

# Technology Law Analysis

May 15, 2015

## THE BAZEE.COM SAGA UNRAVELLED: SUPREME COURT CLARIFIES INTERMEDIARY LIABILITIES FOR HOSTING OBSCENE CONTENT

- The Supreme Court has held that, while the Indian Penal Code, 1100% (“**IPC**”) makes the sale of obscene material through traditional print an offence, once that offence has a nexus with an electronic record under the Information Technology Act, 2000 (“**IT Act**”), and no charge is made under the relevant provision of the IT Act, the accused cannot be proceeded against under similar provisions of the IPC.
- In case there arises a conflict between laws, the special law(s) such as the IT Act shall prevail over general and prior laws.

The Supreme Court (“**SC**”) of India, recently held that in case of obscene material circulated over the internet, the IT Act, which is a special law, would prevail over the general law i.e. the IPC.

### Factual Background of the case: *Sharat Babu Digumatri v. Government of NCT of Delhi*

- An obscene MMS video was listed for sale on the website www.bazeee.com (now www.ebay.in) (“**Website**”). Though the Website had requisite filters to detect such listings, this listing was not tracked.
- The item was first listed on the evening of November 27, 2004 on the Website and deactivated only two days later i.e. on 29 November, 2004 after a complaint was lodged. In the meantime, a few sales took place through the Website.
- Upon investigation by the Crime Branch of Delhi, Ravi Raj, Avnish Bajaj, the managing director of the Website, and Sharat Digumarti, the manager of the Website, were held responsible for handling the content on the Website. They were listed as the accused on the charge sheet.

### RELEVANT PROVISIONS OF THE IPC AND IT ACT

- Section 292 of the IPC deals with obscenity, and states that a figure or any object shall be deemed to be obscene if it is lascivious or appeals to the prurient interests such as to tend to deprave and corrupt a person. Further, the section makes it an offence to distribute, import, export, exhibit, advertise, etc. obscene content by means of traditional *print* media
- Section 294 of the IPC makes it an offence to do any obscene acts, or utter obscene words or songs in public places to the annoyance of others.
- Section 67 of the IT Act makes it an offence to publish or transmit obscene content in *electronic* form.

Thus, the difference between Section 292 of the IPC and Section 67 of the IT Act is that while the latter criminalizes the transmission of obscene content by electronic means, the former criminalizes the dissemination of obscene content through conventional print media, such as through writings, drawings, books or pamphlets.

### COURT PROCEEDINGS IN THE AVNISH BAJAJ CASE

Avnish Bajaj filed a petition for quashing of the criminal proceedings against him. He contended, among other grounds, that the MMS was transferred directly between the seller and buyer without the intervention of the Website. Hence, he could not be held responsible for a mere listing on the Website which was not obscene and in no way attracted either Section 292 or 294 of the IPC or Section 67 of the IT Act.

In 2005, the Delhi High Court (“**DHC**”) observed that<sup>1</sup>:

- There was a prima facie case against the Website in respect of the listing of the video clip and its contents and an offence, under certain sub-sections of Section 292 of the IPC was made out.
- Avnish Bajaj could not be held liable as the company was not arraigned as a plaintiff.
- The IPC did not recognize the concept of automatic criminal liability of a director of a company, when the company itself was not a party to the suit.
- A *prima facie* case was made out against Avnish Bajaj for an offence under section 67 of the IT Act, since the law recognizes the deemed criminal liability of the directors even where the company is not arraigned as an accused.

This is because, Section 85<sup>1</sup> of the IT Act provides that, when a company commits an offence under the IT Act, every person who was in charge of the company at the time may be proceeded against.

However, the SC, in 2012<sup>2</sup>, overturned this finding while holding that, vicarious liability cannot be fastened to Avnish Bajaj and he could not be held guilty under the IT Act provisions as the company was not arraigned as an accused. In this respect, the SC drew a parallel between section 141 of the Negotiable Instruments Act, 1881 (“**NI Act**”), and

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section 85 of the IT Act. Section 141 of the NI Act<sup>i</sup> is of the same substance as section 85 of the IT Act, in the context of certain offences by companies under the NI Act. In interpreting section 141 of the NI Act, the SC held that the commission of an offence by the company was an express condition precedent to attract the liability of others in charge of the company, hence, since there was no case made against the company, Avnish Bajaj was acquitted.

