

Freedom To Speech And Expression- A Different Threshold ‘Online’ Vis-à-vis ‘Offline’ Mediums

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“If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter.”

George Washington

Abstract-On 24.03.2015 the Hon'ble Supreme Court of India (“SC”) vide its final order and judgment in the Shreya Singhal v. Union of India¹ struck down the Section 66A of the Information Technology Act, 2000 (as amended by the Information Technology Amendment Act, 2008) (“Act”) as being contrary to Article 19 and 21 of the Constitution as Section 66A, finding it impossible to save any part of the provision applying the doctrine of severability and declared the provision to be unconstitutional.

Keywords- Freedom, Hon'ble Supreme Court of India (“SC”), Information Technology Amendment Act, 2008

I. INTRODUCTION

While the netizen rejoiced with the verdict and hailed the SC to be the protector of Article 19 and 21 of the people of India, those fundamental rights which allows one the right to freedom to speech and expression and their right to live. However, the same was not the ground reality in the parts of India. While more than enough has been said on the events leading to the challenge of Section 66A of the Act by every netizen, the true intent or rather the bifurcation of the criminality of Indian Penal Code, 1860 (“IPC”) and the Act were not dwelled into or even the fact as to why freedom of speech and expression had different test platforms in different statutes.

II. GENERALIA SPECIALIBUS NON-DEROGANT (GENERAL WORDS DO NOT DEROGATE FROM SPECIAL PROVISIONS)

To succinctly state, IPC and the Act are not co-dependent to each other as the Act has its own provisions and punishment in Chapter XI which governs the issue of offences in the cyberspace i.e. virtual space as compared to the offences as committed in the Real or the physical world, which simply means that if an offence that happens in the cyberspace and is covered under the Act then the Act and its provisions would apply which have a considerable larger duration of punishment and monetary fines.

When the Act was passed by the parliament, the prime objective of the Act was initially only the legal recognition

¹ (2015) 5 SCC 1

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of transactions carried out by means of electronic data interchange and similar means of electronic communications including emails and the internet. A brief perusal of the provisions under part XI of the Act is enough to determine that some provisions are quite stalemated while some are likely to lead to litigation due to ambiguity and vagueness simply because the part XI of the Act is correlated to part IX i.e. Penalties, compensation and adjudication. Be that as it may, the Act is currently the only piece of legislation which remotely tries to regulate cyberspace.

As legal principle goes the rule stipulating that specific provision prevails over the general provision was noticed by the Apex Court way back in the year 1961 in *J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. State of Uttar Pradesh and other*², which reads as under:-

“The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.”

Thereby, applying this rule of construction, it was held by the Apex Court in *J.K. Cotton*³ that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision. The same has been consistently followed by the SC till date.

In fact, the SC in a recent ruling of *Sharat Babu Digumarti v. State of NCT*⁴ of Delhi in relation to the Act and IPC relying on *Talcher Municipality v. Talcher Regulated Market Committee*⁵ “The provisions of the said Act, therefore, would prevail over the provisions

of the Orissa Municipal Act. The maxim “*generalia specialibus non derogant*” would, thus, be applicable in this case. (See *D.R. Yadav v. R.K. Singh*⁶, *Indian Handicrafts Emporium v. Union of India*⁷ and *M.P. Vidyut Karamchari Sangh v. M.P. Electricity Board*⁸.)” and eventually held once any special provisions which have an overriding effect do cover an act of criminal nature and related offender, IPC won’t be applicable, in the present case, the case was an interplay between Section 292 IPC in the present case solely as any and all forms of electronic forms of transmission is fully covered by the Act, being a special law and it is settled position in law that in such a scenario a special law shall always prevail over the general or the prior laws.

III THE PROBLEM

But in the aforesaid scenario, Section 66A despite getting declared as unconstitutional by the SC didn’t get affected. In the legal sense, a declaration of unconstitutionality results in rendering a provision void ab initio either

²*AIR 1961 SC 1170*

³ *See Supra* ¶29.

⁴ (2017) 2 SCC 18

⁵ (2004) 6 SCC 178

⁶ (2003) 7 SCC 110

⁷ (2003) 7 SCC 589

⁸ (2004) 9 SCC 755

wholly or in part, essentially meaning the date the verdict of Shreya Singhal⁹ came into existence, Section 66A ceased to exist from the date of its insertion into the Act i.e. 27.10.2009 and as a consequence, all investigations, prosecutions and convictions based on Section 66A would be termed as illegal and it would forestall any use of Section 66A after the decision was rendered i.e. 24.03.2015 and effectively all cases terminated and/or quashed.

However, a research paper published by IFF Working Paper No. 02/2018¹⁰ gave out instances that Section 66A continued to be used in the Indian framework despite the SC striking down the said provision. These instances were further highlighted by the media as well. Some of the instances that came involved a case of a 22 year being arrested from Greater Noida on a complaint that he had morphed picture of the chief minister of Uttar Pradesh for an offence under Section 66A, however, post media reports the charging provisions were modified to Section 153A¹¹ IPC and Section 6612 of the Act. Similarly, another instance was seen where one Zakir Ali Tyagi was booked under Section 66A for posting a comment on Facebook questioning the judgment of the “Living Entity Ganga¹³”, and spent 42 days in jail. Eventually, post his bail the charges were modified to Sedition and for an offence under Section 6614 of the Act.

