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CYBER LAW

*Deepa Kharb**

I INTRODUCTION

YEAR 2015 was a landmark year in the evolution of cyber law in India. This was the year when the Supreme Court of India delivered the historic judgment in *Shreya Singhal* v. *Union of India*.[1] The issue of the constitutionality of section 66A, section 69A and section 79 and the rules framed under section 69A and 79 of Information Technology Act, 2000 (hereinafter IT Act) was addressed by the Supreme Court in this case, taking cognizance of all the petitions dealing with this issue together. The freedom of speech and expression on online forums was upheld as a fundamental right under the Constitution of India by the court in this landmark judgment quashing the controversial and restrictive section 66A as unconstitutional on different grounds.[2]

The survey discusses this judgment particularly and some other recent decisions delivered by the Supreme Court and different high courts, though not in good number, that have either laid down new principles or propounded debatable prepositions in order to elucidate the scope and extent of cyber law.

II SECTION 66A OF THE INFORMATION TECHNOLOGY ACT, 2000 QUASHED AS UNCONSTITUTIONAL

A young law student filed the petition challenging section 66(A) of the IT Act in 2012 after the arrests of the two young girls in Maharashtra The two girls were arrested in Thane's Palghar after one of them posted a comment on a social media website against the shutdown in Mumbai following Shiv Sena leader Bal Thackeray's death and the other 'liked' it. Although they were granted bail and the charges against them were dropped subsequently, the arrests created a nation-wide uproar against the abuse of section 66A against citizens using social media to express their dissent. In the wake of this outrage, the Supreme Court admitted the petitions of Shreya Singhal and others for a detailed hearing on the constitutionality of section 66A and other related provisions of the IT Act.

* Assistant Professor, Indian Law Institute, New Delhi.

1 AIR 2015 SC 1523.

2 *Ibid.*

The main arguments put forth by the petitioners in the writ petitions challenging section 66A are as highlighted below:

(i) Section 66A violates the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) and is not saved by Article19(2);
(ii) Section 66A suffers from the vice of vagueness and has a chilling effect on the freedom of speech and expression;
(iii) Section 66A violates right to equality as granted under article 14 of the Constitution;
(iv) Section 69A and the rules framed under it are unconstitutional for not providing for the procedural safeguards;
(v) Section 79 is vague and arbitrary & the Intermediary Guidelines' Rules,2011 go beyond the reasonable restrictions provided under article 19(2);
(vi) Section 118(d) of the Kerala Police Act is violative of article 19(1)(a) and not saved by article 19(2).

Freedom of speech and expression in cyberspace

Liberty of thought and expression is not just an inspirational ideal, it's a cardinal value in a democracy that is of paramount significance under our constitutional scheme and must be preserved. Various judgments[3] have recognised the importance of freedom of speech and expression not only from the point of view of the liberty of the individual but also from the point of view of democratic governance because public criticism is essential to the working of its institutions.

The court first analysed the provisions of section 66A in relation to the fundamental right to freedom of speech and expression granted under article 19(1) (a) of the Constitution. The court reasoned that to assess the provisions of section 66A in relation to the fundamental right to speech and expression granted under the Constitution, it was important to first understand the meaning and scope of this expression "freedom of speech and expression". Various judgments handed down by United States (US) and Indian courts on freedom of speech were referred by the court in this regard.

The Supreme Court noted that although the US First Amendment recognise and promote free speech, the flexibility of the restrictions that could validly be imposed renders the American decisions inapplicable/ not much relevant for resolving the questions arising under article 19(1) (a) of our Constitution wherein the grounds on which limitations might be placed under article 19(2) are definite and precise.[4]

3 *Romesh Thappar* v. *State of Madras* (1950)SCR 594;*Sakal Papers (P)Ltd.* v. *Union of India* (1962) SCR 842; *Bennett Coleman & Co.* v. *Union of India* (1973) 2 SCR 757.

4 *Kameshwar Prasad* v. *The State of Bihar* 1962 Supp. (3) SCR 369.

