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THE RESURRECTION OF SAFE HARBOURS FOR INTERNET INTERMEDIARIES IN INDIA

1. INTRODUCTION

In its recent judgment in the matter of *MySpace Inc. v. Super Cassettes Industries Ltd.*¹, a division bench of the Delhi High Court (the “**Court**”) comprising of S. Ravindra Bhat and Deepa Sharma, JJ., overturned a single judge’s order in the matter of *Super Cassettes Industries Ltd. v. MySpace Inc.*².

The Court, while setting aside the single judge’s order, re-affirmed and re-established some important legal principles regarding internet intermediary liabilities in the case of claims of copyright infringement under the Copyright Act, 1957 (the “**Copyright Act**”), the scope of safe harbour immunities available to intermediaries under the Information Technology Act, 2002 (the “**IT Act**”) and injunctions.

The Court held that free speech is the ethics based on which the internet intermediary industry functions and unwarranted private censorship would be contrary to such integrities and would be wholly unfair to intermediaries.

2. BACKGROUND

In 2008, Super Cassettes Industries Ltd., also known as T-Series, (the “**Plaintiff**”) filed a suit against MySpace Inc. and its owner (a division of News Corporation, Fox Interactive Media) (the “**Defendants**”) for infringing their copyright under Section 51³ of the Copyright Act.

The Plaintiff was engaged in the business of music distribution and film production and claimed to be the owner of the copyright in the collection of several sound recordings, cinematograph films and songs. It also claimed to have over 20,000 (twenty thousand) non-film Hindi songs and around 50,000 (fifty thousand) songs in various regional languages in its copyright catalogue.

¹ (Myspace Inc. vs. Super Cassettes Industries Ltd., 2016)
Myspace Inc. vs. Super Cassettes Industries Ltd. (2016), FAO(OS) 540/2011, C.M. APPL.20174/2011, 13919 & 17996/2015 (High Court of Delhi at New Delhi December 23, 2016).

² (Super Cassettes Industries Ltd vs. Myspace Inc., 2011)
Super Cassettes Industries Ltd vs. Myspace Inc., IA NO. 15781/2008 & IA NO. 3085/2009 IN CS (OS) NO. 2682/2008 (High Court of Delhi at New Delhi July 29, 2011).

³ Section 51 of the Copyright Act: When Copyright Is Infringed
Copyright in a work shall be deemed to be infringed—

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

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

The Defendants owned a social networking and entertainment website (the “MySpace Website”) based out of the United States of America, which offered a variety of entertainment applications including sharing and viewing of music, images, cinematograph works and use of various online tools.

The Plaintiff alleged that the MySpace Website hosted copyrighted material of the Plaintiff which included recently released infringing material and also the material which had not yet been released or was authorised only for broadcast through the authorised distribution channels. The Plaintiff also contended that the MySpace Website made the Plaintiff’s copyrighted material available to its users free of cost without the Plaintiff’s permission.

The Plaintiff argued that the Defendants were guilty of primary infringement under Section 51(a)(i) of the Copyright Act, for communicating copyrighted works to the public without a license. Further, the Plaintiff argued that the Defendants were guilty of secondary infringement under Section 51(a)(ii) of the Copyright Act, since they were providing a place for communication of the said works to the public being aware of the infringing material and also were benefitting commercially from such knowledge.

The Defendants, while challenging the admissibility of the suit on the ground of lack of territorial jurisdiction, essentially argued that the Plaintiff had failed to specify the copyrighted works in respect of which it claimed copyright infringement. The Defendants also contended that the Plaintiff’s non-specific prayers, if granted, would impose impossible burden on the Defendants. The Defendants also claimed to be an intermediary providing a free-of-cost platform to third-party users without actual or direct knowledge of the content uploaded by them; they also claimed the benefits of Section 79⁴ of the IT Act, also known as safe harbour immunities, available to intermediaries in India.

