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# CYBER LAW

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### I INTRODUCTION

LAST YEAR, Supreme Court's landmark judgment in *Shreya Singhal v. Union of India*<sup>1</sup> created history by striking down section 66A of Information Technology Act, 2000 (IT Act hereinafter) as unconstitutional. Year 2016 was also remarkable, in as much as it saw how the high courts and Supreme Court in India were dealing with issues related to intermediary liability and electronic records- redefining and adding more clarity to the law relating to these areas particularly post *Shreya Singhal* and *Anwar v. Basheer*<sup>2</sup> judgments.

The year 2016 saw an interesting mix of cases, forming part of the survey, wherein degree of difference is witnessed in handling, with contrasting conclusions by the courts especially on intermediary liability under section 79 of IT Act. The Indian courts have tried to contribute their bit towards evolving jurisprudence in these areas/ issues. Through various judgments, though not in good number, covered under this survey, the different high courts and the supreme court of India have further helped in the evolution of cyber law jurisprudence.

### II ADMISSIBILITY OF ELECTRONIC EVIDENCE

In 2014, a three judges bench of the Supreme Court in *Anwar P.V.* case 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 Indian Evidence Act, 1872 (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 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.

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1 (2015) 5 SCC 1: AIR 2015 SC 1523.

2 (2014) 10 SCC 473.

The importance of role played by sections 65A and 65B of the Evidence Act with regard to the admissibility of electronic records was reiterated by the Supreme Court in *Harpal Singh @ Chhota v. State Of Punjab*.<sup>3</sup> The prosecution in this criminal appeal produced printed copies of relevant records but failed to adduce a certificate as required under section 65-B (4) of the Act. The high court dismissed the plea of inadmissibility of such call details by observing that all the stipulations contained under section 65 of the Act had been complied with. However, the Supreme Court, going by the decision of this court in *Anvar P.V.*, ordaining an inflexible adherence to the enjoinders of sections 65B(2) and (4) of the Act, refused to sustain high court's finding on the issue. The court held that where the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of section 65B (2) had been complied with, in absence of a certificate under section 65B (4), the secondary evidence has to be held inadmissible in evidence. However, upholding the sentence, the court added that the charges against the accused persons, including the appellants, stand proved beyond reasonable doubt even without considering the call details.

Further elaborating on this issue, in *Avadut Waman Kushe v. State of Maharashtra*,<sup>4</sup> the Bombay high court judge observed that a perusal of the provision of Section 65-B(4) shows that, there is nothing in the provision that specifies the stage of production of the certificate. Rather the court inferred that the indication therein is otherwise as the provision of Section 65-B is about admissibility of electronic record and not production of it. Further, from the opening words of section 65-B(4) "*In any proceedings where it is desired to give statement in evidence*", it is clear that the certificate can be filed at the time the record is tendered in evidence. It need not be filed at the time of production of the electronic record, definitely not be the stage of filing of the charge sheet which is the preliminary stage of the proceedings, and the subsequent filing of the certificate cannot reduce its effectiveness. The writ petition was accordingly dismissed by the court.

Again, in *Eli Lilly and Company v. Maiden Pharmaceuticals Ltd.*,<sup>5</sup> a suit filed for injunction in case of infringement of trademark and passing off in 2007, the issue before the High Court of Delhi was whether the certificate or affidavit as required under section 65-B must be filed along with the electronic evidence, or it can be filed subsequently also when the evidence extracted from the electronic record had already been filed in the court.

The counsel for the plaintiffs, in response to the objections raised by the defendant counsel on filing of some documents for the first time with the affidavit, contended that the need for filing an affidavit under sections 65-A and 65-B of the Evidence Act arose only because of the creation of separate commercial courts after

3 (2017) 1 SCC 734.

4 2016 SCC OnLine Bom. 3236.

5 2016 SCC OnLine Del. 5921.

coming into force of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Commercial Courts Act) *w.e.f.* October 23, 2015.<sup>6</sup> It was also argued that the plaintiffs have filed the computer printouts as well as CDs of the electronic record at the appropriate time and the affidavit aforesaid under sections 65-A and 65-B is in support thereof.<sup>7</sup>

Although the ratio in *Anwar*; according to the reading of Endlaw J, required the certificate/affidavit under section 65-B of the Evidence Act to accompany the electronic record when produced in the court, the later judgment of a single judge of High Court of Rajasthan and division bench of High Court of Delhi added more clarity on the issue. In *Paras Jain v. State of Rajasthan*,<sup>8</sup> the judge observed that when additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the court it is essential for the proper disposal of the case, how can the certificate under section 65B be denied subsequently if the same was not submitted along with the electronic record and not produced with the charge sheet in the court. It can be considered a curable irregularity not going to the root of the matter. Further

6 *Id.* at para 8.-Attention was also drawn to sub-rules (1), (2), (5) and (6)] of Order XI Rule 6 of the CPC as applicable to commercial disputes by the plaintiff.

7 *Supra* note 2, See, para 16 reads:

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

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

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

8 2016 (2) RLW 945(Raj): 2015 SCC OnLine Raj 8331.

9 2015 SCC OnLine Del 134647.

the division bench of High Court of Delhi in *Kundan Singh v. State*<sup>9</sup> held that the words 'produced in evidence' did not postulate that the computer output when reproduced as paper print out/optical/magnetic media must be simultaneously certified by an authorised person under section 65-B(4).

According to the court all that is required is that the person giving the certificate under section 65-B(4) should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in section 65-B(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.

It thus but has to be held, according to the single judge, that the plaintiffs are entitled to file the certificate under section 65-B of the Evidence Act, even subsequent to the filing of the electronic record in the court. Order XI Rule 6 of Code of Civil Procedure, 1908 (CPC) as applicable to commercial suits is also not found to provide to the contrary. It was also held that section 65-B of the Evidence Act and the interpretation therein applies to civil suits also.

