

Technology Law Analysis

October 11, 2024

BOMBAY HIGH COURT BRINGS FACT CHECK UNIT SAGA TO A CLOSE: DELIVERS TIE BREAKER JUDGMENT STRIKING DOWN FACT CHECK UNIT SET UP UNDER IT RULES AS UNCONSTITUTIONAL

- In its order dated September 20, 2024, Justice A.S. Chandurkar of the Bombay High Court (“**Court**”), delivered a “tie breaker”¹ judgment in the case of *Kunal Kamra and Ors. v. Union of India*² wherein he struck down the amendment to Rule 3 (1)(b)(v) (“**Impugned Rule**”) of the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023* (“**IT Rules 2023**”), seeking to set up a Fact Check Unit (“**FCU**”) to fact check content on social media, as unconstitutional.
- The Court concurred with the judgment of Justice G.S. Patel that the Impugned Rule was violative of Article 14 (*Right to equality before the law*), Article 19(1)(a) (*Right to freedom of speech and expression*), and Article 19(1)(g) (*Right to practice any profession, or to carry on any occupation, trade or business*). The Court also opined that the Impugned Rule was *ultra vires* its parent legislation, the Information Technology Act, 2000 (“**IT Act**”), vague and overbroad, disproportionate, and resulted in a chilling effect on free speech vis-a-vis intermediary platforms.
- Following the Court’s opinion, a bench comprising Justice A.S. Gadkari (in place of the now-retired Justice G.S. Patel) and Justice Neela Gokhale on September 26, 2024, taking into account Justice Chandurkar’s opinion, formally struck down the Impugned Rule, declaring it unconstitutional by a majority of 2:1³.

FACTUAL BACKGROUND

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**IT Rules 2021**”), require intermediaries to exercise due diligence in order to avail safe harbour/ immunity from liability for content under the Information Technology Act, 2000 (“**IT Act**”).

Apart from this, to combat fake news concerning the Government of India, the Press Information Bureau (“**PIB**”) established an FCU in November 2019. The FCU takes cognizance of any fake and misleading news concerning Central and States Governments. This is done by: (1) publishing clarifications⁴ on its own website, and (2) responding to queries⁵. Where the query pertains to a State Government, the FCU forwards it to them⁶.

On April 2023 the Impugned Rule was notified to introduce the following due diligence obligation for intermediaries:

“The intermediary shall inform its rules and regulations, privacy policy, and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts by itself, and to cause the users of its computer resource to not host, display, upload, modify, publish, transmit, store, update, or share any information that:

... deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature or in respect of any business of the Central Government, is identified as fake, false, or misleading by such fact-check unit of the Central Government as the Ministry may specify by notification published in the Official Gazette”. (emphasis supplied)

Hence, the Impugned Rule sought to require intermediaries to inform their users not to publish content identified as fake / false by the FCU and make reasonable efforts to cause users not to publish such information.

The constitutional validity of the Impugned Rule was challenged before the Bombay High Court (“**BHC**”). Comedian and satirist Kunal Kamra, along with the Editors Guild of India and the Association of Indian Magazines, filed writ petitions before the BHC. The News Broadcasters and Digital Association, Bennett Coleman & Company Limited, and M/s TV18 Broadcast Limited also filed an application for intervention in this matter. (All of them are collectively referred to herein as “**Petitioners**”).

On January 31, 2024, a split judgement was delivered by the division bench of Justices GS Patel and Neela Gokhale (“**Division Bench**”). Justice Patel sought to strike down the Impugned Rule as unconstitutional, whereas Justice Gokhale upheld the constitutional validity of the Impugned Rule. The case was accordingly referred to a third judge - Justice A.S. Chandurkar, to deliver a tie breaker judgment.

Pending the judgment, the Petitioner filed an interim application (“**IA**”) before the Court to stay the formation of the FCU under the Impugned Rule; however, this was rejected by the High Court on March 3, 2024. The Court opined that at this stage, when the material arguments of both sides are being considered, the judiciary must exercise restraint in staying the applicability of the Impugned Rule. Consequently, the Petitioner filed a special leave petition (“**SLP**”) before the Supreme Court of India.

