MOMENTOUS VICTORY OR PILLOW SHAM: A CRITIQUE ON SHREYA SINGHAL v. UNION OF INDIA

-

- **Anuj Bhansal and Shubham Chaudhury***

ABSTRACT

The scrapping of S. 66-A of the Information Technology Act, 2000 by the Supreme Court of India in Shreya Singhal v. Union of India for being violative of Article 19 (1) (a) of the Indian Constitution has received much appreciation and is expected to catalyze positively the realization of free speech in cyber space.

Authors have however attempted to evaluate the merit in such claims so as to determine if the judgment progressively contributes to the Indian Democracy by strengthening the fundamental freedom of speech and expression or it is a hollow shield apparently safeguarding the hallowed freedom. The strength of arguments advanced against the constitutionality of S. 66-A as well as the other impugned provisions, namely S. 69-A and S. 79 of the Act has been observed so as to put forth the fallacies contained therein, which makes it palpably clear that the Honourable Court has created a bedlam by proceeding along two inconsistent jurisprudential approaches by deploying variable connotations to homogenous submissions. It is somehow unfortunate that the constitutionality of impugned provisions has been gauged considering a priori ideals rather than empirical standards since the court acknowledges a bundle of factors as significant at one place and irrelevant at another. Authors have also highlighted as to how the court has

* Student, Third year, B.A LL.B (Hons.), Ram Manohar Lohia National Law University, Lucknow

committed a breach of constitutional spirit while applying the doctrine of severability.

It is concluded that reading down of S. 66-A serves no good for the betterment of free speech in electronic age owing to a large number of statutory provisions which are much more draconian in nature and arbitrary in action as compared to S. 66-A.

1. INTRODUCTION

The fortress of democracy elevates on the pillars of freedom, and freedom of speech and expression is indubitably one such pivotal pillar which enjoys the status of a fundamental right vested in every citizen of India by the virtue of Article 19 (1) (a) of the Indian Constitution. Supreme Court of India, acting as the guardian of Indian Constitution has time and again invalidated the statutory provisions contravening this freedom.[1]

With the advent of technological era, serious threats have been posed to the state machinery under the guise of freedom of speech and expression owing to the widespread reach of technology. It is therefore indispensable for the state to intervene by enacting legislations to curb down such abuse[2] and Section 66-A of the Information Technology Act, 2000 is one such legislation. However, the apex court reading it down in the historic case of *Shreya Singhal v. Union of India*[3] held it to be violative of Article 19 (1) (a) on account of vagueness that encumbered the freedom in an arbitrary and disproportionate manner. The validity of S. 69-A and S. 79 was however upheld. While many comments have already popped up commending

[1] See Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305; Bennet Colemon Co. v. Union of India, (1972) 2 SCC 788; RomeshThappar v. State of Madras, AIR 1950 SC 124.

[2] See Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 Harvard Journal of Law& Technology 236 (1998), available athttp://jolt.law.harvard.edu/articles/pdf/v12/oldNonPaginated(DONOTUSE)/12Harvard Journal of Law and Techmology 149.pdf, last seen on 30/07/2015.

[3] Shreya Singhal v. Union of India, (2015) 5 SCC 1.

the momentous victory of freedom of speech and expression[4], there is a dearth of analysis on the other side of it. Authors have attempted to dwell into the same in order to figure out if scrapping the impugned provision actually solves the problem.

Part II of the comment discusses the fallacies in the arguments considered by the court in invalidating the impugned law while the justifications over constitutionality of S. 69-A vis-à-vis S. 79 of the act have been questioned in Part III, followed by the suggestive conclusive remarks of the authors.

2. VALIDITY OF S. 66-A: VERACITY OF CLAIMS

Element of vagueness in S. 66-A was not severable and was determined to be lethal for its constitutionality whereas the provision was not held to be violative of Article 14. This part puts to test all such claims on the touchstone of free speech jurisprudence in India to figure out the accuracy contained therein.