However, the court, concurring with the recent judgements referred above, added a word of caution here that the late filing of the certificate should be allowed only if the party makes out a case for reception thereof. If the party so producing the said certificate/affidavit is unable to satisfy the court as to the reasons for which the certificate/affidavit was not filed at the appropriate time, may run the risk of the certificate/affidavit being not permitted to be filed and resultantly the electronic record, even if filed at the appropriate time, remaining to be proved, to be read in evidence.

Not only so, even if the delayed filing of the said certificate/affidavit is permitted by the court, the party producing the same may run the risk of being not able to prove the said electronic record.

Further, there is one more possibility that the person in a position to identify the electronic record and to give particulars of the device involved in the production of the electronic record and as to other matters prescribed in section 65-B(2) and in Order XI Rule 6(3) of CPC may not be subsequently available (situation discussed later in the survey in the case of *Saidai Duraisamy v. Stalin*<sup>10</sup>) or with frequent changes in technology, the device involved in the production of electronic record may not be identifiable and the certificate/affidavit may not withstand the cross-examination by the opposing counsel on the said facts, leading to the electronic record being not read in evidence and the plea taken on the basis thereof remaining to be proved.

Thus, merely because it has been held that the certificate/affidavit under section 65-B and/or order XI Rule 6 of CPC can be filed at a subsequent stage, does not mean that the parties to litigation do not file such certificate/affidavit along with electronic record produced before the court. The proof of the said certificate/affidavit, unlike other documents, will be much more stringent.

However, it will be open to the counsel for the defendant to cross-examine the deponent of the said affidavit and the proof of the said affidavit under sections 65-A and 65-B of the Evidence Act shall be subject to such cross-examination and if it is found that the deponent of the affidavit was not a competent person to issue the certificate/affidavit, needless to state, the electronic record tendered in evidence shall also not be read.

A peculiar situation anticipated by Endlaw J in *Eli Lilly*<sup>11</sup> came up for consideration before the High Court of Madras in *Saidai Duraisamy v. Stalin*.<sup>12</sup> The high court took cognisance of this application filed by the petitioners in an election petition praying for the issue of 'subpoena' to an assistant returning officer to give evidence/issue certificate for the purpose of proving the 15 CDs marked as exhibit under section 65B of the Evidence Act. The situation arose as the person marked as the competent person to issue certificate under section 65B (4), the then returning officer could not be summoned at the address furnished.

The application was opposed by the respondents contending that issue of subpoena, a time delay tactics by petitioners, would amount to abuse of process of law and illegal for two reasons:

- i. one because the plaintiff has merely submitted the CDs in the court without certificate required under section 65-B of Indian Evidence Act hence making it inadmissible;
- ii. secondly because the assistant returning officer sought to be summoned by the Petitioner who was working with the Returning Officer at that time and could not be served in the addresses furnished, was not identified as by C.W.2 as a person competent to issue certificate hence not competent to issue certificate.

The court observed that in terms of section 65-B when a statement has to be produced in evidence, it should be accompanied by a certificate showing compliance with the conditions of sub-section (2) of section 65-B of the Act. An electronic evidence without a certificate cannot be proved by means of oral evidence and also the opinion of an expert under section 45-A of the Evidence Act, cannot be resorted to make such electronic evidence admissible. Section 45-A can only be availed once the provisions of section 65-B are very much fulfilled. Therefore, compliance of the ingredients of section 65-B are now mandatory for relying upon any electronic record in a case.

Further, the court observed that an objection as to the mode of proof ought to be taken before a document is admitted and marked as exhibit. However, when the document is accepted before a court of law/trial court, the party against whom it is being brought on record is entitled to question it on the ground of its inadmissibility.

11 *Supra* note 5.

12 *Supra* note 10.

If after the admission of a particular document it is later found to be irrelevant and inadmissible one, in the eye of law, it may be rejected at any stage of the suit as per order 13 rule 3 of CPC. The court therefore directed the registry to issue subpoena to the concerned official.

### III OBSCENITY

The central issue for consideration in *Sharat Babu Digumarti v. Government (NCT of Delhi)*,<sup>13</sup> an appeal before the Supreme Court, was whether the appellant who has been discharged under section 67 of the IT Act could be proceeded under section 292 IPC? And whether an activity emanating from electronic form, which may be obscene, would be punishable under section 292 IPC or section 67 of the IT Act or both or any other provision of the IT Act.

The appellant along one Avnish Bajaj and others was arrayed as an accused in a FIR filed in 2004.<sup>14</sup> After the investigation was concluded, charge sheet was filed before the learned Metropolitan Magistrate who took cognizance of the offences punishable under Sections 292 and 294 of the Indian Penal Code, 1860 (IPC) and section 67 of the IT Act against all of them. Avnish Bajaj filed a petition for quashment of the proceedings before the High Court of Delhi which came to the conclusion that prima facie case was made out under Section 292 IPC, but it expressed the opinion that Avinish Bajaj, the petitioner in the said case, was not liable to be proceeded under section 292 IPC and, accordingly, he was discharged of the offence under sections 292 and 294 IPC. However, he was *prima facie* found to have committed offence under section 67 read with section 85 of the IT Act and the trial court was directed to proceed to the next stage of passing of order of charge uninfluenced by the observations made in the order of the high court.

Avnish Bajaj filed an appeal before the Supreme Court which referred to section 85 of the IT Act and held that the company was not assigned as a party and therefore, the director could not have been made liable for the offence under section 85 and accordingly quashed the proceedings against him.<sup>15</sup> The present appellant thereupon filed an application before the trial court to drop the proceedings against him. The

13 (2017) 2 SCC 18.

14 *Avnish Bajaj v. State* 2008 SCC OnLine Del 688.