On this count, the court Venkataramiah, J from *Indian Express* case:[5]

While examining the constitutionality of a law which is alleged to contravene Article 19(1) (a) of the Constitution, we cannot 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. American judgments on free speech laws carry great persuasive value in India, since, as a matter of interpretation, American and Indian Constitution are believed to be similar on the guarantee of free speech rights.

Therefore, taking reference from *Whitney* v. *California*,[6] the court reasoned that the three concepts which are fundamental in understanding the reach of 'freedom of speech and expression' are- discussion, advocacy and incitement.[7] Mere discussion or even advocacy of a particular cause, howsoever unpopular, is covered by article 19(1) (a). However, article 19(2) is invoked to curtail speech or expression only when such discussion or advocacy reaches the level of incitement.

The court further observed that since the definition of information,[8] on which the whole premise of offence under section 66A rests, is an inclusive one roping in information of all kinds -current events or scientific, literary or artistic *i.e.*, the market place of ideas[9] which the internet provides to persons of all kinds, public's right to know under article 19(1)(a) is affected. 'Such information' may cause annoyance or inconvenience to some is how the offence is made out under section 66A. The court concluded that the section in this regard makes no distinction 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. Therefore, accepting the contention of the petitioners the court held that section 66A, in creating an offence against persons who use the internet and annoy or cause inconvenience to others, directly curbs the freedom of speech and expression of the citizenry of India at large.

Article 19(2)

The scheme of article 19 under our constitution is such to include 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. The state cannot directly restrict freedom of speech in public interest or by placing an otherwise

5 *Indian Express Newspapers (Bombay) Private Limited* v. *Union of India* (1985) 2 SCR 287 at 324.

6 See observations of Brandeis J in *Whitney* v. *California* 274 U.S. 357 (*1927*); 71 L.Ed.1095.

7 *Supra* note 1 at para 13.

8 Information Technology Act, 2000, s. 2(v) reads: "Information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche.

9 Concept laid down by Holmes J in dissenting judgment in *Abrams* v. *United States* 250 US 616(1919) and later referred in *S. Khushboo* v. *Kannaiamal* (2010) 5 SCC 600.

permissible restriction on another freedom. Therefore, in curtailing freedom of speech, the restrictions have to be proximately related to one of the eight designated subject matters contained in article 19(2). Further, the phrase 'reasonable restriction' connotes that the limitation imposed under 19(2) should not be arbitrary or excessive in nature.

The Supreme Court reiterated that in curtailing freedom of speech, the restrictions have to be proximately related to one of the eight designated subject matters contained in article 19(2). A limitation which has no proximate relationship or nexus with the achievement of one of the designated subject matters, cannot amount to a "reasonable restriction" under article 19(2).

It analysed four out of the eight elements of article 19(2) which the union of India raised in its defence to find any proximate relationship of the section with any of them in the light of judicial precedents from Indian and US jurisprudence.

The term "public order" was defined in *Romesh Thappar*[10] as "a state of tranquility which prevails amongst the members of a political society." In *Ram Manohar Lohia* v. *State of Bihar,*[11] the court conceptualised three concentric circles to explain: 'law and order' being the widest, 'public order' being narrower, and 'security of the state' being the narrowest. Thus, a disruption of public order is something graver than simply breaking of a law, or disrupting 'law and order'.

The decision[12] laid down the test that has to be applied in all such cases is- 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 is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The apex court observed that section 66A makes no distinction between dissemination of information to one person and mass dissemination.

It was also noted that the section does not require that such message should have a clear tendency to disrupt public order. The nexus between the message and action that may be taken based on the message is conspicuously absent. Where speech is to be limited on grounds of public order, the law placing such a constraint, the court ruled, has to satisfy a test of clear and present danger. Any information that is disseminated must contain a tendency to (imminently) incite or create public disorder, and the information disseminated must be proximately linked to such disorder, for the speech to be restricted.

The court applied the test laid down in *Kameshwar Prasad* [13] and *Lohia*[14] case as well as the 'Clear and present danger-tendency to affect' test enunciated by Holmes J

10 *Romesh Thappar* v. *State of Madras* (1950) SCR 594.