2.1. Vagueness and Unconstitutionality: Where to toe the line?

Imprecision not necessarily means vague and vagueness in law is desired many a times since a strait jacketed provision may leave scope for orifices using which the wrongdoers might escape the liability, thus defeating the objective law sought to achieve.[5] However, the legislature cannot set a net large enough to catch all possible offenders and leave it to the court to step in and say who could be rightfully detained and who should be set at liberty.[6] To put it simply, such vagueness paves way for arbitrary exercise of authority if it crosses the threshold of reasonableness. It becomes undesirable when the

[4] See Sunil Abraham, *Shreya Singhal and 66-A: A cup half full and half empty*, L (15), Economic & Political Weekly 12, 15 (2015) available athttp://cis-india.org/internet-governance/blog/shreya-singhal-judgment.pdf, last seen on 30/07/2015.

[5] See Wil Waluchow, Stefan Sciarffa, *Philosophical Foundations of the Nature of Law*, 71 (1st ed., 2013).

[6] United States v. Reese, 92 U.S. 214 (1875, United States Supreme Court).

persons applying it are in a boundless sea of uncertainty[7] and cannot possibly determine the stretch of such law.

Section 66-A was held to be vague in its scope and application for the indeterminate language in which it was couched. Analyzing the rulings of English Courts in cases cited, the court opined 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.[8]

It should be noted here that the process of adjudication is based neither on the notions of *a priori* ideals which the adjudicator seeks to achieve nor on the felicific calculus of its pros and cons.[9] It is rather guided by a sociological balancing of interests which essentially involves both quantitative and qualitative analysis.[10] Whenever divergent stands are encountered by the court, it resorts to the aid of sociological approach, as vigilant from the evolution of 'rarest of rare' doctrine in *Bachan Singh.*[11] The court in this case not only failed to carve out the merit in the above stated contention but also stretched the application of doctrine of vagueness to what seems to be an illogical extent. Such failure is substantiated by the misapplication of the *Kedar Nath*[12] to the present context where S.124-A of the Indian Penal Code was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It is unclear as to why such narrow construction of the impugned provision is not feasible which has deliberately been left hung in the corridor of uncertainty by the court.

---

[7] K.A. Abbas v. Union of India, (1970) 2 SCC 780.
[8] Supra 3, at 86.
[9] Philippe Nonet, Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, 93 (1st ed., 2001).
[10] R.W.S. Dias, *Jurisprudence*430 (5th ed., 2014)
[11] Bachan Singh v. State of Punjab, (1982) 3 SCC 24.
[12] KedarNath v. State of Bihar, AIR 1962 SC 955.

The court also discussed some provisions of the Indian Penal Code language of which stood on the same pedestal as that of the impugned provision in order to emphatically illustrate the dividing line between an acceptable threshold of vagueness in law and otherwise. Illustration using S.294 of IPC, which punishes obscene acts essentially adds to the ambiguity for that it provides only for an inclusive definition of obscenity which is equally capable of being applied arbitrarily owing to its vagueness since the guilt under the provision shall depend on the notions in which obscenity is perceived by the executive, thus rendering the situation no better than what is contained in the impugned provision. Moreover, it is surprising to witness that S. 298 of IPC (reproduced as under) was not taken into consideration even though it also contains imprecise, rather vague terms as S. 66-A of the IT Act.

> *298.* ***Uttering, words, etc., with deliberate intent to wound the religious feelings of any person****—Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.*[13]

While the above stated provision is a clear violation of Article 19 (1) (a), it is obvious that the **"wounding of religious sentiments"** is a facet highly variable dependent upon the quantum of belief existent in an individual. The precedential test of determining vagueness as employed by the court therefore falls foul for being unjustifiable to S. 298 of IPC.

As far as the question over the element of Mens Rea in the impugned provision is concerned, there has to be a presumption of the presence of fault element as a constituent in every crime unless it has been explicitly ruled out by the legislature or the implied ruling out of Mens Rea is compellingly clear.[14] The court concluded in haste the absence of Mens Rea

---

[13] S. 298, The Indian Penal Code, 1860.

[14] K.A. Pandey, *Principles of Criminal Law in India: Cases and Materials*, 97 (1st ed., 2014).

without explaining as to how it interpreted such an implication from the statute.