15 In arriving at this conclusion, the Supreme Court relied upon its finding in *Aneeta Hada v. Godfather Travels and Tours (P) Ltd.* (2012) 3 SCC 661 at 688 : “Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.”

trial court partly allowed the application and dropped the proceedings against the appellant for offences under section 294 IPC and section 67 of the IT Act, however, proceedings under section 292 IPC were not dropped, and the trial court framed the charge under section 292 IPC. Being aggrieved by the order framing of charge, the appellant moved the high court in criminal revision and the single judge by the impugned order declined to interfere on the ground that there is sufficient material showing appellant's involvement to proceed against him for the commission of the offence punishable under section 292 IPC.<sup>16</sup> Hence this appeal before the Supreme Court.

Supreme held that section 67 of the IT Act clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with section 67-A and 67-B are a complete code relating to the offences that are covered under the IT Act. section 292 IPC makes offence sale of obscene books *etc.*, but once the factum of electronic record is admitted, section 79 of the IT Act must apply *ipso facto* and *ipso jure* and the protection and effect of this provision cannot be ignored and negated. It is a special provision for a specific purpose and the IT Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind section 81 of the IT Act. Section 81 specifically provides that the provision of the Act shall have effect notwithstanding anything inconsistent therewith contained with any other law for the time being in force. It is apt to note here that electronic forms of transmission are covered by the IT Act, which is a special law. It is settled position in law that a *special law* (emphasis added) shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under section 292 IPC. The court cited the observation made by it in *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.*<sup>17</sup>

Where there are two special statutes which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.

The bench therefore deduced that since IT Act covers electronic forms of transmission, it is a special law in that regard and as per the concept of '*generalia specialibus non derogant*', a general statute must yield to a special and prior laws. Further, if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. It was held :<sup>18</sup>

16 *Sharat Babu Digumarti v. State (Govt. of NCT Delhi)*, 2015 SCC OnLine Del 11591.

17 (2001) 3 SCC 71 at 74.

18 *Supra* note 13 at 33.

Section 81 of the Act also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply.

Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, section 292. Therefore the court arrived at the conclusion that when the IT Act in various provisions deals with obscenity in electronic form, it covers the offence under section 292 IPC and the high court has fallen into error in saying that though charge has not been made out under section 67 of the IT Act, yet the appellant could be proceeded under section 292 IPC. The court therefore, quashed the criminal prosecution lodged against the appellant in this case.

In the past,<sup>19</sup> the courts have, in matters of obscenity over the internet, considered the provisions of both the IPC as well as the IT Act. This judgment that way gives some relief to the intermediaries. Reaffirming the principle of *generalia specialibus non derogant*, the court has held that once the criminal act had a nexus with the electronic record, it is impossible to avoid the provisions of the IT Act, particularly the safe harbour principle under section 79.

The court made a harmonious construction while holistically reading the offence under section 292 of the IPC with sections 67, 79 and 81 of the IT Act to give effect to the legislative intent. The interpretation of the Supreme Court in this case on the interpretation of special laws enacted to address specific offences that arise out of technological advancement is a welcome precedent.

#### IV INTERMEDIARY LIABILITY IN COPYRIGHT INFRINGEMENT

In face of the growing number of copyright related issues, the safe harbour jurisprudence has undergone a major shift in the past few years. The issue of

<sup>19</sup> *Maqbool Fida Husain v. Raj Kumar Pandey*, 2008 Cri LJ 4107 wherein the High Court of Delhi 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.

intermediary privilege under section 79 of IT Act, 2000 came up before the High Court of Delhi division bench comprising of S. Ravindra Bhat and Deepa Sharma, JJ. on December 23, 2015 in the case of *MySpace Inc. v. Super Cassettes Industries Ltd.*,<sup>20</sup> involving copyright infringement. The division bench, hearing an interlocutory appeal against the interim injunction granted by the single judge, has given a significant judgment with respect to the extent and scope of safe harbour for online intermediaries under section 79 of IT Act, 2000 in instances of copyright infringement.

The suit was filed by 'Super Cassettes Industries Ltd.' (hereinafter "SCIL") against MySpace for infringing their copyright under section 51 of the Copyright Act, 1957. Plaintiff, seeking permanent injunction and damages, contended that MySpace was liable for infringement of copyright under section 51(a)(i) for communicating its work to the public without permission and authority through its website as well as under section 51(a)(ii) for generating revenue by providing a "space" for uploading of infringing material. SCIL argued that "any place" under section 51(a)(ii) would include an intangible space also just like a physical or tangible space. Further it contended that in the present case, MySpace possessed the knowledge as well as had reasons to believe that the content being uploaded was without authorization from the original owner, evident from the technological tools created by MySpace apprehending copyright violation on its website. Therefore, the exception to section 51(a)(ii) would not be invited here SCIL submitted.

SCIL also argued that MySpace's existing systems of protecting copyright – *i.e.*, terms of service agreement with its users directing them not to violate copyright, a notice-and-takedown system and a rights management tool could not absolve it of liability under copyright law.

MySpace, on the other hand, claimed to be an intermediary, and that it played no role in creating, modifying, or uploading of content on its website and therefore, protected under the safe harbour provision provided under section 79 of the IT Act. The advertisements shown just before a video played were through an automated process only.

MySpace further contended that the provisions of the IT Act and Copyright Act, 1957 are to be read harmoniously otherwise it would lead to an absurd situation where an intermediary would be absolved from liability under the IT Act but would still invite strict liability under the Copyright Act, 1957. The entire purpose for enacting section 79 of the IT Act was to shield intermediaries from liability invited by primary infringers as long as the intermediary fulfils the conditions set out in the provision including exercise of due diligence and lack of actual knowledge.