11 (1966) 1 SCR 709.

12 *Ibid.*

13 *Kameshwar Prasad* v. *The State of Bihar* (1962) Supp.3 SCR 369.

14 *Superintendent, Central Prison, Fatehgarh* v. *Ram Manohar Lohia* (1960) 2 SCR 821.

in *Schenck* v. *United States*[15] and observed that the section has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates in order for it to be constitutionally valid.

It is also clear that the section is not aimed at defamatory statements at all. 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.

Equally, the court found that 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 sent may be purely in the realm of 'discussion' or 'advocacy' of a "particular point of view". 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".

Secondly, according to the court, 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 reasoned the court. Therefore, what has been said with regard to public order and discussion, advocacy and incitement to an offence equally applies in regard to decency and morality element of article 19(2).[16]

The court turned down the request of the additional solicitor general to read each of the subject matters contained in article 19(2) into section 66A to save the constitutionality of the provision stating that it would be doing complete violence to the language of section 66A by reading into it something that was never intended to be.

The additional solicitor general, enumerating a number of differences between the internet and other forms of traditional media argued for a relaxed standard of reasonableness of restriction. The Supreme Court recognised the distinction between the print and other media as opposed to the internet to provide for separate offences to apply to internet speech. However, according to it, that does not warrant a more relaxed test of "reasonableness" when assessing restrictions to speech online. Therefore it was concluded[17] that the validity of such a law will have to be tested on the touchstone of the tests which are applicable to the traditional media.

15 249 U.S. 47 (1919); 63 L. Ed. 470 The court held that American judgments on free speech laws carry great persuasive value in India, since, as a matter of interpretation, the American and Indian Constitution are not as dissimilar on the guarantee of free speech rights.

16 *Supra* note 1 at para 47.

17 In reaching this conclusion, the Supreme Court quoted the case of *Secretary, Ministry of Information & Broadcasting, Government of India* v. *Cricket Association of Bengal* (1995) 2 SCC 161.

Vagueness

Apart from rejecting the state's defences under article 19(2), the court also held section 66A unconstitutional for its lack of exactness. In *Kartar Singh* v. *State of Punjab*,[18] the Supreme Court observed that: [19]

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 and may trap the innocent by not providing fair warning.

The Supreme Court drew attention to two United Kingdom cases, *Director of Public Prosecutions* v. *Collins*[20] and *Chambers* v. *Director of Public Prosecutions*[21] to conclude that 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.[22]

The court observed:

> …[E]very 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.[23]

Apart from that, the section was held 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[24] on free speech and would, therefore, have to be struck down on the ground of over breadth.

18 (1994) 3 SCC 569.

19 *Id* .at 648.

20 (2006) 1 WLR 2223.

21 (2013) 1 WLR 1833.

22 *Supra* note 1 at 82.

23 *Id.* at para 76

24 The chilling effect refers to a situation where, faced with uncertain, speech-restricting statutes, which blur the line between what is permitted and what is prohibited, citizens are likely to self-

For example, 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 proselytising 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. The court observed that 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.

Further referring to *The Secretary, Ministry of Information and Broadcasting* v. *Cricket Association of Bengal*,[25] the court noted 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. Court based this observation on principles laid down in two constitution bench decisions in *Kameshwar Prasad* [26] and *S. Khushboo*,[27] thus binding in this regard.

The court reiterated that since section 66A purports to authorise 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, the possibility of it being applied for purposes not sanctioned by the Constitution cannot be ruled out. Therefore, holding that no part of section 66A is severable, the apex court declared the provision as a whole to be unconstitutional.

The challenge on the ground of article 14 violation was rejected by the court making 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.