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On March 21, 2024, the Supreme Court rejected the Court's reversed the High Court's order and stayed the formation of the FCU. The Supreme Court opined that the matter implicated core values affecting freedom of speech and expression, as well as the freedom to practice any profession or to carry on any occupation, trade, or business. Hence, it was necessary to stay the operation of the FCU until these issues were addressed by the Court.

The procedural history of the judgement has been covered in **Annexure A** and relevant provisions pertinent to this matter are covered in **Annexure B**.

ARGUMENTS MADE BY THE PARTIES

Petitioners

Constitutionality under Article 14 / Natural Justice

- The term "business of the government" used in the Impugned Rules was a term of widest import, making it vague and ambiguous.
- The Impugned Rule results in unfair class legislation in favour of the government. There is no rationale behind limiting the operation of the FCU solely to the business of the Central Government.
- The Impugned Rule is manifestly arbitrary, as it only ensures compliance with the rules for digital media, but not for print media.
- The Impugned Rule gives the Central Government the authority to determine if information about it is false or misleading.
- The Impugned Rules does not provide any defined process or redressal mechanism which can be relied on to dispute any unfavourable order given by the FCU. Hence, it is against principles of natural justice.
- While rendering her opinion, Justice Gokhale "read down" the Impugned Rule by reading in the option of issuing a disclaimer instead of taking down the content, which was not contemplated in the Impugned Rule, and was contrary to the terms of Rule 3(1)(b), which required intermediaries to make reasonable efforts not to host, display certain information, etc. Hence, appending a disclaimer would amount to a modification which was not permissible.

Constitutionality under Article 19 (1)(a)

- Article 19(2) of the Constitution limits the grounds on which restrictions on freedom of speech and expression may be imposed, but the Impugned Rule introduces additional, restrictions beyond those under Article 19(2).
- There is no fundamental right restricted to true and correct information and the Impugned Rule is disproportionate in its attempt to ensure accurate speech.
- A similar attempt to expand the restrictions under Article 19(2) in case of Section 66-A of the IT Act was made in *Shreya Singhal v. Union of India*⁷, which was deemed vague and unconstitutional by the Supreme Court.
- The Impugned Rule would have a chilling effect on free speech. The argument of the Respondent that there was no direct penal consequence for an intermediary/user is not correct in view of Section 45 of the IT Act, which provided for consequences including imposition of a penalty.
- The FCU's power to identify fake content coupled with the threat of FIRs under the *Bhartiya Nyaya Sanhita, 2023* could deter individuals from expressing themselves freely, leading to a chilling effect on free speech.

Constitutionality under Article 19(1)(g)

- The differential treatment and additional obligations imposed on digital media entities regarding government-related information discriminate against them, create unnecessary burdens, and violate Article 19(1)(g) of the Constitution. This could also discourage social media entities from sharing news information, potentially limiting and controlling the dissemination of news in the digital sphere.
- There has been no rationale to show that there was a requirement of constituting the separate FCU when a FCU under the Press Information Bureau was already in existence. Moreover, even in accidental non-compliance there exists a threat of losing safe harbour protection.

Respondent

- The Impugned Rule is created with an intent to act as a deterrent for creators and disseminators of fake news and misinformation. It also provides people with an easy avenue to report suspicious and questionable information pertaining to the Government of India.
- The Impugned Rule is not vague. The business of the Central Government has been clearly categorized under the Government of India (Allocation of Business) Rules, 1961, which provides a fair understanding of the business of the Central Government and justifies the validity of the Rule.
- The additional compliance requirements for digital media are in the interest of society, and the same tests and regulations applicable to print media cannot be considered the threshold for digital media.
- The Central Government is not the final arbiter. The remedy of approaching a court of law regarding the FCU's decision would be available.