The single bench of the High Court of Delhi found favour with the contention of plaintiffs, holding that MySpace cannot take the aid of section 79 of the IT Act, 2000 since the IT Act and the Copyright Act, 1957 operate in different fields and only the Copyright Act, 1957 would apply to the case at hand by virtue of proviso to section 81 of the IT Act.

Though the single judge was of the view that no prima facie case of copyright violation was made out under section 51(a)(i) it held MySpace liable under section 51(a)(ii) *firstly* for providing a “space” for publication of infringing material<sup>21</sup> and *secondly*, it had the requisite ‘knowledge’<sup>22</sup> for being provided with entire list of such works by plaintiff, sufficient to attract liability.<sup>23</sup>

MySpace was accordingly directed to delete all unauthorised uploads and an injunction in relation to hosting on its website all of SCIL’s works including future works as and when details are provided by the plaintiff, within one week of such communication was given by the single judge’s interim order. MySpace aggrieved by the interim order of the single judge filed an appeal before the division bench for relief and quashing of injunctions passed against it.

World over conflicting opinions from different judicial systems prevail over the issue of intermediary liability. Therefore, the division bench were aware of the far reaching implications of these issues on the parties as well as public at large, both in India as well as at global level. At the same time, the court felt the need to restrict the discussion to barest minimum, to the extent possible, deciding the soundness and feasibility of the interim order only.

The crux of the argument revolves around three provisions of the relevant 51(a)(ii) of the Copyright Act, 1957; section 79 and 81 of the IT Act read with Rule 3(due diligence to be observed by the intermediary) of the Information Technology Intermediary Guidelines Rules, 2011. The following three legal issues were framed by the division bench for adjudication:<sup>24</sup>

- i. whether MySpace could be said to have ‘*knowledge*’ of infringement as to attract Section 51(a)(ii) and consequent liability;
- ii. does proviso to Section 81 override the “*safe harbour*” granted to intermediaries under Section 79 of the IT Act and ;
- iii. the possibility of harmonious reading of Sections 79 and 81 of the IT Act and Section 51 of the Copyright Act.

Since the issue of primary infringement under sec 51(a)(i) was rejected by the prior court only, the two judges bench allowed deliberation on vicarious

21 Copyright Act, 1957, s. 51(a)(ii) reads: Copyright in a work shall be deemed to be infringed- (a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-

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

22 *Ibid.* The two mandatory requirements under section 51 of Copyright Act, 1957.

23 *Supra* note 21.

24 *Supra* note 20 at para 32.

liability(secondary infringement) of MySpace under section 51(a)(ii) of Copyright Act,1957.

The court of appeal, after a detailed analysis, was convinced with the finding of the single judge that the term ‘any place’ covers even a virtual space like MySpace’s web platform falling under the above mentioned provision. The web space provider was required to prove that it was not aware/had knowledge of the infringement to avoid vicarious liability under the aforementioned provision.

What amounts to knowledge and whether, in the absence of a specific notice, ‘awareness’ or having ‘reasonable belief’ could be established as per section 51(a)(ii) were the pivotal questions before the division bench.

The single judge took general awareness to be sufficient to impute knowledge and the very presence of safeguard provisions and tools (such as notice-and-take-down) in MySpace’s user agreements according to him, signalled a “general awareness” that copyright was being infringed on its website, enough to attract liability under section 51(a)(ii).

The division bench found the ‘knowledge’ test applied by the single judge as untenable and incongruous, and observed:<sup>25</sup>

...that test overlooks that unlike “real” space, in a virtual world, where millions of videos are uploaded daily, it is impossible under available technology standards to identify the streaming content, which actually infringes. Knowledge has a definite connotation, i.e a consciousness or awareness and not mere possibility or suspicion of something likely. The nature of the Internet media is such that the interpretation of knowledge cannot be the same as that used for a physical premise.

What would constitute knowledge as to invite liability of intermediary in a given case has been a controversial issue. World over courts have tried to outline on knowledge component. The bench referred to various foreign judgments and legislations in this regard.

The Digital Millennium Copyright Act (DMCA hereinafter), the US copyright law,<sup>26</sup> a pioneer legislation with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, under section 512(c)(1)(A) has three prong

25 *Supra* note 20 at para 37.

26 DMCA was signed into law in 1998 to give effect to the 1996 Internet treaties WCT WPPT and it created a system imposing limitations on the liabilities of internet service providers when found engaging in certain types of activities. These activities carried the immunity known as “safe harbour”. Such safe harbour provisions apply as long as (i) the intermediary establishes, publicizes and implements a “Notice and Take Down” regime for removing content once a copyright owner sends a notice to the intermediary; (ii) there exists a system for identifying repeat offenders and removing them from the system and (iii) to make provisions for technical protection measures.

‘applicable knowledge standard’, apparent knowledge and expeditious removal. Actual knowledge has been interpreted narrowly to mean knowledge of specific infringing material. A general knowledge of infringing material residing on one’s site does not seem to be enough. The third prong, expeditious removal, simply requires the service provider to create a “take-down” system.<sup>27</sup>

The second prong, apparent knowledge, requires that in the absence of actual knowledge, the ISP be unaware of facts or circumstances from which infringing activity is apparent. It is known as the “red flag” test. The test can be divided more easily into two parts, a subjective part and an objective part: (1) was the service provider aware of infringing material and (2) whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances. If the answer is yes to either part, then the ISP had apparent knowledge.

In other words, the actual knowledge provision turns on whether the provider actually or ‘subjectively’ knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.

While deciding the *Viacom v. YouTube*<sup>28</sup> the court looked for specific and identifiable knowledge to extend the safe harbour provision under DMCA. Viacom International, Inc., were copyright owners whose content was infringed upon on YouTube’s website. The plaintiffs brought suit against YouTube for direct and secondary copyright infringement. In its defense, Google argued that the DMCA protected YouTube from liability because the site promptly takes down infringing content once it is notified. According to the DMCA, safe harbour protection applies if an Internet service provider like YouTube “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.”

