DELHI HIGH COURT EXERCISES LONG-ARM JURISDICTION, DIRECTS FACEBOOK, YOUTUBE, GOOGLE AND TWITTER TO TAKE DOWN CONTENT GLOBALLY

1. INTRODUCTION

A Single Judge bench of the Delhi High Court (the "**High Court**") on October 23, 2019 held that Indian courts can issue orders to internet intermediaries like Facebook Inc. ("**Facebook**"), Google Inc. ("**Google**"), and Twitter International Company ("**Twitter**") to take down defamatory content published by users on the intermediaries' platforms on a global basis.[1]

The High Court, while passing the said order, stated that not only does it have the jurisdiction to prohibit dissemination of content/material on various internet platforms falling within its geographical domain, but it also has the jurisdiction when such content/material is disseminated outside the territorial jurisdiction of an Indian court. The High Court further observed that the only test while exercising such jurisdiction would be whether the source of the content is within the territorial jurisdiction of such a court or not. Additionally, the High Court stated that in order to avail the immunity afforded under Section 79 of the Information Technology Act, 2000 (the "**IT Act**"), the intermediaries would now have to 'completely' disable access to the material identified as offensive by the court, and in order to exercise such a 'complete' disabling, the intermediary would have to block the content in the whole network and not a mere (geographically) limited network restricted to a country.

2. BACKGROUND

The suit was filed by Swami Ramdev and Patanjali Ayurved Limited (collectively, the "**Plaintiffs**") against Facebook, Google, YouTube LLC and Twitter (collectively, the "**Defendants**"), requesting the High Court to order a global take-down of content (videos), which was defamatory in nature, from the online platforms of the Defendants and other unnamed intermediaries.

It has been contended by the Plaintiffs that various defamatory remarks and information including videos, based on a book titled "*Godman to Tycoon – the Untold Story of Baba Ramdev*" were being disseminated over the Defendants' social media platforms. It has also been averred by the Plaintiffs that the defamatory content contained in the said book was the subject matter of a judgment passed in CM (M) 556/2018, wherein a Ld. Single Judge of the Delhi High Court had restrained the publisher and the author of the said book from publishing, distributing and selling the book without deleting the offensive portions. The said judgment was challenged by the publisher before the Supreme Court

[1] *Swami Ramdev & Anr. vs. Facebook, Inc & Ors., CS*(OS) 27/2019, order dated 23.10.2019.

and is pending adjudication. However, it was clarified by the Plaintiffs that there is no stay of the judgment passed by the Ld. Single Judge. It was the case of the Plaintiffs that allegations mentioned in the videos, uploaded on the Defendants' platforms are in fact the defamatory allegations contained in the book which have already been directed to be removed.

On January 24, 2019, after hearing the parties, the Defendants were directed to remove/block/disable the URLs and weblinks connected to the offensive videos from the India domain. The Defendants agreed to take down the content in question from their India specific domains and use geo-blocking to ensure refusal of access in accordance with law declared by the Supreme Court of India in *Shreya Singhal vs. Union of India*[2]. However, on the issue of global take-down, the Defendants resisted the same on principles of international comity, different standards of freedom of speech and law of defamation around the world, and that they did not actively monitor uploads on their platforms, being intermediary platforms.

The said issue of global blocking of URLs was taken up for hearing by the Single Judge on May 29, 2019.

3. ISSUES FOR CONSIDERATION BEFORE THE HIGH COURT

While the parties had also argued on issues such as non-joinder of parties, whether the content is defamatory, and whether the Defendants are intermediaries, the following are the key-issues upon which the order of the High Court is based:

(a) What would constitute removal or disabling access within the meaning of Section 79 of the IT Act?

(b) Can removal or disabling access be geographically limited or should it be global?

4. ANALYSIS BY THE COURT AND JUDGMENT

As it was unanimously admitted by the Defendants that they have already blocked or disabled access to the URLs specified by the Plaintiffs insofar as the Indian domain is concerned, the question before the High Court was whether the platforms can also be directed to block the content on a global basis.

The Defendants, while seeking to avail of the protection under the IT Act, contended that they merely provide a platform to upload the content and they do not in any manner initiate, select or modify the transmission of content posted on their platform. It was also contended by Facebook, that they do not have an obligation to proactively monitor the contents posted on their platform in order to block the offensive posts, and that they are not the author or publisher of content posted by a third party. In view of the same, they qualify for the safe harbor provision under Section 79 of the IT Act. The Defendants also submitted that the posts made on the platform are governed by the respective 'terms of service' of each Defendant, and are immediately taken down if found to be in breach of the relevant 'terms of service'. Further, the Defendants unanimously argued that they are in compliance

[2] AIR 2015 SC 1523

with the Information Technology (Intermediary Guidelines) Rules, 2011 (the "**Rules**") and they shall not host, display, modify or publish any information which is covered under Rules 2 and 3 of the said Rules.

While dealing with the first issue, the High Court noted that although the Defendants have claimed protection under Section 79 of the IT Act, the protection granted under this provision is not absolute. The High Court further observed that and in order to avail the exemptions sought by the Defendants under Section 79(1) and (2) of the IT Act, the intermediaries have a duty to "*expeditiously remove or disable access*" to "*that material*". In addition, the term "*that material*" as mentioned under Section 79(3)(b) of the IT Act would be the information or data "*residing in or connected to a computer resource*".

The High Court relied on the Rules while explaining the material which is to be expeditiously removed (or to which access is to be disabled). Under Rule 3(2) of the Rules, the information or data which constitutes "*that material*" would be "*the material or information that is grossly harmful, harassing, blasphemous, defamatory…. or otherwise unlawful in any manner whatsoever*". Thus, the intermediary upon receiving a court order, has the duty to expeditiously remove or disable access to any material or information falling in any category enshrined in Rule 3(2) of the Rules.

