SUPREME COURT OF INDIA

Sharat Babu Digumarti

Vs.

Govt. of NCT of Delhi

Crl.A.No.1222 of 2016

(Dipak Misra and Prafulla C.Pant,JJ.,)

14.12.2016

JUDGMENT

Dipak Misra,J.,

SLP (Crl)No.7675 of 2015

1. Leave granted.

2. The appellant along one Avnish Bajaj and others was arrayed as an accused in FIR No. 645 of 2004. After the investigation was concluded, charge sheet was filed before the learned Metropolitan Magistrate who on 14.02.2006 took cognizance of the offences punishable under Sections 292 and 294 of the Indian Penal Code (IPC) and Section 67 of the Information Technology Act, 2000 (for short, "the IT Act") against all of them. Avnish Bajaj filed Criminal Misc. Case No. 3066 of 2006 for quashment of the proceedings on many a ground before the High Court of Delhi which vide order dated 29.05.2008 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.

3. Being grieved by the aforesaid order, Avnish Bajaj preferred Criminal Appeal No. 1483 of 2009. The said appeal was tagged with *Ebay India Pvt. Ltd. v. State and Anr.* (Criminal Appeal No. 1484 of 2009). The said appeals were heard along with other appeals that arose from the lis relating to interpretation of Sections 138 and 141 of the Negotiable Instruments Act, 1881 (for short, "NI Act") by a three-Judge Bench as there was difference of opinion between the two learned Judges in *Aneeta Hada v. Godfather Travels and Tours (P) Ltd.*[1].

4. Regard being had to the pleas raised by Avnish Bajaj and also the similarity of issue that arose in the context of NI Act, the three-Judge Bench stated the controversy that emerged for consideration thus:-

> "2. In Criminal Appeals Nos. 1483 and 1484 of 2009, the issue involved pertains to the interpretation of Section 85 of the Information Technology Act, 2000 (for short "the 2000 Act") which is in pari materia with Section 141 of the Act. Be it noted, a Director of the appellant Company was prosecuted under Section 292 of the Penal Code, 1860 and Section 67 of the 2000 Act without impleading the Company as an accused. The initiation of prosecution was challenged under Section 482 of the Code of Criminal Procedure before the High Court and the High Court held that offences are made out against the appellant Company along with the Directors under Section 67 read with Section 85 of the 2000 Act and, on the said base, declined to quash the proceeding.
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> 3. The core issue that has emerged in these two appeals is whether the Company could have been made liable for prosecution without being impleaded as an accused and whether the Directors could have been prosecuted for offences punishable under the aforesaid provisions without the Company being arrayed as an accused."

5. In the context of Section 141 of NI Act, the Court ruled thus:-

> "58. 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."

6. As far as the appeal of Avnish Bajaj is concerned, the Court referred to Section 85 of the IT Act which is as follows:-

> "85. Offences by companies.—(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

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

7. Interpreting the same, the Court opined thus:-

> "64. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the Director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the Company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the Director. As a logical sequitur, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the Company in the present form are quashed."

8. After the judgment was delivered, the present appellant filed an application before the trial court to drop the proceedings against him. The 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 vide order 22.12.2014, the trial court framed the charge under Section 292 IPC.

9. Being aggrieved by the order framing of charge, the appellant moved the High Court in Criminal Revision No. 127 of 2015 and the learned 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. It has referred to the allegations made against him and the responsibility of the appellant and thereafter referred to the pronouncements in *P. Vijayan v. State of Kerala and Anr*[2]. and *Amit Kapoor v. Ramesh Chander and Anr*[3]. which pertain to exercise of revisional power of the High Court while dealing with propriety of framing of charge under Section 228 of the Code of Criminal Procedure.

10. The central issue that arises for consideration is whether the appellant who has been discharged under Section 67 of the IT Act could be proceeded under Section 292 IPC.

11. Be it noted, on the first date of hearing, Dr. A.M. Singhvi, learned senior counsel appearing for the appellant urged that the dispute raised require interpretation of various provisions of the IT Act and bearing that in mind, the Court thought it appropriate to hear the learned Attorney General for the Union of India. In the course of hearing, the Court was

assisted by Mr. Mukul Rohatgi, learned Attorney General for India, Mr. Ranjit Kumar, learned Solicitor General and Mr. R.K. Rathore, learned counsel for the Union of India.