The court held that YouTube had neither the actual nor the apparent knowledge that their website contained Viacom’s copyright protected material. It was held that YouTube (an online intermediary) qualified for safe harbour provisions under the DMCA and the court outlined the ‘red flag’ test to determine whether the defendant had specific and identifiable knowledge or just a general awareness of the infringing activity on its website. While talking of red flag the court held as under:<sup>29</sup>

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

27 See The Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A)(iii) (1998).

28 676 F.3d 19 (2012).

29 *Id.* at para 56.

‘ubiquitous’ does not impose a duty on the service provider to monitor or search its service for infringement.

In *Capitol Records, LLC v. Vimeo, LLC*,<sup>30</sup> the US Second Circuit went a step further and held that to disqualify a service provider from safe harbour, the plaintiff is under burden of proving that the defendant had actual/red flag knowledge. Interestingly the court held that mere interaction by a service provider’s employees with user videos of recognizable songs did not imply knowledge. Furthermore, a mere suspicion by the service provider’s employees that infringement was taking place on the site and sporadic incidents of alleged employee encouragement of user infringement, was insufficient to negate the safe harbour protection.

The bench holding Indian law on safe harbour to be different from DMCA however deduced in the light of the referred cases that requirement under Indian copyright law is to give specific information to the content host or the website (MySpace) that infringement occurs with respect to the specific work. A general or vague description of the works would be insufficient as this then leaves room for MySpace to rely guesswork as to what content has to be removed. Therefore, the onus is upon the plaintiff to give detailed description of its specific works, which are infringed to enable the web host to identify them.”<sup>31</sup>

The question of deemed or constructive notice, in the opinion of the court, cannot be on the basis of any generalization, without inquiry into circumstances. The division bench in *Myspace* took credence from *R.K. Mohammed Ubaidullah v. Hajee C. Abdul Wahab*, and stated:<sup>32</sup>

A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

The respondent’s notifying a list of more than one lakh songs in which it had copyright to MySpace was held to be insufficient. It is only when MySpace has specific or actual knowledge or when it has reasonable belief; based on information supplied by SCIL and if despite such knowledge or reasonable belief it fails to act can it be held liable for infringement under section 51(a) (ii).

Further, such blind and indiscriminate taking down of files, applying a general filter would further lead to multifarious disputes for causing damage to authorised individual licences and right to fair use.

Both Copyright Act and IT Act talk about knowledge – whereas section 51 talks about a system of notice section 79 contemplates actual knowledge or through

30 826 F.3d 78 decided on June 16, 2016.

31 *Supra* note at 20, para 38.

32 See *supra* note 20 at para 39 also see, (2000) 6 SCC 402.

notification by the government/its agency. The scope was widened in *Shreya Singhal*<sup>33</sup> where actual knowledge was held to mean a court order in cases relatable to article 19 of the Constitution of India.

In case of section 51(a) (ii), the only exception is that *MySpace* was not aware or had no reasonable grounds to believe that the content was infringing. Section 79(3), the court observed, perhaps is more mindful of the way the internet functions and supplemented knowledge with the term “actual knowledge”. Therefore, going by the supplementary nature of the provisions- one where infringement is defined and traditional copyrights are guaranteed and the other where digital economy and newer technologies have been kept in mind, the division bench held that the only logical and harmonious manner to interpret the law would be to read them together. Not doing so would lead to an undesirable situation where intermediaries would be held liable irrespective of their due diligence.

#### **Interplay between section 79 and 81 on intermediary liability under the IT Act**

The division bench also resolved the confusion between sections 79 and 81 of the IT Act by saying that both have to be harmoniously construed. Section 79 of the IT Act provides a safe harbour to the intermediaries by pointing out cases where the intermediary liability would not be arising. The difficulty in interpretation arises because section 79 of the IT Act contains a non-obstante to the effect that the provisions of the IT Act would override any law whereas section 81 lays down that the provisions of the Copyright Act, 1957 would not in any way be curtailed by the IT Act.

*MySpace* contended that since it complied with the requirements of section 79(2) (b) and (c), it should consequently be guaranteed protection under section 79(1) as an intermediary for observing due diligence and following government guidelines.<sup>34</sup>

SCIL challenged this argument on the ground of wilful modification of the content by the appellant and placing of advertisements to generate profits. Also, it contended that by virtue of the overriding section 81, more importantly its proviso, the safe harbour provisions would be of no avail to the appellant. Therefore, only the provisions of the Copyright Act, specifically section 51(a) would be applicable here, accepted by the single judge.

Section 79 has an overriding effect because of the non obstante clause contained therein<sup>35</sup> which means that the only restriction to be placed in the application of section 79(1) is contained within the section *i.e.*, under section 79 (2) and (3). This means that irrespective of any other law, an intermediary is guaranteed a safe harbour and the only restriction comes from section 79(2) and (3).

33 *Supra* note 1.

34 Information Technology Intermediary Guidelines Rules, 2011, r. 3(4).

35 Information Technology Act, 2000, s. 79- Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3).

However, the added twist in construction arises due to the proviso under section 81. Section 81 too provides for an overriding effect of the Act because of the proviso attached.<sup>36</sup>

According to the reading of the two judges, the legislative intent in amending section 79 and adding proviso to section 81 by way of amendment of 2009 was not to interfere with the rights of copyright and patent holder/owners under Copyright Act, 1957 and Patents Act, 1970 respectively. The language of Rule 3(2)(d)<sup>37</sup> of the Intermediary Guidelines Rules, 2011 further substantiated this construction. Section 79, the court held, merely sets up a scheme where the intermediaries have to follow certain minimum standards to avoid liability thereby providing an affirmative defence, not blanket immunity from liability. The court held:<sup>38</sup>

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

It was observed by the court that Copyright Act, 1957 does not define/ contain specific protection provision for internet intermediaries except under section 52 and

36 *Id.*, s.81 reads: Act to have overriding effect - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970).