The petitioners also argued that section 66A in creating new categories of offence has violated article 14 of the constitution and is that way violative of right to equality in the absence of an intelligible differentia, thus arbitrary in nature. Although the Supreme Court has not examined the constitutionality of the section in relation to article 14 in great detail, it was satisfied with the arguments on behalf of the union of India that there was an intelligible differentia between speech on the internet and other mediums of communication. This observation is very relevant for providing

censor, in order to be definitively safe. Brennan J in *New York Times* v. *Sullivan* 11 L Ed 2d 686 (1964) laid down the concept. Concept recognized by Indian Supreme Court in some cases like *R. Rajagopal* v. *State of Tamil Nadu* (1994) 6 SCC 632.

25 (1995) SCC 2 161.

26 *Kameshwar Prasad* v. *The State of Bihar* (1962) Supp. 3 SCR 369.

27 *S. Khushboo* v. *Kanniammal* (2010) 5 SCC 600. The law should not be used in a manner that has chilling effects on the "freedom of speech and expression" (para 47).

guidelines to the legislature and the courts for the creation as well as upholding of new offences in relation to internet.

III SECTION 69A AND THE INFORMATION TECHNOLOGY (PROCEDURE AND SAFEGUARDS FOR BLOCKING FOR ACCESS OF INFORMATION BY PUBLIC) RULES, 2009 HELD CONSTITUTIONAL

Section 69A accords the authority on the government to block the transmission of information that is generated, transmitted, received, stored or hosted in any computer resource, including the blocking of websites, when it is necessary or expedient to do so, for among other reasons, the interest of sovereignty and integrity of India, public order or for preventing incitement to the commission of any cognizable offence. The section requires the reason for such blocking to be recorded in writing. The rules under section 69A provide a detailed procedure required to be followed by the relevant government agencies and officers for the purpose of blocking access to any content under section 69A.

The court noticed that section 69A unlike section 66A is a narrowly drawn provision which has several safeguards. *Firstly*, 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). It is also required to recorded reasons for such blocking in writing so that they may be assailed in a writ petition under article 226 of the Constitution.

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. Merely because certain additional safeguards such as those found in section 95 and 96 Code of Criminal Procedure, 1973 are not available does not make the rules constitutionally infirm. The Supreme Court therefore opined that section 69A as well as the rules are constitutionally valid and contain sufficient safeguards against governmental abuse.

IV SECTION 79 AND THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES) RULES, 2011

Section 79 belongs to chapter XII of the Act is an exemption clause which grants protection, under certain limited circumstances, to intermediaries (*e.g.*, websites such as Facebook and YouTube) for content published by individuals who use their platforms.

The Information Technology (Intermediary Guidelines) Rules, 2011, notified in pursuance of powers conferred under section 87(2)(zg) (conferring rule making powers on the executive) read with section 79(2), details the nature of the due diligence to be followed by intermediaries to claim exemption under section 79.Petitioners' counsel 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).

The challenge to Rule 3(2) and 3(4) is made 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. Secondly, there are no safeguards provided as done in the 2009 Rules made Under Section 69A. Petitioners also challenged sub-rule (2) of Rule 3 for being vague and over broad having no relation with the subjects specified under article 19(2).

Section 79(3) (b) was also challenged on the same ground as Rule (3)(2) and 3(4) for allowing intermediary to 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).

The Supreme Court upheld the constitutionality of the provisions imposing two caveats. It read down section 79(3) (b) of the IT Act on intermediary liability to mean that an intermediary will only be liable if when "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." The court reasoned that otherwise it would be very difficult for intermediaries 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.

At the same time the court held that 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. Court also stated that 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.

Unlike section 69A the intermediary under section 79A is required to apply its own mind along with receipt of actual knowledge. The 'actual knowledge' received by an intermediary to take down an offensive content within 36 hours formerly under this section could be from anywhere has been interpreted to include only in the form of a government direction or court order.

The provision must now be read as providing for intermediary liability only where an intermediary has received actual knowledge from a court order or on being notified by government that unlawful acts related to article 19(2) are going to be committed, and that the intermediary had failed to expeditiously remove or disable access to such information. Section 118(d) of the Kerala Police Act, 2011 was also struck down being violative of article 19(1)(a) and not saved by article 19(2) on similar grounds.