2.2. *Was S. 66-A really inseverable?*

It has already been explained as to how there are innumerable vague laws existent on statute books and that the vagueness in Section 66-A is not fatal to its validity. Being the guardian of Indian Constitution, Supreme Court is laden with the responsibility of ensuring its infallible implementation and owes a duty to apply the sacrosanct doctrinal aspects embedded thereof.[15] However, the court in the instant case seems to have set a bad precedent by refusing to resort to the doctrine of severability primarily because the submissions made on behalf of the government in that regard were vague.[16]

Doctrine of Severability is contained in Article 13 (1) of the Indian Constitution, which explicitly states that a law contravening with the provisions of Part III shall be invalid to the extent of contravention. It is clear from the multiple rulings of the court that the doctrine is not applied only in the cases where it is impossible to segregate the contravening and non-contravening provisions of the impugned law, which is not the case here.

Placing heavy reliance on *Romesh Thapar*,[17] court opined that the sole test for determining if provisions of an impugned law are severable or not is to see whether the provisions are possible to survive after split up. Anticipating failure of such split up, the court rejected the application of severability without putting forth any plausible reasons for the same. It is submitted that even if the court held the impugned law to be substantially vague, S. 66-A (b) and S. 66-A (c) could have been spared from the axe of unconstitutionality for that the requisite Mens Rea was mentioned thereof and the acts constituting the offence essentially find place in the Indian Penal Code also as indicated earlier.

[15] A.V. Dicey, *Law of the Constitution*, 24 (10th ed., 1993).
[16] Supra 3, at 97.
[17] Romesh Thappar v. State of Madras, AIR 1950 SC 124.

What the authors contend is that the court cannot simply refrain from applying the doctrine of severability on account of poor submissions on behalf of government, since the onus of administering its adherence is upon the court and not the government. The court may or may not be correct in rejecting the application of severability to S. 66-A, but it ought to have dealt with any such possibility by dwelling into merit of such claims.

2.3. Procedural Unreasonableness and Right to Equality.

Petitioners in this case challenged the validity of the impugned provision contending it to be violative of Article 14, for that it was inappropriate to discriminate between offences on the basis of the mode of committing the act. Moreover, it was contended that the provision also suffered from the vice of procedural unreasonableness.[18] While the Honourable Court correctly rejected the former contention explaining as to how an intelligible differentia indeed existed in segregating the offences on the basis of mode of commission, it offered a mystical answer to the latter contention. What is interesting to note here is that the court deliberately kept the argument of procedural unreasonableness outside the realm of Article 14 challenge.

It is submitted that the interpretation of Article 14 acquired a new dimension in the historic case of *E.P. Royappa*[19] where it was held that equality is a dynamic concept with many aspects and dimensions which cannot be cribbed, cabined and confined within traditional and doctrinaire limits. Since then, the general rule to test any impugned provision on the touchstone of right to equality has been to determine as to whether any sort of arbitrariness in state action exists thereof.[20] This general rule has been emphatically reiterated in a plethora of judgments by the apex court which indubitably establishes that every kind of arbitrariness is a breach of equality guaranteed by Article 14. Further, there exists no tinge of doubt that a provision unfair in

[18] Supra 3, at 101.
[19] E.P. Royappa v. State of T.N., (1974) 4 SCC 3.
[20] Ibid

procedural aspect is in direct contravention with the principle of equality and therefore void.[21]

Though the court decided not to dwell into the argument of procedural unreasonableness owing to the fact that the impugned provision was already held invalid for being violative of Article 19 (1) (a), but it is erroneous to consider procedural unreasonableness beyond the domain of Article 14.

3. S. 69-A AND S. 79: ADOPTING DUAL STANDARDS?

Given the detailed discussion in the context of Section 66-A, the manner in which the court has dealt with S. 69-A is highly astonishing and the authors are skeptical of the accuracy of such approach. S. 69-A, which deals with website blocking has been upheld by the court for that it is a narrowly drawn provision with adequate safeguards, and hence not constitutionally infirm.

While Examining the constitutionality of the provision and the rules notified in this regard, the Court has noted that the Blocking Rules provide for a hearing to the concerned intermediary or originator of content and specific conditions need be adhered to for content to be blocked. There are multiple levels of decision-making and review which eradicates arbitrary actions. Given these safeguards, the Court found the provision constitutional. The Court stressed upon the importance of a written order for blocking and thus chose to leave Section 69-A intact citing it as an existing safeguard. However, the court seems to have been under the impression that either the intermediary or the content originator is normally informed but the reality portrays a totally different scenario since the safeguard is not evidenced in practice.[22] While the rules indicate that a hearing is given to the originator of the content, not even a single instance exists on record for such a hearing ever conducted. It is also worth considering at this juncture as to what happens in the case of information

---

[21] ShrilekhaVidyarthi v. State of U.P., (1991) 1 SCC 212.