12. It is not disputed that the appellant is the senior manager of the intermediary and the managing director of the intermediary has been discharged of all the offences as per the decision in Aneeta Hada (supra). and further that singular charge that has been framed against the appellant is in respect of Section 292 IPC. It is submitted by Dr. Singhvi that the appellant could not have been proceeded under Section 292 IPC after having been discharged under Section 67 of the IT Act. Mr. Rohatgi, learned Attorney General assisting the Court submitted that Section 67 of the IT Act is a special provision and it will override Section 292 IPC. He has made a distinction between the offences referable to the internet and the offences referable to print/conventional media or whatever is expressed in Section 292 IPC. Mr. D.S. Mahra, learned counsel appearing for the NCT of Delhi, would contend that publishing any obscene material as stipulated under Section 67 of the IT Act cannot be confused or equated with sale of obscene material as given under Section 292 IPC, for the two offences are entirely different. It is urged by him that an accused can be charged and tried for an offence independently under Section 292 IPC even if he has been discharged under Section 67 of the IT Act. According to him, there is no bar in law to charge and try for the offence under Section 292 IPC after discharge from Section 67 of the IT Act. Learned counsel would further contend that the role of person in charge of the intermediary is extremely vital as it pertains to sale of obscene material which is punishable under Section 292 IPC and not under Section 67 of the IT Act. It is put forth by the learned counsel that the plea advanced by the appellant is in the realm of technicalities and on that ground, the order of charge should not be interfered with.

13. Dr. Singhvi has taken us through the legislative history of proscription of obscenity in India. He has referred to the Obscene Books and Pictures Act, 1856. The primary object of the said Act was to prevent the sale or exposure of obscene books and picture. It prohibited singing of obscene songs, etc. to the annoyance of others. Any person found indulging in the said activities was liable to pay a fine of Rs. 100/- or to imprisonment up to 3 years or both. Be it noted, learned senior counsel has also referred to the Obscene Publications Act, 1925. The said Act has been repealed.

14. Section 292 IPC in its original shape read as follows:- "292. Sale, etc., of obscene books, etc.—Whoever

> "(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
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> (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.—This section does not extend to any book, pamphlet, paper, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance or idols, or kept or used for any religious purpose."

15. The constitutional validity of Section 292 IPC was challenged in *Ranjit D. Udeshi v. State of Maharashtra*[4]. Assailing the constitutional validity, it was urged before the Constitution Bench that the said provision imposes incompatible and unacceptable restrictions on the freedom of speech and expression guaranteed under Section 19(1)(a) of the Constitution. The Constitution Bench opined as follows:-

"7. No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act (7 of 1925) to give effect to Article 1 of the International' Convention for the suppression of or traffic in obscene publications signed by India in 1923 at Geneva. It does not go beyond obscenity which falls directly within the words "public decency (1) (1868) L.R. 3 Q.B. 360. and morality" of the second clause of the article. The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form. Mr. Garg seeks to limit action to cases of intentional lewdness which he describes as "dirt for dirt's sake" and which has now received the appellation of hard¬core pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse, sexual feelings.

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9. The former he thought so because it dealt with excretory functions and the latter because it dealt -with sex repression. (See Sex, Literature and Censorship pp. 26 201). Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely "poor value in the-propagation of ideas, opinions and information of public interest or profit." When there is propagation of ideas, opinions and information of public interest or profit, the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292, Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Article 19."

16. Eventually, the Court upheld the constitutional validity of the said provision. After the pronouncement by the Constitution Bench, the legislature amended Section 292 which presently reads thus:-

"292. Sale, etc., of obscene books, etc.—(1) For the purposes of sub-section (2), book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever—

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

Exception.—This section does not extend to—

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in—

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

17. At the outset, we may clarify that though learned counsel for the appellant has commended us to certain authorities with regard to role of the appellant, the concept of possession and how the possession is not covered under Section 292 IPC, we are not disposed to enter into the said arenas. We shall only restrict to the interpretative aspect as already stated. To appreciate the said facet, it is essential to understand certain provisions that find place in the IT Act and how the Court has understood the same. That apart, it is really to be seen 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.

18. On a perusal of material on record, it is beyond dispute that the alleged possession of material constitutes the electronic record as defined under Section 2(1)(t) of the IT Act. The dictionary clause reads as follows:-

> "Section 2(1)(t). electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

Thus, the offence in question relates to electronic record.

19. *In Shreya Singhal v. Union of India* [5], the Court was dealing with constitutional validity of Section 66-A of the IT Act and the two-Judge Bench declared the said provision as unconstitutional by stating thus:-

> "85. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In Collins case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66-A and the authorities who are to enforce Section 66-A have absolutely no manageable standard by which to book a person for an offence under Section 66-A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66-A is unconstitutionally vague.
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> 86. Ultimately, applying the tests referred to *in Chintaman Rao*[6] *and V.G. Row case*[7], referred to earlier in the judgment, it is clear that Section 66-A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right."

20. Thereafter the Court referred to *Kameshwar Prasad State of Bihar*[8] *and Central Prison v. Ram Manohar Lohia*[9] and came to hold as follows:-

> "94. These two Constitution Bench decisions bind us and would apply directly on Section 66-A. We, therefore, hold that the section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth."

