"Liability of Intermediaries under the Information Technology Act"

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The intermediary liability reign has been defined under section 79 of the Information Technology Act and intermediary rules of 2009 and 2011. Since long, the online social media and platforms are poor victims of fault committed by the user in the form of there user generated content. They are unnecessarily being added as the defendants for a third party mistake, and find themselves in the whirlpool of claims and questions regarding their responsibilities and duties in monitoring and tackling the dissemination of offensive information, and the extent to which they should regulate ,supervise and control the menace of ever growing virtual hostility. Twitter and face book and other social media are strong tool of broadcasting and circulating ones view on any subject under the sun and with world wide access, it is next to impossible for them to keep a check on the post of every user and run, if required, content filter to prevent the gross and sensitive words from being published.

The position had been worst before the amendments in the Information Technology Act, 2000 were brought in. For the much controversial Information Technology Act, 2000 often called as draconian and arbitrary because of its wider approach and interpretations had put the intermediaries in the troubled waters and it seemed so much as the inconsequential and un-erring act of the latter could lock them in a legal broil. One of the major setbacks in the statue was its incapability to define the term "Intermediary". Due to this inadequacy, some mistook intermediary as publishers of the content while they were only providing the platforms to the people to stimulate healthy discussion on various aspects of life. In an ongoing case of Google India Pvt Ltd vs. Vishaka industries Limited[1] it was alleged by the petitioners that Google published various articles defamatory in nature and hence claimed compensation. However, Google contended that that actions of intermediaries does not amount to publication and the question of holding such intermediaries liable for defamation does not arise and also if the requirements listed under Section 79(3) of the IT (Amendment) Act, 2008 are fulfilled, intermediaries cannot be made liable for any post or information or link uploaded by the end users.

1. WHAT LED TO AMENDMENTS IN THE ORIGINAL ACT?

In the famous case of Avinash Bajaj vs. State of Delhi[2] , the CEO of the Bazee.co was arrested for an auction of a pornographic video uploaded by the third party and triggered the heated debate on section 67 and section 79 of the act and finally the software industries and online forums demanded the much- needed protection in the forms of amendments in section 79 and clearing their status as only the online platform providers and not as the publishers of the

[1] Google India Pvt Ltd v. Vishaka Industries Ltd Criminal Petition No.7207 of 2009
[2] Avinash Bajaj v. State of Delhi (2005) 3 CompLJ 364 Del.

information. Under the section 79 of the act, so much as the constructive knowledge on the part of the intermediary would suffice to take action against them, and considering the huge traffic online, it's practically impossible for them to monitor the content of every user, to scrutinize the legality of the content and finally decide whether it needs be blocked or not and hence promote private censorship.

In the backdrop of this event, the IT Act, 2000 was amended in 2008 with a hope of bringing reasonability and impartiality. Section 79 has been modified to the effect that an intermediary shall not be liable for any third party information data or communication link made available or hosted by him. This is however subjected to the three conditions as mentioned in section 79(2) of the act.

Thus, an intermediary is not liable if it only provide access to a communication system and does not tamper with information and observes due diligence. However, an intermediary would lose the immunity, if the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act. Sections 79(3) (b) also introduced the concept of "notice and take down "provision which provides that an intermediary would lose its immunity if upon receiving actual knowledge or on being notified that any information, data or communication link residing in or connected to a computer resource controlled by it is being used to commit an unlawful act and it fails to expeditiously remove or disable access to that material. However, despite the amendments, section 79 could not overcome its loopholes and often interpreted mischievously. The lacuna lies in section 79(3) (b) which is read as upon intermediary receiving actual knowledge through the consumers/public or government or its agencies as regards to the information being mischievous and demanding its removal off the online media.

In what is termed as tested law case, a Journo Swati Chaturvedi was harassed on twitter by the anonymous user and therefore she filed an FIR. This particular case led to the discussion on validity of applicability of section 67 of the act which prescribes punishment for publishing or transmitting obscene material in electronic form. This case had yet again questioned on the role of the internet service provider. The question whether the Internet service provider or the online social platforms should decide what speech is permissible or not? Should they be apply their own faculties in deciding whether the particular speech is offensive or not and block it. Should they be labeled as the publisher or the distributor of the information or the data or the link posted by the users? The pursuit of securing the intermediaries right was gaining a full momentum all over the world.

Then, to everybody dismay came a conflicting judgment in 2015 by the European Court on Human Rights in Delfi AS vs. Estonia[3], wherein the Court said "the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large

[3] Delfi v.Estonia (2013) ECHR 941.

commercial Internet news portal to prevent or rapidly remove such comments". After this judgment, it seemed that the interminable protests and meetings for protection of rights of intermediaries were in vain.

2. SILVER LINING...

However, after so many decades of being harassed and made poor victims, the landmark judgment of Honorable Supreme Court in Shreya Singhal vs. Union of India[4], gave the intermediaries a silver lining. Supreme Court struck down the draconian section 66A and gave section 79(3) (b) the interpretation it most needed. The apex court said "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."

Perusal of Supreme Court judgment shows that the court has addressed the issue of intermediaries complying with takedown requests from non-government entities and has made government notifications and court orders to be consistent with reasonable restrictions in Article 19(2). Also court held Section 69A which prescribes the blocking and restriction requirement as constitutional on the basis that blocking orders are issued when the government has sufficient reasons to back the blocking orders and they are not in breach of the Article 19(2).Further, court also suggested that under section 69A, the intermediary and the originator of the information, if identified, have the right to be heard before blocking orders are complied with.

The apex court also paid heed to the Rule 3(4) of the Intermediaries rules 2011 which is the bone of contention between the law makers and the law abiders. As per the rule 3(4) intermediary upon obtaining knowledge by itself or been brought to actual knowledge by an affected person shall act within 36 hours in taking down that content, thereby imply their own judgment in deciding whether the content falls within the any of the category of words listed under Rule 3(2) (b) and consequently to avoid the potential legal troubles, the intermediaries choose the cautious way of taking down the content then examine the legality of it. So, instead of going into the validity of 2011 rules, apex court read down the "Rule3 (4) in the same manner as section 79(3) (b) and the knowledge spoken of in the said sub-rule must only be through the medium of a court order only"[5]. Also, 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"[6].

[4] Shreya Singhal v. Union of India AIR (2015) SC 1523
[5] Shreya Singhal v. Union of India AIR (2015) SC 1523, para[118].
[6] Shreya Singhal v. Union of India AIR (2015) SC 1523, para [117].

3.STILL LONG WAY TO GO...

Though the Shreya Singhal judgment dealt impressively with section 66A of the act but the issues of the intermediary liability still needs to be addressed a major way. While, apex court has addressed the issues of prior hearing of intermediaries and the originator of the content but unless a proper channel of implementing the issue backed by the rules or guidelines on it, it's impossible to enforce it. Also court did not consider the constitutionality of section 69A notoriously known as blocking section. The court decided to keep it intact and asserted that it has inbuilt safeguards and no blocking orders can be passed unless the review committee is satisfied. Sadly, there is no review or appeal mechanism under rule 14 of the intermediary guidelines, 2009, so if once the review committee has approved the blocking of the user-generated content. We all need to understand, in particular the legislators that freedom of right is violated not only by hindering the right to freedom of expression and speech but also by the blocking the information on online platform for readers and listeners.