[22] *32 Websites Go Blank*, The Hindu, available at http://www.thehindu.com/news/national/now-modi-govt-blocks-32-websites/article6742372.ece, last seen on 30/07/2015.

disseminated from outside India. Will the originator of the content bother deposing before the Indian government on why the content should be kept online? The court unfortunately fails to unveil the curtains of chaos on such aspects.

An example in this regard is the case of a website like *Github*, which is a global code repository used by software engineers. Should the Government Issue (even a questionable) order to ISPs to block the website? In the event *Github* itself is unable or unwilling to make representations to the Indian government in this regard, the content will be taken down – even if this is against the interests of Indian citizens, thus curtailing market place of ideas.[23]

Though Section 69A provides that any information sought to be blocked must have a reasonable nexus with six restrictions contained therein but these conditions are hardly fulfilled. Statistics revealed in an RTI query from the Software Freedom Law Centre, DEITY said that 708 URLs were blocked in 2012, 1,349 URLs in 2013, and 2,341 URLs in 2014.[24] Analysis of a leaked block lists received as responses to RTI requests have revealed that the block orders are full of errors as in some orders items do not exist, in some items are not technically valid web addresses and web pages from mainstream media houses including a Times Now report, a Telegraph picture gallery, etc. have also been blocked. Moreover, some URLs are base URLs blocking of which would result in thousands of pages getting blocked when only a few pages might contain allegedly illegal content and in a wholesale manner that leads to innocent speech also being proscribed.[25] This is what leads to what the Supreme Court has referred to in the contest of Section 66A as the 'chilling effect' affecting people right to know, which is an equally important facet of Article 19 (1) (a). Such

---

[23] Ibid.

[24] Ministry of Information and Communications Technology, Government of India, No. 14 (74)/2014-ESD, available at http://sflc.in/wp-content/uploads/2015/04/RTI-blocking-final-reply-from-DEITY.pdf, last seen on 30/07/2015.

[25] Pranesh Prakash, *Analysing Latest List of Blocked Sites (Communalism and Rioting Edition)*,CILS Blog, available at http://cis-india.org/internet-governance/blog/analysing-blocked-sites-riots-communalism/. (last seen on 30/07/2015).

over breadth is an illegitimate infringement with the freedom of speech and cannot be saved under the garb of regulation measures.[26]

Anomaly pertaining to S. 69-A does not end here. Rule 16 of Procedure and Safeguards for Blocking for Access of Information by Public, 2009 enacted under S.69-A (2) requires confidentiality with respect to blocking requests and complaints, and actions taken in that regard. This essential gives the leverage to the executive authorities to exercise the power to block information arbitrarily and without transparency. The worst part about Rule 16 is that it makes it impossible for anyone to independently monitor and reach a conclusion as to whether an internet resource is inaccessible as a result of a block order executed against the content or due to a network anomaly. Information of a block order remains limited to the authorities or at the most intermediaries, however non conveyance of such information to recipients is a breach of right to receive which is indubitably a vital aspect of freedom of speech and expression.[27] Recipients definitely require to be informed more than just a flash of 404 error!

Another deficiency which S. 69-A suffers from is the lack of external checks and balances over the execution of blocking orders. Governments are known to fix committees so they are aligned with their own leaning.[28] If all the executives in the Committee comprise of executives from the Ministry of Home Affairs and the Department of Telecommunications, then owing to the presence of Rule 16, the maintenance of confidentiality leaves no scope for watching the activities of watchdogs, i.e., the Review Committee.

---

[26] Elizabeth G. Olson, *As Hate Spills Onto the Web, a Struggle Over Whether, and How, to Control It*, The New York Times 11 (New York, 24/11/1997).

[27] Indian Soaps and Toiletries Makers Assn. v. Union of India, (2013) 3 SCC 641.

[28] *Transparency reports of Internet companies are skewed: GulshanRai*, Business Standard, available at http://www.business-standard.com/article/current-affairs/transparency-reports-of-internet-companies-are-skewed-gulshan-rai 115033000808_1.html, last seen on 30/07/2015.