- Access to accurate information is essential to Article 19(1)(a) of the Constitution, and the Impugned Rule aims to protect this right.
- There is no constitutional right to untrue information. In the Supreme Court's judgment of *D.C. Saxena v. Chief Justice of India*⁸ it was held that the right to know and have correct information and the right to receive true information that is neither fake, false, nor misleading were part of the rights guaranteed under Article 19(1)(a).
- Article 66-A which was set aside in *Shreya Singhal* was a penal provision, the same test could not be applied in the present case as no aspect of personal liberty was involved.
- The contention based on chilling effect was far-fetched and based on mere apprehension. There is no material evidence before the court to indicate that the enforcement of the Impugned Rule will create a chilling effect.
- There are sufficient safeguards for intermediaries under Section 79 of the IT Act, Therefore, any argument that the Impugned Rules have a chilling effect on the operation of intermediaries is not valid.

- Since the law regulates intermediaries and imposes specific obligations upon them, a claim of infringement of their right to trade/profession—without a formal challenge from the intermediaries themselves—remains unsubstantiated.
- Prior to the implementation of the Impugned Rules, there were consultations with various intermediaries to gather their insights and concerns, ensuring that the Impugned Rules reflect a balanced approach. Hence, the

Impugned Rules do not have any discriminatory effects, nor do they impose any chilling effects on intermediaries.

Vires of the Rule under the IT Act, 2000

- There is no enabling provision under the IT Act, 2000 that empowers the Central Government to create the Impugned Rule. While the Respondent referred to the provisions of Section 87(1) and (2) of the IT Act, 2000⁹ as the source of the power to issue the Impugned Rule, detailed rules were already introduced viz. the Information Technology (Procedure and Safeguards for Blocking Access to Information by the Public) Rules, 2009 ("Blocking Rules"). Hence, the field is already occupied.
- The introduction of the Impugned Rule in exercise of powers under Section 87(2), Section 87(3) mandates that proposed rules be presented to Parliament as a safeguard. Since this did not occur, the Impugned Rule violates the IT Act, 2000.
- Section 69A, 79, and 87 of the IT Act, 2000¹⁰ allows the Central Government rule making powers to create a FCU and regulate any information that concerns the business of the government.
- The word "information" present in Section 2(1)(v) of the IT Act, 2000 is an inclusive term that does not specify the content of the information. Therefore, the Central Government has the power to create different rules under the same section for regulating different forms of information.

COURT'S OPINION

At the outset, the court accepted the Petitioner's submissions that a reference court, i.e., a court to whom differing opinions were referred for opinion, was required to express an opinion *only on the points of difference between the judges of the division bench*. Even if no opinion on a matter had been expressed by one judge, the opinion expressed by the other would be accepted since there was no difference of opinion.

This contention was accepted by the Court, which recorded that there was no difference of opinion/ no opinion of Justice Gokhale on Justice Patel's holding on the following aspects, and accordingly the Court did not consider these issues:

- Classification** ■ The Impugned Rule aimed to single out and protect only information about the business of the Central Government, with no rationale for limiting its operation in this manner. This amounted to class legislation, and therefore afoul of Article 14
- Natural Justice** ■ The Impugned Rule is devoid of any guidelines regarding the operation of the FCU, procedure for raising objections and opportunity to counter the case set up that some information was fake or false or misleading. Therefore, the Impugned Rule violates the principles of natural justice.

The Court's opinion on the other issues was as follows:

- Constitutionality under Article 14** ■ The Central Government has failed to demonstrate any intelligible differentia that justifies treating information related to its business as distinct from other types of information.
 - There is no rational basis for imposing additional compliance requirements on digital media compared to print media.
 - Since the Central Government will determine the composition of the FCU, this arrangement could lead to a unilateral determination by the executive regarding whether certain information about its business is valid, effectively allowing the Central Government to act as a judge in its own cause.
 - The Rule does not meet the five-fold test established in *Gujarat Mazdoor Sabha v. Union of India*¹¹ and fails the test of proportionality, which is essential to the right to equality under Article 14 of the Constitution.
 - Justice Gokhale's interpretation constitutes "reading out" of the law instead of "reading down". Such an interpretation is not permissible, as reading down cannot be applied in opposition to the clear intention of the legislation, and the Respondent did not make this argument in its submissions.
- Constitutionality under Article 19(1)(a)** ■ The restrictions contemplated under the Impugned Rule was not relatable to any of the subjects under Article 19(2). The Court referred to the Supreme Court's judgment in *Anuradha Bhasin*¹², in which the Supreme Court had held that the freedom of speech and expression under Article 19(1)(a) included the right to disseminate information to as wide a section of the public as possible, and free speech on the internet was an integral part of Article 19(1)(a).
 - The right to know accurate information was in the context of the affairs of the government and the argument this does not mean that this imposes an obligation on everyone to disclose correct and accurate information.
 - The right to freedom of speech and expression cannot be restricted on the grounds that it exists solely to ensure that citizens receive only true and accurate information as determined by the Government and the Government cannot coercively classify speech as true or false.
 - The Impugned Rule requires intermediaries not to host information that is patently fake or misleading, with non-compliance potentially resulting in the loss of safe harbour protection. This creates a chilling effect on intermediaries, placing them under the control of the Central Government in their operations and significantly jeopardizing users' speech and expression. Consequently, intermediaries, fearing the loss of safe harbour protection, may take down most content flagged by the FCU, thereby significantly restricting users' freedom of speech and expression.
- Constitutionality under Article 19(1)(g)** ■ As social media has become the primary news medium, by targeting social media content, even for news outlets with print media, the Impugned Rule directly affects their ability to practice journalism. The Impugned Rule's requirement that news publications present only the government's view online violates the Press Council of India's norms for journalistic conduct and hinders the freedom of the press, ultimately restricting the ability of news outlets to effectively practice their profession.
- Ultra Vires IT Act, 2000** ■ The Impugned Rule failed to meet the requirements set forth in Section 87(3) of the IT Act, 2000, which mandated that amendments be laid before each House of Parliament.

■ The Impugned Rule created substantive laws that extended beyond the IT Act, 2000, and did not pertain to anything permissible under Section 69A or Section 79 of the Act. Moreover, it could not be argued that the Rule was created under Section 87(2)(z) of the IT Act, 2000, as that provision related specifically to the guidelines to be followed by intermediaries and did not encompass the formation of an FCU.

Applicability of the expression “knowingly and intentionally” ■ The term “knowingly and intentionally” applies only to the unamended portions of Rule 3(1)(b)(v), i.e., “*patently false and untrue or misleading*” and not to the Impugned Rule ‘*or in respect of the business of the Central Government, is identified as fake or false or misleading by such fact check unit.*’. The Impugned Rules aim to create two distinct categories, one for non-Central Government business and the other for Central Government business. The term ‘knowingly and intentionally’ would attach only to the former. Accordingly, if after information has been identified as fake or false by the FCU, irrespective of the knowledge and intent of the user, that would result in loss of safe harbour.