The single judge found no *prima facie* case of copyright infringement against the Defendants under Section 51(a)(i) of the Copyright Act and wished to analyse evidence at the time of trial of the suit. However, he held that a valid *prima facie* case was made out under Section 51(a)(ii) against the Defendants. The interlocutory application (filed with the suit seeking interim reliefs till the pendency of the suit) was decided in favour of the Plaintiff; it was concluded that the Defendants could not take protection afforded to intermediaries on the internet under Section 79 read along with Section 81⁵ of the IT Act as only the Copyright Act would apply to this case.

⁴ Section 79 of the IT Act: Intermediaries Not To Be Liable In Certain Cases

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation — For the purposes of this section, the expression “*third party information*” means any information dealt with by an intermediary in his capacity as an intermediary.

⁵ Section 81 of the IT Act: 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 single judge issued an interim direction and order, injunctioning the Defendants from using any of the content of the Defendants, including modifying the Plaintiff's copyrighted content, adding advertisements and sponsors, or making profits. The single judge also ordered the Defendants to remove or block all of the Plaintiff's content from the MySpace Website in an expedited manner.

Thereafter, being aggrieved by the interim order restraining them to practically carry out their business in India, the Defendants preferred an appeal before the division bench of the Court challenging the order of the single judge. The division bench decided the appeal recently and reversed the order of the single judge of the Court basis the below exposition.

3. ISSUES IN APPEAL

The division bench of the Court analysed the case and examined the Defendants' liability under secondary infringement under Section 51(a)(ii) of the Copyright Act only (the primary infringement issue under Section 51(a)(i) was to be determined by the single judge at trial stage) and answered prima facie, the following three main issues:

- (a) Whether the Defendants could be said to have knowledge of infringement so as to attract liability for secondary infringement under Section 51(a)(ii) of the Copyright Act ("**Issue 1**");
- (b) Does the proviso to Section 81 override the "safe harbour" granted to intermediaries under Section 79 of the IT Act ("**Issue 2**"); and
- (c) Whether it was possible to harmoniously read and interpret Sections 79 and 81 of the IT Act and Section 51 of the Copyright Act ("**Issue 3**").

4. DIVISION BENCH'S FINDINGS

The division bench of the Court, deciding in the Defendants' favour, held that the acts of the Defendants did not amount to infringement of the Plaintiff's copyright under Section 51(a)(ii) of the Copyright Act. The Court's observations and conclusion on each of the above issues are summarised as follows.

4.1. Issue 1

In deciding the first issue, the Court held that the standard of awareness contemplated in Section 51(a)(ii) is actual knowledge, and not general awareness or mere suspicion.

The Court defined copyright infringement to mean the doing of any unauthorised act which violate the exclusive rights of the copyright owner. Elucidating the circumstances of the case, the Court held that, to attract liability for secondary infringement, the Defendants would be required to have actual knowledge and not mere awareness of the infringement. Connecting the difference between virtual and physical worlds, the judgment stated:

"The nature of internet media is such that the interpretation of knowledge cannot be the same as that is used for a physical premise."

Further, the Court took inspiration from *R.K. Mohammed Ubaidullah v. Hajee C. Abdul Wahab, 2000 (6) SCC 402* and quoted:

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

The Court identified and settled that it was impossible for the Defendants to monitor infringement of the sheer volume of songs shared by the Plaintiff on the MySpace Website. The Court also observed that mere insertion of advertisements which only altered the format of the video and not the content would not amount to control of content or knowledge of content since such insertion appeared *prima facie* to be through a completed automated process.

Thus, the Defendants could not be attributed with beneficial knowledge and reasonable belief that infringement had taken place because of the sheer size of the content available on the MySpace Website and the inability to monitor everything that is uploaded or shared by millions of users/subscribers on the MySpace Website.

Consequently, the Court ordered the Plaintiff to specify and enlist the authorised content shared with the Defendants and settled that the ritual of merely sharing the names of its content (without allocating the details of the infringing works) with the Defendants were against the established principles of copyright laws.

4.2. Issue 2

The Court, while deciding the second issue, discussed in length Section 79 and Section 81 of the IT Act and tried resolving the confusion between the two by construing that both the sections had to be read harmoniously.