While striking down section 66A of the IT Act as unconstitutional, the court has really elevated the concept of freedom of speech and expression to a great height. The judgment has examined and articulated the journey of freedom of speech and expression under Indian constitution in the light of various judicial pronouncements

from India as well as US and its application to communication and dissemination of information over internet and social media. The judgment has added another dimension to article 19(1) (a) and has far reaching implications on electronic communication *via* computers and communication devices.

V OBSCENITY

Later in *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra*[28] the Supreme Court once again encountered a chance to deliberate upon the purview of freedom of speech and expression. The court was approached to quash the charges of obscenity leveled against a poet for writing a poem called '*Gandhi Mela Bhetala'*(I Met Ganghi), published in 1994 and meant for private circulation among the employees of the All India Bank Association. A complaint was lodged alleging offences under sections 153A and 153B (causing disharmony between classes) of IPC and 292(obscenity). The accused was discharged under sections 153A and 153B but not under 292. The accused, therefore, approached Supreme Court after refusal by high court to quash the charge. The *amicus curiae* appointed in the case, Fali Nariman, submitted before court that the poem would not have been obscene if there was no mention of Mahatma Gandhi a highly respected historical personality of this country, in every stanza.

Gopal Subramanium, the counsel for accused contended that the freedom of speech and expression as enshrined by part III of the Indian Constitution incorporates the freedom to offend. The court refused to express any opinion on whether freedom of speech gives liberty to offend observing that:[29]

Free speech is a guaranteed human right and it is in fact a transcendental right. The recognition of freedom of thought and expression cannot be pigeon-holed by a narrow tailored test. Freedom of speech and expression has to be given a broad canvas, but it has to have inherent limitations which are permissible within the constitutional parameters. We have already opined that freedom of speech and expression as enshrined under Article 19(1) (a) of the Constitution is not absolute in view of Article 19(2) of the Constitution. We reiterate the said right is a right of great value and transcends and with the passage of time and growth of culture, it has to pave the path of ascendancy, but it cannot be put in the compartment of absoluteness. There is constitutional limitation attached to it.

In the context of obscenity, the provision enshrined under the Indian Penal Code's section 292 (sale, etc., of obscene books, etc.) has its room to play, the court said, adding: "We have already opined that by bringing in a historically respected personality to the arena of section 292 IPC, neither a new offence is created nor an ingredient is interpreted."The judicially evolved test, that is, "contemporary community standards test" is a parameter for adjudging obscenity, and in that context, the words used or

28 (2015) 6 SCC 1.

29 *Id.* at 4.

spoken by a historically respected personality is a medium of communication through a poem or write-up or other form of artistic work gets signification.

The court accepted the preposition that one is free to express his disagreement, dissent or criticism about a historically respected personality. However, in the name of artistic freedom or critical thinking, a writer or a poet cannot be allowed to use words/language which may be obscene. The court says that when the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner.[30]

There is no dispute that obscenity is a restriction to the freedom of speech to a certain extent but the important question is what actually constitutes obscenity. The court in the present case has failed to answer this and has further added to the confusion. The test for obscenity, as developed in *Roth* v. *US*[31] and adopted in *Aveek Sarkar,*[32] proceeds on a simple basis: does the work, taken as a whole, to the average reader, appeal to the prurient interest and does not contemplate differential standards for different people. This case is a deviation from the 50 years of Indian obscenity law jurisprudence. The court in the present case postulates that historically respectable figures command a different threshold of obscenity, without explaining what that threshold is. The concept of obscenity varies from society to society but the realm of obscenity must be judged keeping one's right to expression in mind in the present modern scenario.

VI ADMISSIBILTY OF ELECTRONIC EVIDENCE

In 2014, a three judges bench of the Supreme Court in *Anwar* v. *Basheer*[33] settled the law on the admissibility of electronic evidence after a series of conflicting judgments given by various high courts and the trial courts. Placing reliance on the non obstante clause in section 65B of the Evidence Act, the court held that special provision under section 65A and 65B will prevail over the general law on secondary evidence under sections 63 and 65 of the Indian Evidence Act,1872 (hereinafter Evidence Act). Therefore, for an electronic record to be admissible as secondary evidence in the absence of the primary, the mandatory requirement of section 65B certification is required to be complied with.