ANALYSIS AND CONCLUSION

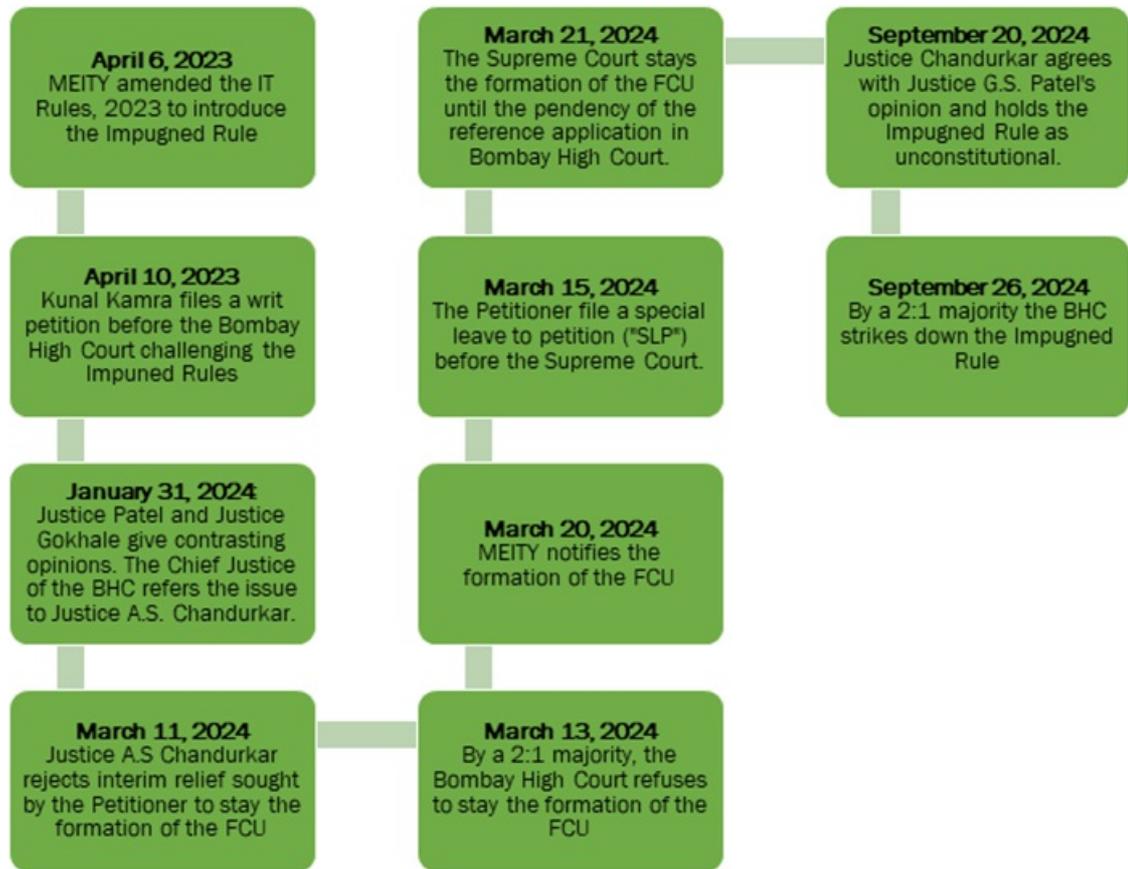
This judgment brings to a close several months of contentious arguments regarding the constitutionality of the FCU before the High Court and the Supreme Court. It has provided welcome clarity on the contours of due diligence obligations which can be imposed on intermediaries in exercise of the provisions under Section 79(2)(c) of the IT Act. It appears that the IT Rules have been amended from time to time to address increasingly diverse issues on digital media, in excess of the parent legislation.

The current Rule 3(1)(b) of the IT Rules, which enumerates the nature of content which intermediaries are required to ‘*make reasonable efforts by itself, and to cause the users of its computer resource to not host, display, upload, modify, publish, transmit, store, update or share,*’ and under which the Impugned Rule was introduced, is also in want of clarity. Unfortunately, the judges did not delve into the interpretation of these terms. In the judgement of *Starbucks Corporation v. National Internet Exchange Of India*¹³, the Delhi High Court held that the expression “reasonable efforts” used in the current Rule 3(1)(b) of the IT Rules, 2021 was vague and asked the Central Government to provide clarity so intermediaries could effectively regulate their platform.

However, several States like Karnataka¹⁴ and Tamil Nadu¹⁵ set up state-wise FCUs pending these proceedings. It remains to be seen whether these FCUs are challenged before the High Courts of these States in light of the Court’s judgment. Having FCUs on a State-wise basis could complicate matters for intermediaries, which will now need to check the applicability of FCUs on a state-by-state basis.

