made by an email. The court observed as follows:[2]

> A harmonious reading of Section 4 together with definition clauses of the Information Technology Act under sections 2(a), 2(r), 2(t), 2(v) and 2(za) would indicate that on account of digital and new communication systems having taken giant steps and the business community as well as individuals are undisputedly using computers to create, transmit and store information in the electronic form rather than using the traditional paper documents and as such the information so generated, transmitted and received are to be

---

* Advocate, Supreme Court of India.

1 AIR 2014 Kant 6.

2 *Id.* at 13.

> construed as meeting the requirement of section 18 of the Limitation Act, particularly in view of the fact that section 4 contains a non obstante clause.

In this case, the respondent did not dispute the information transmitted by email to the petitioner was actually sent by him, for this reason and the aforementioned reasons, the acknowledgement as contained in the e-mails dated 14.01.2010 and 06.04.2010 originating from the respondent to the addressee was held to be legally valid.

Section 66A of Information Technology Act, 2000 held unconstitutional

In a land mark ruling of the *Shreya Singhal* v. *UOI*, [3] the Supreme Court of India struck down section 66A of the IT Act, 2000 as unconstitutional. This public interest litigation (PIL) was filed to challenge the constitutionality of section 66 A of the IT Act as being arbitrary, ambiguous and violative of fundamental right to free speech guaranteed under article 19 of the Constitution of India. The court held that section 66A is clearly vague, ambiguous and is violative of right to freedom of speech and it takes within its sweep the speech that is innocent as well. The court took the view that no part of judgment was severable and section as a whole was struck down as unconstitutional.

Commenting on arbitrariness of section 66A, the court observed: [4]

> 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.

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.

> 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

---

3 AIR 2015 SC 1523.

4 *Id*. at 1556.

> 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.

The court rightly held that section 66A is drafted so widely that any opinion on any subject would be covered by it. The court regarded that if the section was not struck down as unconstitutional there would be a total chilling effect on free speech. The court further observed that if section 66A is otherwise invalid, it cannot be saved despite any assurance from the additional solicitor general that it will be administered only in a reasonable manner.

The court considered constitutionality of section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 and held these are constitutionally valid. According to the court, section 69A is a 'narrowly drawn provision with several safeguards'. Court reached this conclusion on the basis that blocking can only be adopted where the Central Government is satisfied that it is necessary so to do and reason must be covered by the subjects set out in article 19(2). Also, reasons have to be recorded in writing in such blocking so that the order can be challenged if required in a writ petition under article 226 of the Constitution.

The court further observed that section79 of IT Act 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 article19 (2) are going to be committed then fails to expeditiously remove or disable access to such material.

This decision has removed an arbitrary provision from IT Act, 2000 and upheld citizens fundamental right to free speech in India. Though section 66A is struck down, provisions in Indian Penal Code, 1860 (IPC) continue to be applicable prohibiting racist speech, any speech that outrages modesty of a woman or speech aimed at promoting enmity, racism, abusive language, criminal intimidation *etc*.

Cyber appellate tribunal is not functional

In *M/s. Gujarat Petrosynthese Ltd. and Mr. Rajendra Prasad Yadav* v. *Union of India*,[5] petitioners had prayed for direction upon Respondent to appoint Chairperson to Cyber Appellate Tribunal (CAT), so as to ensure that proceedings of cyber appellate tribunal were held on regular basis. It was submitted before court that department would take all necessary steps for filling up post of chairperson within limit of six months and efforts would be made to appoint chairperson even earlier than expiry of that period, in public interest. Petition

---

5 2014 (1) Kar L J 121.

was disposed of on this basis. Despite the said ruling the fact remains that till date no appointment has been made to the cyber appellate tribunal which remains non functional since 2011**.**

Obscenity

Devidas Ramachandra Tuljapurkar v. *State of Maharashtra*,[6] the Supreme Court of India considered whether framing of charges be made for offence punishable under section 292 of IPC ode in relation to publication of a poem of historically respected personalities.

The issue for consideration was whether the poem titled "Gandhi Mala Bhetala" ('I met Gandhi') in the magazine named the 'Bulletin' published, in July-August, 1994 issue, which was privately circulated amongst the members of All India Bank Association Union, could give rise to framing of charge under section 292 IPC against the author, the publisher and the printer. The court held that considering the fact that appellant(publisher) had published the subject poem which had already been recited and earlier published by others and that on coming to know about reactions of certain employees, he tendered unconditional apology before inception of proceedings (since when more than two decades had passed), for these reasons, the court held that charge framed was liable to be quashed .

The court in *Devidas Ramachandra* case discussed meaning of 'obscenity' in Indian context. Also dealing with the concept of obscenity in *Shreya Singhal* [7], case wherein while dealing with the concept of obscenity, court held that:[8]

> This Court in Ranjit Udeshi (supra) 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 who hands a publication of this sort may fall. Great strides have been made since this decision in UK, United States, as well as in our country. Thus, in *Director General of Doordarshan* v. *Anand Patwardhan* (2006) 8 SCC 433 , this Court notice 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.

