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Shreya Singhal V. Union of India: Case analysis

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1. Background of the case

Mumbai police arrested two girls Shaheen Dhada and Rinu Srinivasan in 2012 for communicating their dismay at a bandh brought in the wake of Shiv Sena boss Bal Thackery's demise. The girls posted their remarks on the Facebook. The arrested girls were discharged later on and it was decided to drop the criminal cases against them yet the arrests of them pulled in across the country protest. It was presumed that the police have abused its authority by invoking Section 66A at the same time it is a breach of fundamental right of speech and expression. The offence under section 66A of IT act being cognizable, law enforcement agencies have authority to arrest or investigate without warrants, based on charges brought under the information technology act. The outcome of this was many highly famous arrests of people throughout the country for posting their views and opinions whereas govt called them '*objectionable content'* but more often these content were dissenting political opinions. In January 2013, the central govt had turned out with an advisory under which no person can't be arrested without the police having prior approval of inspector general of police or any other senior official to him/her. The Supreme Court called the entire petition related to constitutional validity of information technology act or any section within it under single PIL case known as *"Shreya Singhal v. Union of India."[W.P. (crl).No.167 of 2012]*

2. International law related to freedom of speech and expression

The right to freedom of expression is articulated under Article 19 as Human Right in Universal Declaration of Human Right as well as in International Covenant on Civil and Political Rights which states that "*everyone shall have the right to hold opinions without interference "and "everyone shall have the right to freedom of expressions; this right shall include freedom to seek, receive and impart information's and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

Human Rights Council of United Nations on July5th, 2012 unanimously adopted a resolution to protect the free speech of the individuals on the internet

3. Facts in Issue.

A writ petition was filed in public interest under Article 32 of the Constitution of India by petitioner, seeking to declares Section 66A,69A and section 79 as unconstitutional on the fact that the phraseology used in Section 66A,69A and section 79 of the IT Act, 2000 is so broad and vague, at the same time incapable of being judged on objective standards, that it is susceptible to wanton abuse and hence falls foul of Article 14, 19 (1)(a) and Article 21 of the Constitution. Petitioner further argues that the terms, menacing, offensive, annoyance, inconvenience, obstruction, danger, and insult have not been defined in the General Clauses Act, IT Act or any other law and so they are susceptible to wanton abuse. petitioner further urged that the provision sets out an unreasonable classification between citizens on one hand and on the other hand netizens as the freedom generally guaranteed under Article 19(1)(a) to citizens including general media now is tamed as far as netizens are concerned. If netizens make comments which could be made generally by citizens, they can be arrested. This is how Article 14 is been violated by this provision

4. Petitioner's arguments

a. Section 66A takes away the Freedom of Speech and Expression guaranteed under Art. 19(1)(a) and is not saved by the reasonable restriction mentioned under Art. 19(2).
b. That causing of annoyance, inconvenience etc. are outside the scope of Article 19(2)
c. Section 66A seeks to create an offence but have infirmity and vice of vagueness as it does not clearly defines the terminology used in it. The terminology used are subjective in nature and are left open at the desire and will of the law enforcement agencies to interpret it. The limitation is not present.
d. Article 14 violated as there is no intelligible differentia as to why only one means of communication is targeted by this section. Thus, self-discriminatory.

5. Respondent's arguments

a. Legislature is in the best position to address the requirements of the people and the courts will only step in when a law is clearly violative of Part III and there is presumption in favour of Constitutionality of the law in question.
b. Court would so construe a law to make it functional and in doing so can read into or read down the provisions of law.
c. Only probability of abuse cannot be a justification to declare a provision invalid.
d. Loose Language is used to safeguard the rights of the people from those who violate them by using this medium.
e. Vagueness is not a ground to declare a statute unconstitutional if it is otherwise qualified and nonarbitrary

6. Free speech

Preamble of Indian constitution guarantees freedom of thought and expression and it is of key significance. The right to freedom in Article 19 guarantees the Freedom of speech and expression which was acknowledge in the Maneka Gandhi v. Union of India [1], where the Supreme Court held that the freedom of speech and expression has no geographical

limitation and it moves with the right of a citizen to collect information and to exchange thought with others not only in India but abroad also. The zest of the Article 19 says: "Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to pursue, receive and promulgate information and ideas through any media and regardless of state boundaries."

In Romesh Thappar v. State of Madras [2], it was stated that "Freedom of speech and Expression that of the press lay at the foundation of all democratic organisations, without free political discussion no public education which is essential for the proper functioning of the process of popular government, is possible." The Supreme Court in *Union of India v. Association for Democratic Reforms and Anr* [3] held that "One sided information, disinformation, misinformation and noninformation, all equally create an uninformed citizenry which makes democracy a farce. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions". Liberty of speech and expression is infact the most essential of all freedoms. In the leading case of Bennett Coleman v Union of India (1973) [4] it was observed that freedom of speech and press is the ark of the covenant of democracy because assessment of views by people is vital for the working of democratic institution. The Supreme Court in *Sakal Papers v Union of India* (1962) [5] observed that the freedom of speech and expression is one of the most important principles under a democratic constitution. Similarly in the S. Khushboo v Kanniamal and Anr (2010) [6] the apex Court observed that the freedom of speech and expression even not absolute in nature is essential as we need to tolerate unpopular opinions. The right of freedom of speech and expression needs free flow of opinions and views essential to support collective life. Custom of Social dialogue by and large is of great social
importance

7. U.S. and India

1. In case of *Whitney v. California* [7] Justice Brandeis stated that the Liberty should be treated as a means as well as an end and to justify suppression of free speech there should be a reasonable explanation to fear that serious evil will result if such free speech is practiced.
2. The Supreme Court debated at length that whether U.S. Judgements must be taken in context of Art. 19? Three distinction were made:
   - US first amendment is absolute and congress shall make no law which abridges the freedom of speech
   - US first amendment speaks of freedom of speech and of the press without any reference to expression whereas Art. 19(1)(a) talks about freedom of speech and expression without any reference to the press.
   - Under US law speech may be abridged if it is obscene, libellous, lewd, and profane whereas under Indian law it is subjected to eight elements mentioned under art. 19(2).