ANNEXURE: A

TIMELINE



ANNEXURE: B

LIST OF RELEVANT PROVISIONS

Rule 3(1)(b)(v) of the IT Rules, 2021

Due diligence by an intermediary: An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, shall observe the following due diligence while discharging its duties, namely:

- the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement in English or any language specified in the Eighth Schedule to the Constitution for access or usage of its computer resource by any person in the language of his choice and ensure compliance of the same;
- the intermediary shall inform its rules and regulations, privacy policy and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts by itself, and to cause the users of its computer resource to not host, display, upload, modify, publish, transmit, store, update or share any information that:
 - belongs to another person and to which the user does not have any right;
 - is obscene, pornographic, paedophilic, invasive of another's privacy including bodily privacy, insulting or harassing on the basis of gender, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or an online game that causes user harm, or promoting enmity between different groups on the grounds of religion or caste with the intent to incite violence;
 - is harmful to child;
 - infringes any patent, trademark, copyright or other proprietary rights; and
 - deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify.

Article 14 of the Constitution

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 19(1)(a), Article 19(1)(g) and Article 19(2) of the Constitution

- All citizens shall have the right
 - (a) to freedom of speech and expression;
 - (b) to assemble peaceably and without arms;
 - (c) to form associations or unions;
 - (d) to move freely throughout the territory of India;
 - (e) to reside and settle in any part of the territory of India; and
 - 1) to practise any profession, or to carry on any occupation, trade or business.
- 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.

Section 2(1)(v) of the IT Act, 2000

"information" includes data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fich.

Section 66-A of IT Act, 2000

Punishment for sending offensive messages through communication service, etc. - Any person who sends, by means of a computer resource or a communication device,

- any information that is grossly offensive or has menacing character; or
- 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;
- 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.]

Section 69-A of the IT Act, 2000

- 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.
- 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.
- 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 also be liable to fine.

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.

Section 87 of the IT Act, 2000

Power of Central Government to make rules.

(1) The Central Government may, by notification in the Official Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

- the conditions for considering reliability of electronic signature or electronic authentication technique under sub-section (2) of section 3A;
- the procedure for ascertaining electronic signature or authentication under sub-section (3) of section 3A;
- the manner in which any information or matter may be authenticated by means of electronic signature under section 5;
- the electronic form in which filing, issue, grant or payment shall be effected under sub-section (1) of section 6;
- the manner and format in which electronic records shall be filed, or issued and the method of payment under sub-section (2) of section 6;
- the manner in which the authorized service provider may collect, retain and appropriate service charges under sub-section (2) of section 6A;
- the matters relating to the type of electronic signature, manner and format in which it may be affixed under section 10;
- the manner of storing and affixing electronic signature creation data under section 15;
- the security procedures and practices under section 16;
- the qualifications, experience and terms and conditions of service of Controller, Deputy Controllers, Assistant Controllers, other officers and employees under section 17;
- the requirements which an applicant must fulfil under sub-section (2) of section 21;
- the period of validity of licence granted under clause (a) of sub-section (3) of section 21;
- the form in which an application for licence may be made under sub-section (1) of section 22;
- the amount of fees payable under clause (c) of sub-section (2) of section 22;
- such other documents which shall accompany an application for licence under clause (d) of subsection (2) of section 22;
- the form and the fee for renewal of a licence and the fee payable thereof under section 23;
- the form of application and fee for issue of Electronic Signature Certificate under section 35;
- the form in which application for issue of an electronic signature Certificate may be made under sub-section (1) of section 35;
- the fee to be paid to the Certifying Authority for issue of an electronic signature Certificate under sub-section (2) of section 35;
- the duties of subscribers under section 40A;
- the reasonable security practices and procedures and sensitive personal data or information under section 43A;
- the manner in which the adjudicating officer shall hold inquiry under sub-section (1) of section 46;