37 Due diligence to be observed by intermediary — The intermediary shall observe following due diligence while discharging his duties, namely : —

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

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

38 *Supra* note 20 at para 51.

the infringement contemplated under section 51 is also in general terms without differentiating between virtual and actual physical space. Realising the unique characteristics of internet and internet intermediaries, a special regime was created by the parliament for the intermediaries, providing them qualified immunity (safe harbour provision) in case of third party generated/uploaded content. At the same time, it was quite mindful of the implications of the width and sweep of section 79 therefore, avoided blanket immunity to intermediaries by inserting proviso in section 81.

Further, section 79 itself had an overriding clause which, according to the division bench, meant “that the only restriction to be placed in the application of section 79(1) is contained within the section under clauses (2) and (3).

The division bench clarified that the remedies of the intermediaries would be available and the same shall not stand precluded by virtue of section 81 of the IT Act. The appeal was allowed by holding that the plaintiff *i.e.*, SCIL will have to discharge the burden of pointing out the exact violation for MySpace to take it off their website and the same shall be done within 3 weeks as is contemplated in Rule 3(4) of the Information Technology (Intermediary Guidelines) Rules, 2011.

This decision is landmark in the sense that it has contributed to a great extent to an evolving international jurisprudence on online free speech and intermediary liability. The analysis of actual knowledge for intermediaries under the copyright law in the judgment is quite innovative though its finding could have added more clarity on interplay between copyright law and IT Act. The high court has not only paid close attention to the peculiarity/unique characteristics of the internet, it has also tried to ensure that the flexibility of internet is not suppressed by literal application of legal concepts developed for the offline world. Most importantly, the judgment desist following the recent trend of granting *qua timet* injunctions accompanied by *John Doe* orders as practiced by some of the high courts especially the Delhi high court.

One of the orders passed by the supreme court on November 16, 2016 in the case of *Sabu Mathew George v. Union of India*<sup>39</sup> is worth discussing here wherein it discussed the issue of internet intermediary liability in two situations: one; for causing advertisements, and two; for causing organic searches, on pre-natal determination or pre-conception selection of sex (PNDPS) to be displayed on their platforms.

The publishing, distributing or communicating, or causing to be published, distributing or communicating advertisements on pre natal sex determination is a punishable offense in India as per section 22 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT Act). The petitioner, an activist, submitted that despite the legal prohibition, the respondents, namely, Google India, Yahoo India and Microsoft Corporation (I) Pvt. Ltd., display advertisements for the sale of sex determination kits online in violation of the legal provision contained in the PCPNDT Act, 1994.

39 2016 SCC On Line SC 681.

In the previous hearing, the court took notice of the submission of the solicitor general that the companies are bound to develop a technique so that no one can enter/ see the said advertisement or message or anything that is prohibited under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, specifically under section 22 of the said Act. The solicitor general had submitted a 'proposed list of words' and put forth that the principle of "auto-block" should be applied to the said words.

The respondent companies submitted before the apex court that the intent behind section 22 of the PCPNDT Act is to expressly prohibit an advertisement that is a commercial communication and does not extend to other forms of content including "search results, videos, blogs or images". Access to information of any nature, unless it is not advertisement, which is prohibited under section 22 of the 1994 Act, would come within the freedom of access to have information. The doctrine of auto-block, as proposed by the solicitor general can easily lead to legitimate information being censored. Even if the website uses the words in a legal manner, access is blocked because of the mere presence of the questionable terms. This leads to censorship of potentially legal information, and thereby dilutes the right of freedom of speech and expression.

Further, at this stage of hearing the counsel for Google India Private Limited urged the bench comprising of Dipak Misra and Amitava Roy JJ that section 22 of the 1994 Act only relates to advertisement and cannot travel beyond it. According to him, section 79(1) of the IT Act, 2000 as amended by the Information Technology (Amendment) Act, 2008, has been read down in *Shreya Singhal* so that it could be constitutionally treated as valid.<sup>40</sup>

Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

40 *Supra* note 1 at 181.

It was contended by the respondent companies that the term “advertisement” has to be understood in the commercial sense and neither section 22 of the 1994 Act nor the Explanation carries the meaning to a greater horizon, therefore, it required further debate. Additional Solicitor General appearing for the Union of India contended today is that the term “advertisement” as used in section 22 of the 1994 Act, if read in conjunction with Explanation appended thereto, is an inclusive definition and not restricted to the advertisement as is understood in common parlance therefore a broader meaning has to be conferred.

In this order on November 16, 2016, the apex court has been very forthcoming in holding that intermediaries are responsible for the content that is displayed on their platforms. While it was contended by respondent-companies that access to information of any nature, unless it is not advertisement, which is prohibited under section 22 of the 1994 Act, would come within the freedom of access to have information, the bench took reference from affidavit filed by Union of India which in paragraph 9 read:<sup>41</sup>

The Section 22 and the explanation appended to it is very wide and does not confine only to commercial advertisements. The intention of law is to prevent any message/communication which results in determination/selection of sex by any means what so ever scientific or otherwise. The different ways in which the communication/messages are given by the internet/search engine which promote or tend to promote sex selection are prohibited under Section 22.