21. While dealing with obscenity, the Curt referred to Ranjit D. Udeshi (supra) and other decisions and opined thus:-

"48. This Court in Ranjit D. Udeshi v. State of Maharashtra (supra) took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in Hicklin case which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the U.K., the United States as well as in our country. Thus, in Directorate General of *Doordarshan v. Anand Patwardhan* [11]this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject-matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary, artistic, political, ^educational or scientific value (see para 31).

49. In a recent judgment of this Court, *Aveek Sarkar v. State of W.B.*[12], this Court referred to English, US and Canadian judgments and moved away from the Hicklin (supra) test and applied the contemporary community standards test.

50. What has been said with regard to public order and incitement to an offence equally applies here. Section 66-A cannot possibly be said to create an offence which falls within the expression "decency" or "morality" in that what may be grossly offensive or annoying under the section need not be obscene at all—in fact the word "obscene" is conspicuous by its absence in Section 66-A."

22. In *Devidas Ramachandra Tuljapurkar v. State of Maharashtra and Ors* [13] analyzing the said judgment another two-Judge Bench has opined that as far as test of obscenity is concerned, the prevalent test is the contemporary community standards test. It is apt to note here that in the said case the Court was dealing with the issue, what kind of test is to be applied when personalities like Mahatma Gandhi are alluded. The Court held:-

"142. When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in. To elaborate, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standards test for use of the same language, it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene. While so concluding, we leave it to the poet to put his defence at the trial explaining the manner in which he has used the words and in what context. We only opine that view of the High Court pertaining to the framing of charge under Section 292 IPC cannot be flawed."

23. Reference to Shreya Singhal (supra) is only to show that in the said case the Court while dealing with constitutional validity of Section 66-A of the IT Act noticed that the said provision conspicuously did not have the word "obscene". It did not say anything else in that regard. In the case at hand, it is required to be seen in which of the provision or both an

accused is required to be tried. We have already reproduced Section 292 IPC in the present incarnation. Section 67 of the IT Act which provides for punishment for publishing or transmitting obscene material in electronic form reads as follows:-

> "67. Punishment for publishing or transmitting obscene material in electronic form. - Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees."

24. Section 67A stipulates punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form. Section 67B provides for punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form. It is as follows:-

> "67B. Punishment for publishing or transmitting of material depicting children in seually explicit act, etc., in electronic form. - Whoever -
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> (a) publishes or transmits or causes to be published or transmitted material any electronic form which depicts children engaged in sexually explicit act or conduct; or
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> (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or
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> (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resources; or
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> (d) facilitates abusing children online; or
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> (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees: Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form-

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purposes. Explanation.- For the purpose of this section "children" means a person who has not completed the age of 18 years."

25. Section 69 of the IT Act provides for power to issue directions for interception or monitoring or decryption of any information through any computer resource. It also carries a penal facet inasmuch as it states that the subscriber or intermediary who fails to comply with the directions issued under sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

26. We have referred to all these provisions of the IT Act only to lay stress that the legislature has deliberately used the words "electronic form". Dr. Singhvi has brought to our notice Section 79 of the IT Act that occurs in Chapter XII dealing with intermediaries not to be liable in certain cases. Learned counsel has also relied on Shreya Singhal (supra) as to how the Court has dealt with the challenge to Section 79 of the IT Act. The Court has associated the said provision with exemption and Section 69A and in that context, expressed that:-

"121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed—one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

122. 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. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. 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).

123. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid."

27. We have referred to the aforesaid aspect as it has been argued by Dr. Singhvi that the appellant is protected under the said provision, even if the entire allegations are accepted. According to him, once the factum of electronic record is admitted, Section 79 of the IT Act must apply ipso facto and ipso jure. Learned senior counsel has urged Section 79, as the language would suggest and keeping in view the paradigm of internet world where service providers of platforms do not control and indeed cannot control the acts/omissions of primary, secondary and tertiary users of such internet platforms, protects the intermediary till he has the actual knowledge. He would contend that Act has created a separate and distinct category called 'originator' in terms of Section 2(1) (z)(a) under the IT Act to which the protection under Section 79 of the IT Act has been consciously not extended. Relying on the decision in Shreya Singhal (supra), he has urged that the horizon has been expanded and the effect of Section 79 of the IT Act provides protection to the individual since the provision has been read down emphasizing on the conception of actual knowledge. Relying on the said provision, it is further canvassed by him that Section 79 of the IT Act gets automatically attracted to electronic forms of publication and transmission by intermediaries, since it explicitly uses the non-obstante clauses and has an overriding effect on any other law in force. Thus, the emphasis is on the three provisions, namely, Sections 67, 79 and 81, and the three provisions, according to Dr. Singhvi, constitute a holistic trinity. In this regard, we may reproduce Section 81 of the IT Act, which is as follows:-

"81. 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 or the Patents Act 1970."