The Court explained that Section 79 of the IT Act provides a 'safe harbour' to internet intermediaries by directing instances where the intermediary's liability would not be arising. The Court observed that the Indian safe harbour provisions under the IT Act were more similar to the European Community Directives ("ECD") than the US Digital Millennium Copyright Act ("DMCA") in the way Internet Service Providers (*ISPs*) were more broadly defined under the ECD and the IT Act than under the DMCA and the list of dos and don'ts applicable for them to be able to obtain the benefit of the safe harbour provisions were more clearly set out in the ECD and the IT Act.

The difficulty in interpretation and reconciliation between Section 79 and Section 81 of the IT Act arose because both these sections contain a non-obstante clause. Section 79 provides that notwithstanding anything contained in any other law other than Section 79(2) and 79(3) which means that Section 79 reigns supreme in the determination of the safe harbour provisions. However, in a similar fashion, Section 81 provides that notwithstanding anything contained in any other provision of law, the IT Act will have effect and this very Section 81 has a proviso to the effect that nothing in the IT Act will prevent the exercise of any right conferred under the Copyright Act.

The division bench clarified that the proviso does not override 'safe harbour' and such defence cannot be denied to intermediaries in case of copyright infringement actions. The Court held that remedies would be made available to the intermediaries and the same shall not stand precluded by virtue of Section 81 of the IT Act because rights granted under the IT Act are in addition to the rights granted under the Copyright Act.

4.3. Issue 3

Finally, in relation to the third issue, the Court emphasised on the fact that all 3 (three) sections (i.e. Sections 79 and 81 of the IT Act and Section 51 of the Copyright Act) had to be read and interpreted together since it would be only logical to interpret the law by reading the sections together because in an age where service providers and subscribers are technologically driven and digitalised, an infringement by a subscriber cannot be attributed to the service provider, who acted as the intermediary and only provided the network and had no connection to the content being used, uploaded, downloaded, shared, saved, etc. on the network.

5. CONCLUSION

The division bench of the Court held that the Defendants were an internet intermediary as defined under the IT Act, as the MySpace Website was not selecting or modifying the material being transmitted or initiating any transmission. Being an internet intermediary, they were entitled to the safe harbour benefits under Section 79 of the IT Act, having followed the due diligence principles and guidelines issued thereunder. These include having the appropriate notices, agreements and a procedure for taking down infringing material which comes to their specific knowledge.

To summarise, the Defendants had not infringed on the copyright works of the Plaintiff, since the content was shared by the Plaintiff and as an intermediary, they were compliant with the due diligence procedure involved in monitoring such large content over an internet space used by millions of subscribers. The Defendants were only the medium through which the message was dispensed to the masses and could have no control over content which they had no direct knowledge about.

For the above reasons, the Court set aside the single judge's order and granted relief to the Defendants.

IndusLaw View:

The judgment passed by the division bench of the Delhi High Court is a significant ruling, which has harmonized provisions that appeared contradictory to each other in the Copyright Act and IT Act. The Court has tried to balance two different statutes through its interpretation and application by making one an extension of the other.

The Court has shown its progressive outlook by taking into consideration the idiosyncrasies of the distinct internet intermediary community and overturned a regressive order which would have otherwise created a system of control over the basic and fundamental principles of free speech over the internet.

By doing this, the Court has tried to strike a balance between the rights of intellectual property holders and the intermediary community in the interest of dissemination of information, entertainment and knowledge.

This judgment of the Delhi High Court is important in its analysis of actual knowledge for intermediaries under the Copyright Act. The holding that attributing knowledge generally to an intermediary would result in closure of several websites and services and that it would perpetrate a greater evil of private viewing and censorship resulting in breach of a fundamental right to privacy is fairly visionary, and exhibits a mature knowledge and understanding of the new internet medium and its technicalities by the judiciary. This bodes well for the internet industry as a whole and gives multinational and Indian internet companies a much-needed assurance that they will have a fair hearing and a fair application of law in Indian Courts.

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