In 2015, judges of the different high courts and trial courts placed vehement reliance upon the ratio of the *Anwar* judgment in matters related to admissibility of electronic evidence. The Bombay High Court in *Balasaheb Gurling Todkari* v. *State of Maharashtra*[34] held that the call details record (CDR) cannot be admitted in evidence in the absence of the requisite certificate as per section 65B. In *Anvar P. V.* v. *P. K.*

30 *Ibid.*

31 *Roth* v. *United States* 354 US 476(1957).

32 *Aveek Sarkar* v. *State of Maharashtra* (2014) 4 SCC 257.

33 (2014) 10 SCC 473.

34 2015 SCC online Bom 3360.

Basheer [35] wherein the Supreme Court overruled its previous decision in *State (NCT of Delhi)* v. *Navjot Sandhu @ Afsan Guru:*[36]

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."[37]

The evidence relating to electronic record 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 derogan't, special law will always prevail over the general law…. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record;[38]

Similarly in the case of *Faim* v. *State of Maharashtra*,[39] the Bombay High Court held that it was mandatory for the prosecuting agency to produce the certificate in terms of section 65B obtained at the time of collecting document(CDR). As under section 65B (4) of the Evidence Act, if it is desired to give a statement pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(i) There must be a certificate which identifies the electronics record containing the statement;
(ii) The certificate must describe the manner in which the electronic record was produced;
(iii) The certificate must furnish the particulars of the device involved in the production of that record;
(iv) The certificate must deal with the applicable conditions mentioned under Section 65B (2) of the Evidence Act; and
(v) The certificate must be signed by a person occupying a responsible official position in relation to the operation f the relevant device.[40]

Thus, in view of the mandate of section 65B of the Evidence Act and in the absence of its compliance, the evidence of CDR produced by the prosecution in respect of the mobile phones was held fully inadmissible in evidence. *In S.K. Saini* v. *C.B.I* [41] also the appellant admittedly has not produced any certificate in terms of section 65B in respect of the CDs. Therefore, High Court of Delhi held that the same cannot be admitted in evidence.

35 *Supra* note 33 at para 19 and 22.
36 AIR 2005 SC 3820.
37 *Supra* note 33 at para 19.
38 *Id.* at para 22.
39 2015 SCC OnLine Bom. 5842.
40 *Ibid.*
41 2015 SCC online Del 11472.

Although the *Anwar* judgment to a very large extent clarified the position relating to section 65B certification, but it did not specify anything on time of filing of such certificate *i.e.*, whether the said certificate is required to be filed with the charge-sheet or it can be submitted at the later stage, during the trial. In the absence of any Supreme Court ruling, this issue was addressed by Delhi and Rajasthan High Courts taking the view that the said certificate can be filed at a later stage. In the case of *Kundan Singh* v. *State*,[42] an appeal against murder conviction where the chain of events were created using electronic evidence, the section 65B certificate pertaining to the CDR of the accused was not submitted along with the charge sheet. It was submitted by the nodal officer of the concerned telecom agency at the time of his re-examination only.

The division bench of the Delhi High Court was required to decide as to whether a certificate under sub-section (4) to section 65B must be issued simultaneously with the production of the computer output or it can be issued and tendered when the computer output itself is tendered to be admitted as evidence in the court or as in the present case by the official when the accused was recalled to give evidence. This court referred the Supreme Court judgment in *Anwar P.V. (S)* v. *P.K. Basheer*[43] on the issue. To quote: [44]

The expression used in the said paragraph is when the electronic record is "produced in evidence." Earlier portion of the same sentence emphasises the importance of certificate under Section 65B and the ratio mandates that the said certificate must accompany the electronic record when the same is "produced in evidence".

According to the Delhi High Court, the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to section 65B. This is not so stated in section 65B or sub-section (4) thereof. Of course, it is necessary that the person giving the certificate under sub-section (4) to section 65B should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in sub-section (2), identify the electronic record, describe the manner in which "computer output" was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer.