The proviso has been inserted by Act 10 of 2009 w.e.f. 27.10.2009.

28. Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Section 67A and 67B is a complete code relating to the offences that are covered under the IT Act. Section 79, as has been interpreted, is an exemption provision conferring protection to the individuals. However, the said protection has been expanded in the dictum of Shreya Singhal (supra) and we concur with the same. Section 81 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. In this regard, we may refer to *Sarwan Singh and Anr. v. Kasturi Lal*[14] . The Court was considering Section 39 of Slum Areas (Improvement and Clearance) Act, 1956 which laid down that the provisions of the said Act and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law. The Delhi Rent Control Act, 1958 also contained non-obstante clauses. Interpreting the same, the Court held:-

> "When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. A piquant situation, like the one before us, arose in *Shri Ram Narain v. Simla Banking & Industrial Co. Ltd*[15]. the competing statutes being the Banking Companies Act, 1949 as amended by Act 52 of 1953, and the Displaced Persons (Debts Adjustment) Act, 1951. Section 45-A of the Banking Companies Act, which was introduced by the amending Act of 1953, and Section 3 of the Displaced Persons Act, 1951 contained each a non-obstante clause, providing that certain provisions would have effect "notwithstanding anything inconsistent therewith contained in any other law for the time being in force ...". This Court resolved the conflict by considering the object and purpose of the two laws and giving precedence to the Banking Companies Act by observing:
>
> "It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein" (p. 615) As indicated by us, the special and specific purpose which motivated the enactment of Section 14-A and Chapter III-A of the Delhi Rent Act would be wholly frustrated if the provisions of the Slum Clearance Act requiring permission of the competent authority were to prevail over them. Therefore, the newly introduced provisions of the Delhi Rent Act must hold the field and be given full effect despite anything to the contrary contained in the Slum Clearance Act."

29. In *Talcher Municipality v. Talcher Regulated Market Committee* [16], the Court was dealing with the question whether the Orissa Municipal Act, 1950 or Orissa Agricultural Produce Markets Act, 1956 should apply. Section 4(4) of the 1956 Act contained a non-obstante clause. In that context, the Court opined:-

> "The Act, however, contains special provisions. The provision of Section 4(4) of the said Act operates notwithstanding anything to the contrary contained in any other law for the time being in force. 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*[17] , *Indian Handicrafts Emporium v. Union of India*[18] and *M.P. Vidyut Karamchari Sangh v. M.P. Electricity Board*[19] .)"

30. In Ram Narain (supra), the Court faced a situation where both the statutes, namely, Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951 contained non-obstante clause. The Court gave primacy to the Banking Companies Act. To arrive at the said conclusion, the Court evolved the following principle:-

> "7. ... It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."

31. In *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.*[20], this Court while dealing with two special statutes, namely, Section 13 of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and Section 32 of Sick Industrial Companies (Special Provisions) Act, 1985, observed as follows:-

> "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."

32. The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. 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. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law 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.

33. In *Jeewan Kumar Raut v. CBI* [21], in the context of Transplantation of Human Organs Act, 1994 (TOHO) treating it as a special law, the Court held:-

"22. TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences.

23. TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code."

And again:-

"27. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO."

34. In view of the aforesaid analysis and the authorities referred to hereinabove, we are of the considered opinion that the High Court has fallen into error 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.

35. Consequently, the appeal is allowed, the orders passed by the High Court and the trial court are set aside and the criminal prosecution lodged against the appellant stands quashed.

Judgment Referred.

[1]*(2008) 13 SCC 0703*
[2]*(2010) 2 SCC 0398*
[3]*(2012) 9 SCC 0460*
[4]*AIR 1965 SC 0881*
[5]*(2015) 5 SCC 0001*
[6]*Chintaman Rao v. State of M.P., AIR 1951 SC 118*
[7]*State of Madras v. V.G. Row, AIR 1952 SC 196*
[8]*(1962) Supp. (3) SCR 369 : AIR 1962 SC 1166*
[9]*AIR 1960 SC 0633*
[10] *R v. Hicklin, (1868) LR 3 QB 360*
[11]*(2006) 8 SCC 0433*
[12]*(2014) 4 SCC 0257*
[13]*(2015) 6 SCC 0001*
[14]*(1977) 1 SCC 0750*
[15]*AIR 1956 SC 0614*

[16]*(2004) 6 SCC 0178*
[17]*(2003) 7 SCC 0110*
[18]*(2003) 7 SCC 0589*
[19]*(2004) 9 SCC 0755*
[20]*(2001) 3 SCC 0071*
[21]*(2009) 7 SCC 0526*