---

6 (2015) 6 SCC 1.

7 *Supra* note 3.

8 *Id*. at 1544.

Reliance was also placed on *Aveek Sarkar* v. *State of West Bengal* [9] wherein the court was dealing with the situation where Boris Becker, a world renowned tennis player, had posed nude with his dark-skinned fiancée by name Barbara Feltus, a film actress. In the article, both of them spoke about their engagement and their lives. In *Aveek Sarkar*, the court referred to the pronouncement in Hicklin,[10] the majority view in *Brody* v. R[11] and the pronouncement in *R.* v. *Butler* [12] and opined thus:[13]

> We are also of the view that Hicklin test (1868) LR 3 QB 360 is not the correct test to be applied to determine "what is obscenity". Section 292 of the 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 the "Hicklin test" to determine what "obscenity" is. 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 the section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse the feeling of 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

---

9 (2014) 4 SCC 257.

10 *Regina* v. *Hicklin,* LR 1868 3 QB 360.

11 1962 SCR 681.

12 (1992) 1 SCR 452.

13 *Supra* note 9 at 267-268.

> obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

The court also referred to *Bobby Art International*,[14] *Ajay Goswami* [15] and held that applying the community tolerance test, the photograph was 'not suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them'. The court ruled that:[16]

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

The court thus rightly relied on the contemporary standards test and held that the picture or the article which was reproduced by sports world and the Ananda bazar Patrika cannot 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.

Admissibility of digital evidence

In *Anwar* v. *P.V Basheer,*[17] the Supreme Court considered an appeal filed against an order wherein the high court dismissed an election petition wherein that the petitioner failed to prove corrupt practices pleaded in petition and, therefore election could not be set aside under section 100(1) (b) of Act.

Passing a landmark ruling on digital evidence, the court held in this case, that in case of electronic devices, such as CD, VCD, chip, when produced as digital evidence, the same shall is required to be accompanied by certificate in terms of section 65B of Evidence Act, 1872 at time of taking document. If that certificate is not produced, secondary evidence pertaining to electronic record is inadmissible .The court observed:[18]

> 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

---

14 (1996) 4 SCC 1.

15 AIR 2007 SC 493.

16 *Supra* note 9 at 269.

17 (2014)10 SCC 473.

18 *Id.* at 483 .

> 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).

The court further held that the person only needs to state in the certificate that the same is to the best of his knowledge and belief but 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.

As held by the court, 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'. The importance of following this procedure was emphasised by the fact that electronic records are more susceptible to tampering, alteration, transposition, excision, *etc*. and in absence of these safeguards, the whole trial based on proof of electronic records can lead to 'travesty of justice'.

Based on this reasoning, the court held:[19]

> 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 Section45A - 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.

The court held that sections 63 and 65 of IT, Act have no application in the case of secondary evidence by way of electronic record as it is wholly governed by sections 65A and 65B. It thus overruled the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated

---

19 *Id*. at 484.

by this court in *Navjot Sandhu* case.[20] Earlier, *Navjot Sandhu* case had held that there is no bar in adducing secondary evidence, under sections 63 and 65, of an electronic record even though compliance with the requirements of section 65B has been made or not. This was precisely overruled by the *Anwar* case.

Jurisdiction

In *World Wrestling Foundation* v. *Reshma Collection* [21] an appeal was filed against the order passed by a single judge, whereby the plaint filed by the appellant/ was directed to be returned to the appellant/ under order 7 rule10 of the Code of Civil Procedure, 1908 so that it is filed before court of competent jurisdiction.

In this case, plaintiff was seeking permanent injunction on ground of infringement of its copyright, infringement of its trademarks, passing off, dilution, rendition of accounts, damages and delivery up *etc*. The appellant 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 did not carry on business within the jurisdiction of the Delhi Court. The appellant/ contended that the Delhi Court has jurisdiction to entertain the said suit placing reliance on the provisions of section 134(2) of the Trademarks Act, 1999 and section 62(2) of the Copyright Act, 1957.

The specific plea on aspect of jurisdiction was made as under:[22]

> 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 Plaintiffs 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.

---

20 (2005) 11 SCC 600.

21 2014 (60) PTC 452 (Del).

22 *Id*. at 454.

The court held if the contracts and/or transactions entered into between the appellant and its customers are being concluded in Delhi through internet, it can be said that as far as transactions with customers in Delhi are concerned, plaintiff carries on business in Delhi. Consequently, the court took the view single judge ought not to have returned the plaint under order 7 rule10 CPC.

The court also distinguished facts the of *Banyan Tree* case[23] stating that it was based on plea of passing off and there plaintiff claimed jurisdiction on basis of 'part of cause of action' through a website (as different from 'plaintiff carries on business') having arisen under section 20 (c) of Code of Civil Procedure, 1908.

---

23 2008 (38) PTC 288 (Del).