Post this case, the IT Act was amended to introduce, amongst other amendments, an amendment to Section 79(1)<sup>iii</sup> of the IT Act (“**Section 79**”). This section, subject to certain conditions, provides immunity / safe harbor to intermediaries (such as the Website) from the penalties under the IT Act for content made available on its platform by third parties.

## COURT PROCEEDINGS IN SHARAT DIGUMATRI CASE

Following the judgment of the SC quashing all proceedings against Avnish Bajaj, Sharat Digumatri (“**Sharat**”), the other manager of the Website, filed an application before the trial court to drop proceedings against him as well. The trial court dropped the proceedings against Sharat for offences under section 294 of the IPC (“**Section 294**”) and section 67 of the IT Act (“**Section 67**”), however it framed the charge in terms of section 292 of the IPC (“**Section 292**”). This order framing the charge was upheld by the DHC. The DHC stated<sup>3</sup> that liability could attach to Sharat in his individual capacity. Sharat appealed against this DHC order before the SC in the present proceedings.

## ISSUE ADJUDICATED UPON BY THE TWO JUDGE BENCH OF THE SUPREME COURT

*Whether Sharat, who had been discharged under Section 67 could be proceeded under Section 292?*

### Sharat’s Arguments

It was submitted before the SC that:

- Sharat could not be proceeded under Section 292 after having been discharged under Section 67. It was argued that, Section 67 was a special provision and it would override Section 292. There was a distinction drawn between offences in relation to the internet under Section 67 and offences in relation to conventional media under Section 292;
- Even if all the allegations against Sharat were accepted, he would be protected under Section 79 since it was established that the offending material was an electronic record under the IT Act and hence Section 79 would have to apply;
- Section 81 of the IT Act (“**Section 81**”) provided that the provisions of the IT Act had overriding effect on any other law in force.<sup>4</sup> Hence, by virtue of Section 81, Section 79 would get automatically attracted to electronic forms of publication and transmission of obscene material by intermediaries. The horizon of Section 79 had been expanded to extend its protection to individuals as well. For this argument, reliance was placed on the landmark case of *Shreya Singhal v Union of India*<sup>5</sup> in which the SC read down Section 79 to hold that an intermediary would have to receive actual knowledge by means of a court order or a government notification prior to taking down offensive content on the internet. .

### Arguments of the State

The state Government of Delhi (“**State**”) contended that:

- *publishing* any obscene material under Section 67 could not be confused or equated with the *sale* of obscene material under Section 292, for the two offences were distinct. There was no bar in law to charge and be tried for an offence under Section 292 after being discharged under Section 67; and
- the role of the person in charge of the intermediary, such as Sharat, was extremely vital as it pertained to the sale of obscene material, which was punishable under Section 292 and not under Section 67. .

### Judgment

The SC reasoned that it was beyond dispute that the alleged possession of the MMS clip by Sharat constituted an **electronic record**<sup>6</sup> under the IT Act.

The SC referred to the *Shreya Singhal* ruling in which the SC had at the time of striking down section 66 A of the IT Act, held that the provision did not contain the word ‘obscene.’ It criminalized what was ‘grossly offensive’ or ‘annoying,’ and hence, it could not be said to create an offence pertaining to decency or morality. The SC further reasoned that what could be grossly offensive or annoying under the section needn’t have been obscene at all. In the instant case, the SC was required to adjudicate upon which of the provisions and statutes i.e. Section 292 or Section 67, or both, the accused were required to be tried under.