The Delhi High Court held that *Anwar* case does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under section 311Cr PC[45] or, at the appellate stage under section 391 Cr PC[46] The division bench

42 2015 SCC online Del 13647.

43 *Supra* note 33.

44 *Ibid.*

45 Code of Criminal Procedure, s. 311 reads: Power to summon material witness, or examine person present at any stage of any inquiry, trial or other proceeding under this code.

46 *Id*., s. 391 reads Appellate court may take further evidence itself or direct the Magistrate to take it if it thinks necessary .

refused to accept the legal ratio of *Ankur Chawla* v. *C.B.I.*[47] that the certificate must be issued when the computer output was formally filed in the court and certificate under section 65B cannot be produced when the evidence in the form of electronic record is tendered in the court as evidence to be marked as an exhibit.

On a similar note in *Paras Jain* v. *State of Rajasthan*,[48] the single judge bench highlighted a well settled legal position that the goal of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record. Thus, in all the cases where the police has not filed the certificate under section 65B, the prosecution agency can file the certificate by way of supplementary charge sheet under section 173(8) of Cr PC.[49] It is a statutory right which does not even require the prior permission of the magistrate.

While coming out with this deduction, the court reasoned[50] that when legal position is that an additional evidence, oral or documentary, is allowed to be produced during the course of trial if in the opinion of the court its production is essential for the proper disposal of the case, how it can be held that the certificate as required under section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the court with the charge-sheet. According to the court it is only an irregularity, a defect which is curable, not going to the root of the matter.

It is also pertinent to note that in the present case, the certificate was produced along with the charge-sheet but it was not in a proper form. However, later during the course of hearing of these petitions, it was produced in the prescribed form.

In *Kundan Singh*[51] case the Delhi High Court, in a part of the judgment, also considered the hearsay rule in the context of electronic evidence. Since the CDRs were in question, the court distinguished between electronic records automatically created and those requiring human intervention.

The high court of Delhi observed that in *Anwar*,[52] the Supreme Court noticed the difference between relevancy and admissibility which is examined at the initial stage and genuineness, veracity and reliability of evidence which is seen by the court subsequently. Thus, the ratio and dictum in *Anwar P.V* is premised on the difference between admissibility and veracity or evidentiary value. The Supreme Court dealt with the aspect of admissibility in strict legal sense, without confusing it with evidentiary value /correctness of contents.

Analysing the *Anwar* judgment, High Court of Delhi drew observation that section 65B nowhere states that the contents of the computer output shall be treated as the

47 2014 SCC OnLine Del. 13647.

48 2015 SCC OnLine Raj. 8331

49 *Supra* note 42, s. 173(8) reads: Further evidence (oral or documentary) obtained in investigation by the officer in charge of police station after the report has been forwarded to the Magistrate may be sent by a further report.

50 *Ibid.*

51 *Supra* note 42

52 *Supra* note 33 at para1.

truth of the statement. It only deals with the admissibility of secondary evidence in the case of an "electronic records" and not with the truthfulness or veracity of the contents. Mere admission or admissibility of the electronic record would not mean that the contents of the electronic record have been proved beyond doubt and that they are automatically proved when the document is marked exhibit. Mere marking of a document as exhibit does not dispense with the proof of its contents.[53] Section 65B simply authenticates the computer output, it will only show and establish that the computer output is the print out or media copy, etc. of the computer from which the output is obtained.

To put it simply, the court held that section 65-B remains an issue of admissibility, not reliability. The court has still to rule out when challenged or otherwise, the possibility of tampering, interpolation or changes from the date the record was first stored or created in the computer till the computer output is obtained. The courts must rule out that the records have not been tampered and read the data or information as it originally existed.