- the qualification and experience of the adjudicating officer shall possess under sub-section (3) of section 46;
- the form in which appeal may be filed and the fee thereof under sub-section (3) of section 57;
- any other power of a civil court required to be prescribed under clause (g) of sub-section (2) of section 58;
- the powers and functions of the Chairperson of the Appellate Tribunal under section 52A;
- the information, duration, manner and form of such information to be retained and preserved under section 67C;
- the procedures and safeguards for interception, monitoring or decryption under sub-section (2) of section 69;
- the procedures and safeguards for blocking for access by the public under sub-section (3) of section 69 A;
- the procedure and safeguards for monitoring and collecting traffic data or information under sub-section (3) of section 69B;
- the information security practices and procedures for protected system under section 70;
- manner of performing functions and duties of the agency under sub-section (3) of section 70A;
- the officers and employees under sub-section (2) of section 70B;
- salaries and allowances and terms and conditions of service of the Director General and other officers and employees under sub-section (3) of section 70B;
- the manner in which the functions and duties of agency shall be performed under sub-section (5) of section 70B;
- the guidelines to be observed by the intermediaries under sub-section (2) of section 79;
- the modes or methods for encryption under section 84A;

(3) Every notification made by the Central Government under sub-section (1) of section 70 (A) and every rule made by it shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation

Authors

- Pradyumn Sharma and Tanisha Khanna

You can direct your queries or comments to the relevant member.

¹The single judge bench was constituted by the Chief Justice of the BHC upon reference under Chapter I, Rule 7 of the BHC Appellate Side Rules, 1960, read with Section 98 of the Code of Civil Procedure, 1908, and Clause 36 of the amended Letters Patent of the BHC.

²Kunal Kamra and Ors. v. Union of India Writ Petition 9792 of 2023.

³In accordance with Code of Civil Procedure and relevant rules of the BHC, once the referring judge provides its opinion, the original bench decides the matter, considering his/her opinion to determine a majority in case of a split decision.

⁴<https://pib.gov.in/factcheck.aspx>

⁵<https://www.outlookindia.com/national/pib-fact-check-unit-responded-to-31-174-actionable-queries-till-date-govt-news-187017>

⁶https://www.business-standard.com/article/current-affairs/govt-has-taken-several-steps-to-deal-with-fake-news-rajeev-chandrasekhar-121120101400_1.html

⁷Shreya Singhal v. Union of India AIR 2015 SC 1523

⁸D.C. Saxena v. Chief Justice of India 1996 SCC (7) 216

⁹Section 87(1) and Section 87(2) allow the Central Government to make rules for regulating various aspects such as electronic signatures, the powers and functions of tribunals under the IT Act, 2000, and the procedure for intercepting and monitoring information, etc., by publishing in the Official Gazette and the Electronic Gazette.

¹⁰Section 2(1)(v) of the IT Act, 2000 provides the definition of the term "information", Section 69-A empowers the Central Government to issue directions for blocking public access of any information through any computer resource, and Section 79 stipulates exemption of liability of intermediaries in certain cases and provides safe harbor principle to them. By relying on these provisions the Central Government argues that various provisions under the Information Technology Act, 2000, including Sections 2(1)(v), 69-A, 79 and 87, allow it to create delegated legislation to impose additional obligations on an intermediary and block internet access in cases such as when anyone makes a false statement regarding the business of the Central Government.

¹¹In Gujarat Mazdoor Sabha v. Union of India, the Supreme Court provided a five-fold test to determine whether a law is proportionate to any infringement of rights caused by it. This includes satisfying the following criteria: 1) A law interfering with fundamental rights must be in pursuit of a legitimate State aim. 2) Any law that infringes, abridge or abrogate the exercise of fundamental rights must bear a rational connection between the measure, the factual situation and objective or aim of the statute. 3) The measures must be shown to be (a) necessary and (b) not more excessive than needed. 4) Such restrictions must be shown to be necessary to protect or advance legitimate purposes; and 5) The State must provide sufficient safeguards against the abuse of such interference.

¹²Anuradha Bhasin vs Union of India AIR 2020 SC 1308

¹³Starbucks Corporation & Anr v. National Internet Exchange of India CS(COMM) 224/2023

¹⁴<https://www.deccanherald.com/india/kamataka/kamataka-govt-forms-panel-to-frame-fact-check-mechanism-3224895>

¹⁵<https://www.thehindu.com/news/national/tamil-nadu/tamil-nadus-new-fact-check-unit-with-suo-motu-powers-to-deal-with-fake-news-pertaining-to-government-across-all-media-platforms/article67486374.ece>

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