The SC looked at the nomenclature of certain provisions of the IT Act:

- Section 67 provided for punishment for publishing or transmitting obscene material *in electronic form*.
- Section 67A of the IT Act stipulated punishment for publishing or transmitting of material containing sexually explicit acts, etc. *in electronic form*.
- Section 67B of the IT Act, too, provided for publishing or transmitting material depicting children in sexually explicit acts, etc., *in electronic form*.

The court referred to these provisions to emphasize on the fact that the legislature had deliberately used the words ‘electronic form’ in all places. Relying on this, the court reasoned that Section 67, read with section 67A and 67B, was a complete code relating to offences under the IT Act. Section 79 was an exemption provision providing protection to individuals, which protection had been expanded by virtue of the ruling in *Shreya Singhal*.

The SC rationalized that all the aforementioned provisions of the IT Act, along with Section 81, would apply if the offence applied to an electronic record. While Section 292 made it an offence for the sale of obscene books, etc., once the offence had a nexus with an electronic record, Section 79 could not be ignored. The logic underlying this interpretation, according to the SC, was that Section 79 was a *special* provision laid down for a *specific* purpose.

The SC while quashing the criminal proceedings against Sharat, held that:

- obscenity pertaining to **electronic records** fell under the scheme of the IT Act.
- Electronic forms of transmission were covered by the IT Act, which was a special law and if the alleged offender has been acquitted under the relevant provisions of the IT Act, he could not have been proceeded against under the IPC for the same offence.
- the DHC had erred in holding that Sharat could be proceeded under Section 292 despite the charges against him under Section 67 being dismissed.

## ANALYSIS

The courts have, in the past, in cases of obscenity over the internet, considered the provisions of both the IPC as well as the IT Act. For instance, in *Maqbool Fida Husain v Raj Kumar Pandey*<sup>7</sup>, in which an allegedly obscene painting was offered for sale over the internet, the DHC reasoned that since the test to determine obscenity under both the IT Act as well as the IPC was similar, it was *‘necessary to understand the broad parameters of the law laid down by the courts in India, in order to determine obscenity.*

This judgment of the SC gives welcome relief to intermediaries. The SC, in reaffirming the principle of *generalia specialibus non derogant*, held that in cases of obscenity appearing on the web, once the criminal act had a nexus with the electronic record, the provisions of the IT Act, particularly the safe harbor principle under Section 79, could not be ignored. Further, it ruled that if the alleged offender had been acquitted under the relevant provisions of the IT Act he would have escaped from the “net” of the IPC.

This judgment solidifies the view that no enactment can be viewed in isolation. The offence under Section 292 of the IPC was read holistically with Sections 67, 79 and 81 of the IT Act. In reading the aforesaid provisions of the IPC and the IT Act together, the SC construed them harmoniously to give effect to the legislative intent. The IT Act provides for offences that were not within the contemplation of the legislature at the time the IPC was enacted.

As technology continues to evolve, the interpretation of the SC in this case is a welcome precedent on the interpretation of special laws enacted to address specific offences that arise out of technological advancement.

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<sup>1</sup> (2005) 3 CompLJ 364 Del

<sup>2</sup> Criminal Appeal No. 1222 of 2016

<sup>3</sup> CRL.REV.P.127/2015 & CRL.M.A.No.3194/2015

<sup>4</sup> Provisions such as section 81 of the IT Act are termed ‘non-obstante’ clauses. They are enacted to indicate that notwithstanding anything else contained in other enactments, the enactment containing such a clause would prevail.

<sup>5</sup> Writ Petition (Criminal) No. 167 of 2012

<sup>6</sup> Section 2(t) of the IT Act: “Electronic record” means “data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche”.

<sup>7</sup> 2008CriLJ4107

<sup>i</sup> Section 85 of the IT Act: Offences by companies:

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. Explanation.—For the purposes of this section,—

(i) “company” means anybody corporate and includes a firm or other association of individuals; and

(ii) “director”, in relation to a firm, means a partner in the firm

<sup>ii</sup> Section 141 of the NIA Act: Offences by companies:

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: 22 [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.—For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm]

<sup>iii</sup> Section 79 of the IT Act: Intermediaries Not To Be Liable 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.

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