Instances depicted above along with a glance of how the act has worked out shows that S. 69-Aas well as the rules made thereof suffer from procedural unreasonableness, thus in contravention of Article 14 of Indian Constitution[29] and should have been struck down by the Honourable Court. A fair act would be transparent, inclusive, evidence based and consistent with the spirit of the constitution. In *Charan Lal Sahu*,[30] it was ruled by the court that in judging the constitutional validity of an impugned law, the subsequent events, primarily the manner in which the Act has worked out have to be looked into.

The manner in which the Supreme Court has dealt with the claims against constitutionality of S. 79 of the act vis-à-vis Rule 3 (2) and 3 (4) of Intermediary Guidelines, 2011 enacted thereof breaks out a complete mayhem for that it unreasonably deviates from the strength of arguments that lead to the unconstitutionality of S. 66-A. S.79 provides a safe harbor to the intermediaries by exempting their liability in certain cases and has been held valid by the court except for a narrowed down construction of its (3).

Rule 3 of the Guidelines provides for the observance of due diligence by the intermediary while performing its duties under S. 79 of the Act and Rule 3 (2) contains a profusion of conditions wherein the content need be taken down by the intermediaries. Not only the provision is foul for privatization of censorship[31], the conditions contain many vague terms which are far beyond the purview of reasonable restrictions contained in Article 19 (2), such as “grossly harmful”, “blasphemous”, “hateful”, “harming minors in any way” and much more. The contentions as to the vagueness in law and breach of Article 19 (2) have been taken into consideration by the court while dealing with S. 66-A, but an unexplained deviation from such consideration in context of S. 79 has jeopardized the rationale of the judgment. Though the court has recognized this fallacy to some extent which is evident from the narrowed down reading

---

[29] New Horizons Ltd. v. Union of India, (1995) 1 SCC 478.
[30] CharanLalSahu v. Union of India, (1990) 1 SCC 614.
[31] Jon Perr, *Google's Gag Order: An Internet Giant Threatens Free Speech,* Perrspectives Blog, available at http://www.perrspectives.com/articles/art_gagorder01.htm, last seen on 30/07/2015

of S. 79 (3) whereby an action shall be taken by the intermediaries to take down the content which falls within Article 19 (2) which shall be determined by the Government or a Court Order, it is absurd to contend that such narrow construction is not possible for S. 66-A.

Babel does not end here and further confusion is created with the silence of the court over the absence of procedural safeguards absent in the rules made under S. 79 unlike the 2009 rules made under S. 69-A. Such an absence is indubitably paves way for procedural unreasonableness and in turn arbitrariness, thus violative of Article 14.[32]

4. CONCLUSION

Supreme Court seems to have weaved two incompatible strands of free speech jurisprudence in this decision by invalidating S. 66-A of the Information Technology Act, 2000 on certain grounds at one hand and validating a few other provisions which necessarily comprised of inconsistencies similar to those in S. 66-A. The decision apparently highlights the importance of right to freedom of speech and expression in a democratic setup but fails to ensure it in the realm of cyber space for that the verdict does not make any good to the status quo. The scrapping of S. 66-A does not put to trash the bulk of draconian penal provisions contained in the Information Technology Act as well as other penal statutes. For instance, S. 67-A of the act punishes dissemination of sexually explicit information which does not necessarily need be obscene. Many provisions of Indian Penal Code are still existent to oppress free speech outside the ambit of Article 19 (2); such as S. 505 which punishes public mischief and causing fear to public by sending or making any rumors, reports or statements, S. 506 dealing with criminal intimidation causing threats to injure person, S. 354 and S. 509 pertaining to the modesty of a woman, S. 354-D which punishes stalking, S. 507 punishing criminal intimidation by anonymous communication and a many more.

---

[32] Supra 29.

The incoherent strands might become too tough to resolve in future and in the absence of any progressive guidance on the matter by judiciary, it can only be hoped that the legislature comes up with an amendment to the Information Technology Act which defines offences and other terms more precisely not only in S. 66-A, but to the whole lot of provisions containing such terms so that the unimpeachable freedom of speech and expression may not get persecuted by the whims and fancies of the state.