The High Court, while dealing with the first issue, held that the Defendants' have claimed themselves to be 'intermediaries' and therefore, in order to avail the protection provided under Section 79 of the IT Act, the Defendants would have to follow all the guidelines as provided under the IT Act and the Rules.

As regards the second issue, it was argued by the Defendants that the request for global blocking would result in a 'conflict of laws situation', as a global injunction (passed by the High Court) may not be in consonance with the regime of law prevalent in other jurisdictions. It was further contended by the Defendants that under different law regimes, there exist different standards for proving defamation and such global injunction orders may jeopardize the respective Defendant's status as an intermediary in other jurisdictions. It was further argued that such an order would run contrary to the principles of state sovereignty in international law and the principle of international comity, since the laws relating to free speech and defamation are not co-extensive and differ from country to country. The Defendants also contended that an order for a global take-down or global blocking would interfere with the rights of the people over whom the court has no jurisdiction.

It was highlighted before the High Court that the local laws of every country cannot apply to the internet globally, and in view of the same, it was contended that Indian courts thus have to restrict their orders only to 'geo-blocking of the content'[3], since what is illegal in one country need not be illegal in another. The Defendants in order to further substantiate their arguments, placed reliance on the judgment in *Playboy vs. Chuckleberry*[4] and argued that a U.S. court in the said case had held that there could not be an injunction by a U.S. court against publication of a magazine titled "Playmen" in Italy.

[3] Geo-blocking means blocking of content only in the country where the content is in breach of local law.
[4] 939 F. Supp. 1032 (S.D.N.Y. 1996)

The High Court relied upon Section 79(3)(b) of the IT Act while discussing the second issue and observed that removal of or disablement to the offensive material has to take place "*on that resource*". The High Court observed that, "*that resource*", would construe a computer resource in which the "*information, data or communication link*" is "*residing in*" or is "*connected to*". The High Court further observed that a proper reading of Section 79(3)(b) of the IT Act would mean that if any information/data is residing in or connected to a computer network, i.e., a computer resource, which is within the territorial jurisdiction of the court then the intermediary has a duty to remove or disable access to the said information or data on that resource. There is no doubt that when the uploading of information or data takes place by a user upon any computer resource of these platforms, the same is made available on a global basis by such platform.

The High Court further observed that the act of uploading itself vests jurisdiction in the courts where the uploading takes place. If any information or data has been uploaded from India onto a computer resource which has resulted in residing of the data on the network and global dissemination of the said information or data, then the platforms are liable to remove or disable access to the said information and data from that very computer resource. The removal or disabling cannot be restricted to a part of that resource, serving a geographical location. The High Court further observed that it is a matter of public knowledge, that all social media platforms, including the Defendants, maintain a global network of computer systems, which transmit the content, information and data on an almost instantaneous basis across the globe. Thus, if uploading of data which the court considers defamatory or offensive has taken place from IP addresses located in India, then the Indian courts would have jurisdiction to direct the platforms to remove and disable access to the said information or material, from the computer network of the platforms on to which the said information and data has been replicated even though the same may be located outside its territorial jurisdiction.

The High Court in order to buttress its position on global take-downs also placed reliance on the judgments in *Equustek Solutions Inc. vs. Jack* [5] where Supreme Court of Canada ruled against Google and ordered a global take-down and asked Google to de-index listings for protection of trade secret rights of a subject from its global versions; and *Eva Glawischnig-Piesczek vs. Facebook Ireland Limited*[6] where the Court of Justice of the European Union asked Facebook to take down defamatory content against Ms. Piesczek from its global service.

5. APPEAL BY FACEBOOK

The Division Bench of the Delhi High Court, through its order dated October 31, 2019, had admitted the appeal filed by Facebook challenging the order passed by the Ld. Single Judge. While no stay has been granted in favor of Facebook, the Division Bench had clarified that Swami Ramdev and Patanjali Ayurved Limited would not be allowed to move a contempt application before disposal of this appeal. This means that Facebook will not face any contempt action till the disposal of the appeal even if it does not implement the order of global blocking of content against Swami Ramdev and Patanjali Ayurved Limited.

[5] 2018 BC SC 610
[6] Case C-18/18, judgment dated 03.10.2019

6. INDUSLAW VIEW

The present dispute between the parties is admittedly complex in nature as it involves interplay between the IT Act, the laws of defamation and the territorial jurisdiction of the Indian courts. While striving to strike a balance between ever-changing technology and law, the present decision further expands the ambit of intermediary liability. The order is significant in nature as the High Court has gone a step ahead while laying down that the removal and disablement has to be 'complete' in respect of the cause over which the court has jurisdiction. The High Court has reasoned that "such a disablement cannot be limited or partial in nature, so as to render the order of the court completely toothless".

The High Court has also observed that there is an obligation upon the intermediaries (social media platforms) to disable access, i.e., to completely disable access and not partially disable access, which observation may have far-reaching implications on the subject of duties of intermediaries in the long-run. This aside, the High Court seems to have dismissed equally reasonable counter arguments regarding freedom of speech, the laws being different in other geographies and violation of international comity.

Thus, it would remain to be seen whether the Division Bench accepts the reasoning provided by the Single Judge while passing the order or it modifies/rejects the same. It is certainly the need of the hour for the intermediaries that there is slightly more in-depth analysis of the issue at hand by a larger bench of the High Court or the Supreme Court.

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