The Delhi High Court held that evidence may be offered for different purposes and there is difference between a "factum of statement" and "truth of a statement."[54] Thus, electronic record produced as a statement as a tangible in form of a CD, print out on paper, etc. as a fact in itself, must be distinguished from electronic record, which is produced to prove truth of the matter it asserts or correctness of contents for the latter postulates adjudication of veracity and credibility of the information by the person who has made a statement offering or producing the document for its truth.

Where an electronically generated record is entirely a product of functioning of a computer system or computer process like call record details or a report generated on a fax, it is not hit by hearsay rule. Computer generated telephone records are not similar to a statement by a human declarant and, therefore, cannot be treated as hearsay and the credibility and evidentiary value is determined on the reliability and accuracy of the process involved.

VII USAGE AND REGULATION OF ENCRYPTION IN DIGITAL COMMUNICATIONS - DRAFT POLICY DOCUMENT

The Draft National Encryption Policy 2015[55] was issued online under section 84A[56] of the IT Act last year by the Government of India which prescribed methods of

53 *Sait Tarajee Khimchand* v. *Yelamarti Satyam*, AIR 1971 SC 1865; *Narbada Devi Gupta* v. *Birendra Kumar Jaiswal* (2003) 8 SCC 745 and *Mohd. Yusuf* v. *D*, AIR 1968 Bom 112.

54 This distinction has been recognised and accepted in several judgments like *J.D. Jain* v. *State Bank of India*, AIR 1982 SC 673 and S.*R. Ramaraj* v. *Special Courts, Bombay* (2003) 7SCC 175.

55 Department of Electronics and Information Technology, Ministry of Information, see Draft Notification on modes and methods of Encryption 2015 prescribed under S.84A of Information Technology Act 2000, *available at* : https://cdn.netzpolitik.org/wp-upload/draft-Encryption-Policyv1.pdf (last visited on Aug. 10, 2016).

56 Information Technology Act, 2000, s.84 A reads: The Central Government may, for secure use of the electronic medium and for promotion of e-governance and e-commerce, prescribe the modes or methods for encryption.

encryption of data and communications used by all. The objective was to enable information security environment and secure transactions in cyber space for individuals, businesses, government including nationally critical information systems and networks.

The policy document raised widespread policy concerns. According to it the users of encryption services like *Viber, Whatsapp* were required to save all digital communications, including emails and chats, messages in 'plain text' for 90 days ensuring reproduction of it whenever required by law enforcement agencies. Meaning thereby that all data, including passwords, would remain unencrypted and hence vulnerable for a period of 90 days giving hackers ample time to get to the plain text/ the vulnerable data of the users of such services. Moreover, service providers offering encryption were mandatorily required to register with the Indian government for usage and regulation of encryption policy.

The policy was very wide worded and vague covering all citizens, including government personnel and companies performing non-official / personal functions, creating huge uproar following which it was withdrawn for redrafting in the light of concerns of relevant stakeholders.

VIII CONCLUSION

Year 2015 witnessed the historic judgment of the Supreme Court of India in *Shreya Singhal*. The verdict is immensely important in Supreme Court's history for many reasons. It has added more clarity to the jurisprudence of free speech in India which may guide legislative drafting and judicial decisions in future. This judgment is the first major judgment interpreting the constitutional validity of the provisions of the IT Act, therefore, building upon cyber jurisprudence.

Since bad law breeds problem, section 66A caused arrest of more than 3000 people in the year 2015 only before it was struck down on being vague, arbitrary and overboard provision criminalising certain communications in online medium. As the law stands repealed after this judgment, the incidents of cyber bullying and targeting people on social media are bound to increase in future in the absence of a specific law in this regard. This judgment can provide a fertile ground for future legislative drafting to enact a new provision to deal with such offences without offending the constitutional mandate.

The power of the government for interception in the national interest has been strengthened however; the scope of intermediary liability has been read down by the court requiring intermediaries to act only on the order of court of law or of a governmental agency.

The issue of admissibility of electronic records as secondary evidence was decided by *Anwar* judgment in 2014 which was further clarified and redefined in some of the judgments from different high courts as discussed in this survey. It would be interesting to see whether the interpretations of section 65B hold good in the apex court also when they come before it in appeals preferred.