The apex court held that it cannot be doubted that there has to be freedom of access to information, however, such freedom cannot violate a law that holds the field. Referring to its earlier judgements,<sup>42</sup> the bench highlighted apex court’s concern and pro active approach with regard to the decreasing sex ration. Taking note of the innovative approaches/techniques adopted on internet to send across information and advertisements pertaining to gender test, gender test in pregnancy, gender test kit in India etc, the court categorically held that intermediaries were responsible to take down such content under section 22 of the PCPNDT Act. The whole objective of PCPNDT Act according to the two judges stands defeated by adopting a restrictive construction of the term ‘*advertisements*’ in the abovementioned provision.

However, earlier orders from the court on this case were widely criticised by advocates of free speech for over-censorship for its recommendation of the controversial ‘doctrine of auto blocking, and for failing to distinguish advertisements from organic search results.

41 *Supra* note 39 at , para 9.

42 *Centre for Enquiry info Health & Allied Themes (CEHAT) v. Union of India* (2001) 5 SCC 577, *Centre for Enquiry into Health & Allied Themes (CEHAT) v. Union of India* (2003) 8 SCC 398, *Voluntary Health Association of Punjab v. Union of India* (2013) 4 SCC 1 and *Voluntary Health Association of Punjab v. Union of India* 2016 (10) SCALE 531.

In its earlier order on September 19, 2016, the court directed the respondents to develop a “technique so that the moment any advertisement or search is introduced into the system, that will not be projected or seen by adopting the method of auto-block.” This, “doctrine of auto-block”, as per the Supreme Court, shall ensure that no one can access information that is prohibited under the Act. In order to develop these techniques, a list of words was approved for which auto-completion and results would be blocked and a warning would be showed. The Supreme Court also stated that this has to be an in-house procedure introduced by search engines to pro-actively filter content.

To further prevent contravention of the Act, the Supreme Court in its order on November 16, 2016 stated that a nodal agency should be set up which will provide search engines the details of the website to be blocked because they were acting in contravention of the Act.

The search engines are required to take it down within 36- hours and intimate the nodal agency. This all would be done without the court examining the legality of specific requests raising concerns that this was not in keeping with the precedent set in the *Shreya Singhal*, which in fact widened safe harbour immunity of internet intermediaries by requiring take down of content only after it is confirmed by judicial or executive order.

The nodal agency established as per this order also conflicts with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009. The rules provide for setting up a committee to ‘review’ each blocking request and ‘verify’ as per sec.69A of the IT Act for blocking the access to any website/link within 48 hours. The order does not refer to any framework for the review of blocking orders to ensure conformity to section 69 of the IT Act - and as has been laid down by the Rules.

The nature of the ban in this order appears to be more generic rather than content-specific. The censorship/blocking is on the basis of a list of words and their possible combinations, and these words in themselves may not necessarily be illegal - and could in fact often result in censorship of plain medical literature and other likely legitimate discussions pertaining to this subject.

Although the judges were mindful to point out the importance of freedom of expression in the virtual world however, while applying this constitutionally protected right, the court did not go all the way. So, while erecting an in house mechanism to take down content violative of section 22 of the PCPNDT Act, it failed to provide for the right to be heard /to challenge the taking down to the author of the content or the intermediary. Since it was an interlocutory order one cannot expect the court to go in for a full dress argument on these aspects of issues involved.

In another case *Google India Private Limited v. M/s Visaka Industries Limited*,<sup>43</sup> the High Court of Andhra Pradesh had the occasion to deal with the applicability of

the safe harbour under section 79 of the IT Act. In this case, certain politicians had alleged that some articles available on Google had defamed them. Despite having been notified, Google India Private Limited ('Google India') did not remove access to these articles. Google India relied upon the defense of safe harbour under section 79 and claimed immunity. The court held as follows:<sup>44</sup>

... the principle laid down in all the judgments is only based on actual knowledge about posting of defamatory or any content by the 3<sup>rd</sup> parties on the web-blog. The same is the language used in Section 79(3) (b) of the Information Technology Act. Added to that another safeguard is provided under Rule 3 of the Rules framed there under i.e. exercise of due diligence. If the intermediary exercised due diligence and when such posting of defamatory content in the web-blog came to their actual knowledge or brought to their actual knowledge, the intermediary has to take steps to block access to such content or remove such content from the blog after due verification.

Further the court observed that the question whether any actual knowledge was attributed to the intermediary by the plaintiff and whether the intermediary exercised due diligence being a question of fact, required court to deduce evidence from both the parties something which cannot be gone into by the court in second appeal while exercising power under section 100 of CPC.

Even if any knowledge is attributed to the defendant no. 2, it has no control over the website and defendant no. 3 alone was competent to remove or block any such postings of defamatory material on verification in the given circumstances. Therefore, the judgment of the trial court and first appellate court in issuing mandatory injunction was held to be erroneous and inconsistent and unsustainable under law. As per the high court, though trial court had rightly exonerated the defendant no.2/ appellant from its liability and the same was affirmed by the first appellate court also in paragraph 21 (b) of its judgment, the finding on mandatory injunction was faulty. The case is currently under appeal before the Supreme Court of India.

#### V REGULATION OF SEARCH ENGINES AND INTERMEDIARIES

While deciding the plaint in *Ashish Bhalla v. Suresh Chawdhary*,<sup>45</sup> filed for claiming permanent injunction and damages against the aggrieved party, the bench of Rajiv Shai Endlaw J ordered to dismiss the plea against the defendant because of the absence of substantive subject-matter and cause of action.

<sup>44</sup> *Id.* para 104.

<sup>45</sup> 2016 SCC OnLine Del 6329.

In this case, plaintiff filed a suit seeking permanent injunction and damages for defamation against Vishal Dubey who was the administrator of a telegram and Google group on which the allegedly defamatory statements were made.