⁹Supra

¹⁰Sekhri, Abhinav and Gupta, Apar, *Section 66A and Other Legal Zombies (October 31, 2018)*. IFF Working Paper No. 2/2018. Available at <https://ssrn.com/abstract=3275893> or <http://dx.doi.org/10.2139/ssrn.3275893>

¹¹153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony. (1) *Whoever*

(a) *by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or*

(b) *commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, 2[or] 2[(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,] shall be punished with imprisonment which may extend to three years, or with fine, or with both. Offence committed in place of worship, etc. (2) *Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.**

¹²66. Computer related offences. -*If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both. Explanation. -For the purposes of this section, -(a) the word “dishonestly” shall have the meaning assigned to it in section 24 of the Indian Penal Code (45 of 1860); (b) the word “fraudulently” shall have the meaning assigned to it in section 25 of the Indian Penal Code (45 of 1860).*

¹³Mohd. Salim v. State of Uttarakhand; Writ Petition (PIL) No. 126 of 2014 vide judgment dated 20.03.201; see also <https://www.livelaw.in/first-india-uttarakhand-hc-declares-ganga-yamuna-rivers-living-legal-entities/>

¹⁴Supra 13 and 14

However, it is pertinent to note that the SC vide its order dated 07.07.2017¹⁵ stayed the impugned order and advocates and judges commenting, critiquing the said judgment were not arrested anywhere else.

While dropping an alphabet from the provision is the name of the game, the two provisions(66 and 66A) are vastly different as the former deals with issues on unauthorized access, hacking and tampering with documents and monetary losses whereas the latter was a restriction of free speech.

The research paper considered various media reports, data from National Crime Records Bureau and also looked into the various offences under the Section 66A by looking into various legal databases and found out a staggering amount of 45 cases for the period of January 2018 to September 2018 from Indiankanoon.com and over 21 cases for the period of March 2015 till September 2018¹⁶.

From a bare perusal of these cases which pertain to the existence of several quashing petitions filed in and pending before various high courts and the pending trials in the trial courts. It is amply clear that both trial courts and prosecutors are not actively and effectively implementing the decision of the SC and as a result of which the charges of Section 66A are unfairly and illegally being imposed on the innocent persons and in clear and direct contravention of the fundamental rights of such accused persons under Article 19(1)(a) and 21. It is an unconscionable deprivation of fundamental rights of such persons, in fact, such inactions of the state clearly send out a message far and find that despite Article 14¹⁷ and the decision of the SC is subject to such abuse by state authorities, police owing to their sheer ignorance of law within the legal system.

The issue was also felt by various bodies such People's Union For Civil Liberties, who approached the SC highlighting this issue vide an M.A 3220 of 2018 in the disposed of matter of Shreya Singhal¹⁸ and brought to the attention of the SC. The SC equally shocked with this aspect vide its order dated 15.02.2019¹⁹ directed that the aforestated judgment would be made available by every High Court in this country to all the District Courts and further directed the Union Government to make available copies of this judgment to the Chief Secretaries of all the State Governments and the Union Territories, who will in turn, sensitise the police departments in this country by sending copies of this judgment to the Director-General of Police in each State.

¹⁵*State of Uttarakhand v. Mohd. Salim; Petition for Special Leave to Appeal No. 016879 of 2017; See also:- <https://www.livelaw.in/sc-stays-uttarakhand-hcs-order-declaring-ganga-yamuna-rivers-living-legal-entities-read-order/?infinitemscroll=1>*

¹⁶*Supra* 11.

¹⁷*141. Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India*

¹⁸*People's Union For Civil Liberties v. Union of India; M.A 3220 of 2018 in Writ Petition (Criminal) No. 199 of 2013*

¹⁹*Supra* 19

III. CONCLUSION

The entire aspect of writing the present paper is only to highlight that different threshold is still being applied by the Union and State government by holding the citizens to a different threshold and pedestal by way of an unconstitutional law when they post something online as compared to an offline mode of communication and the immediate need of the hour for everyone to know that this is not all right and shouldn't be dealt in such a casual manner as the same is in a clear violation of Article 19 and 21 of the Constitution.

Article 141²⁰ clearly states and declares that once a law is declared by the SC, it is binding each and every person in India; Period. However, the Union government is planning to revise and bring Section 66A in its new form and avatar but until that amendment is formally notified, the law of the land remains that Section 66A has been struck off in all its glory and all pending cases are to be dealt in the manner wherein the said provision of law doesn't exist which includes any and all matters which have Section 66A as a part of the criminal proceedings, the same has and ought to be dropped.

Furthermore, the government should consider bringing a wholesome legislature which distinguishes the problems of the online world with more finesse rather than an Act simply being modified piecemeal by an amendment which happened more than 11 years ago, the Act is not even close to decipher and comprehend the level of offences which are taking place in India and only because this is the sole act which talks and determines the issue of cyberspace, the authorities and people alike are bound to follow it with whatever limited understanding they can leaving it open for the courts to decipher the intent and interpretation of the Act.

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²⁰*Supra* 18