The court observed that in a suit of defamation, the defamatory words uttered or written are required to be pleaded and if the plaintiff has not pleaded the same, the plaintiff cannot rely on the documents. The document which was produced by the petitioner did not qualify to be defamatory rather than it was found to be complimentary statement which does not amount to defamation. Hence the court relied upon the facts and evidence produced by the party and found nothing derogatory and defamatory against the defendant and ordered that the plaint does not disclose any cause of action against the defendants and therefore rejected the plea by the petitioner. Though the high court judgment said administrators are not to be held liable, it cannot be seen as conclusive judicial determination on the issue. The case has been dismissed also for other reasons like the absence of substantive subject-matter and cause of action. Rajiv Sahai Endlaw J said:<sup>46</sup>

I am unable to understand as to how the administrator of a group can be held liable for defamation, even if any, by the statements made by a member of the group. To make an administrator of an online platform liable for defamation would be like making the manufacturer of the newsprint on which defamatory statements are published liable for defamation.

WhatsApp updated its privacy policy on August 25, 2016 for the first time since its acquisition by Facebook in October 2015. As per the updated policy, user information including name/phone number was to be shared by WhatsApp with Facebook and its group of companies so as to serve more relevant ads and improve product experiences, and users were given a 30-day grace period to 2016 to agree to the changed terms and privacy policy in order to keep using the App. This raised concerns among the users leading to this writ, *Karmanya Singh Sareen v. Union of India*,<sup>47</sup> filed in public interest against WhatsApp, Facebook, Union of India (UOI) through its Department of Telecommunications (DoT) and the Telecom Regulatory Authority of India (TRAI) by two users. It was contended that the new policy severely compromised the rights of users and violated their privacy as such data was to be used for commercial exploitation, catering to advertising and marketing needs.

They prayed to the court that WhatsApp should undo the changes to its privacy policy, and also requested that the government be ordered to frame rules or guidelines

<sup>46</sup> *Id.*, at para 17.

<sup>47</sup> 233 (2016) DLT436.

so that Internet-based messaging apps do not compromise on users' privacy. One of the directions sought from the Court by the Petitioners was, "A FULL OPT OUT option to Users from their information being shared with Facebook and its family of companies. This can be simply done by adding a button *viz.*, DON'T SHARE".

The division bench of the court was informed by the counsel for the government that internet service providers regulation was within the purview of the Telecom Regulatory Authority of India Act, 1997 and regulations thereunder but there was no statutory framework to regulate internet messaging applications. However, in 2105 TRAI issued a discussion paper on Over-The-Top (OTT) services<sup>48</sup> and the court was informed that further process to bring such services under regulation net was underway.

On the other hand, WhatsApp argued that it does not share data protection of voice and messages, so no part of the content which is exchanged between two individuals is ever revealed to third party and that their action is compliant with section 79 of the IT Act.

The court was of the view that users of the App were bound by terms as they chose to opt for the services of the App voluntarily. The court also observed that the position regarding existence of fundamental right to privacy was not clear as the issue was pending disposal before the Supreme Court of India.<sup>49</sup> The court held:<sup>50</sup>

Be that as it may, since the terms of service of "WhatsApp" are not traceable to any statute or statutory provisions, it appears to us that the issue sought to be espoused in the present petition is not amenable to the writ jurisdiction under Article 226 of the Constitution of India. We are, therefore, of the view that it is always open to the existing users of "WhatsApp" who do not want their information to be shared with "Facebook", to opt for deletion of their account.

However, the court issued certain directions to protect the interest of the user community of the app including directing non-sharing of user information if user deletes account before September 25, 2016 and non-sharing of data up to September 25, 2016 of the continuing users. The court also directed that such applications should be brought under regulatory net at the earliest. This case turns light on the vacuum in the regulatory regime on internet based applications operating in the country. High

48 Consultation Paper On Regulatory Framework for Over-the-top (OTT) services,2015 at 4: OTT services refers to applications and services which are accessible over the internet and ride on operators' networks offering internet access services, for example social networks, search engines, amateur video aggregation sites, etc. like WhatsApp, Skype, Snapchat, Instagram, Google Talk, Hike, Facebook messenger, etc. *available at* [http://: http://www.trai.gov.in/sites/default/files/OTT-CP-27032015.pdf](http://www.trai.gov.in/sites/default/files/OTT-CP-27032015.pdf)(last visited on Sep. 15, 2017)..

49 *K.S. Puttaswamy (Retired) v. Union of India* (2015) 8 SCC 735.

50 *Supra* note 47 at para 18 and 19.

court therefore disposed off the petition by issuing directions to protect interest of users some of which are given as under:<sup>51</sup>

- i. If the users opt for completely deleting “WhatsApp” account before 25.09.2016, the information/data/details of such users should be deleted completely from “WhatsApp” servers and the same shall not be shared with the “Facebook” or any one of its group companies.
- ii. So far as the users who opt to remain in “WhatsApp” are concerned, the existing information/data/details of such users upto 25.09.2016 shall not be shared with “Facebook” or any one of its group companies.
- iii. The respondent Nos. 1 and 5 shall consider the issues regarding the functioning of the Internet Messaging Applications like “WhatsApp” and take an appropriate decision at the earliest as to whether it is feasible to bring the same under the statutory regulatory framework.

#### VI CONCLUSION

Different supreme court and high court judgments in 2016, covered under this survey, though not in good number, have built upon the foundations of cyber law jurisprudence which has been placed at a strengthened position in the preceding years especially in the year 2014 and 2015. The judicial determinations on various issues related to matters like internet intermediary liability, electronic evidence and obscenity would further help in contributing to the evolving cyber law jurisprudence at global, regional and national levels. It would be interesting to follow discussions and court findings in the coming year in some of the ongoing litigations in the Supreme Court like *K.S. Puttaswamy*<sup>52</sup> *Kamlesh Vaswani v. UOI*.<sup>53</sup>

51 *Id.*, at para 20.

52 *Supra* note 49.

53 W.P(C) No. 177/2013.