The only difference between US and Indian freedom of speech and expression is that if in US, there is a compelling necessity to achieve an important governmental policy or serious goal a law may pass the muster test but in India if it is not cover under eight subject matter then it shall not pass the muster test [8].

8. Constitutionality of 66A

In context of information. there are three concepts essentials to understand the Freedom of Expression: - a. Discussion

b. Advocacy

c. Incitement

The first is discussion, the second is advocacy, and the third is incitement. Just discussion or even advocacy of any particular cause howsoever disliked, unpopular or hated is at the heart of Article 19(1) (a). It is only when any such discussion or advocacy steps into the level of incitement that Article 19(2) gets initiated. It is at this stage/level that a law may be made for curtailing the speech or expression that leads inexorably to or tends to cause public disorder or be prone to cause or have tendency to affect the sovereignty & integrity of India, security of the country, friendly relations with other States, etc.

Further, to curtail the freedom specified under article 19(1)(a) the ground must qualify the test of article 19(2) which enumerate only eight condition or element but section 66A does not pass the muster test and element of article 19(1)(a).

9. On public order

"Public Order" is an expression which indicates a state of peace and tranquillity which prevails over and amongst the members of a society as a outcome of the internal Regulations enforced by the state which state have established with due process of law.

In the case Dr. Ram Manohar Lohia v. State of bihar and others [1966 AIR 740, 1966 SCR (1)709] Supreme Court pointed out the difference between maintenance of law and order and its disruption and the maintenance of public order and its disruption. Public order was said to enfold more of the society and community than law and order. Public order is the smooth and peaceful condition of the life of the community or society at large taking the country as a whole or even a particular locality. Disruption of public order is to be differentiated, from acts directed against or toward individuals who do not disturb the society to the extent or level of causing a general disruption of public tranquillity. It is the degree of disturbance and its impact upon the life of the community in a locality which decides whether the disturbance results only to a breach of law and order.

10. On clear and present danger and tendency to affect

Whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils. It is an issue of proximity and degree. The expected danger should not be farfetched, remote or conjectural. It must have immediate and direct link with the expression. The expression of thought should be substantially dangerous to the public interest or to say that the expression must be inseparably bolted up with the action. This is known as the test of "clear and present danger."

11. On defamation

It must be noticed that for something to be defamatory, injury to reputation is an essential ingredient. Section 66A does not expressly or impliedly concern itself with injury to reputation. Something might be grossly offensive and might be annoy or may be inconvenient to somebody but may not be affecting his reputation. It is established therefore that the Section 66A is not aimed at defamatory statements.

12. On decency or morality.

In the case of, *Directorate General of Doordarshan v. Anand Patwardhan* [9] Supreme Court observed the law in the United States of America and said that a material might be regarded as obscene if the average person applying contemporary society or community standards would find out that the subject matter taken up as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious artistic, literary, political, educational or scientific value.

Section 66A cannot possibly be said to frame an offence which comes within the expression of 'decency' or 'morality'. What might be grossly offensive or annoying under the Section 66A need not be essentially obscene? The word 'obscene' is absent in Section 66A.

13. On incitement to an offence

The mere causing of inconvenience, annoyance, danger etc., or being grossly offensive or having a menacing character is not defined as offences under the Indian Penal Code at all. They are ingredients of some offences under the Indian Penal Code but are not offences in themselves. By taking these reasons into consideration, Section 66A in fact has nothing to do with "incitement to an offence". Section 66A acutely curtails information that may be sent on the internet based on whether it is annoying, grossly offensive, inconvenient, etc. and being not related to any of the eight conditions mentioned Under Article 19(2) so therefore, fail to pass muster test laid down in Article 19(2) and Hence, it is said to breaches Article 19(1)(a).

14. On vagueness

The words used in the section 66A for formation of the offence are subjective and relative in character. That the words used in Section is so vague and loose that an accused person cannot be put on notice as to what precisely is the offence which has been committed by him/her at the same time the authorities administering the Section are not sure as to on which side of a clearly drawn boundary of a specific communication will fall every expression used is vague in meaning. What might be offensive to one might not be offensive to others. What might cause inconvenience or annoyance to one might not cause inconvenience or annoyance to others. Even the word "persistently" is not precise assume a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no clear cut line conveyed by any of these expressions and that is what makes the Section 66A unconstitutionally vague

It is an essential fundamental of due process that a law is void for vagueness if their restrictions are not clearly defined. Vague laws offend many important values. First, because we suppose that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may deceive the innocent persons by not providing just and fair warning. Second, if discriminatory and arbitrary enforcement is to be avoided, laws should provide explicit and clear standards for those who apply them. A vague law impermissibly gives basic policy matters to policemen, juries and judges for resolution on an ad hoc and subjective basis, with the severe dangers of discriminatory and arbitrary application. In *Kartar Singh v. State of Punjab* [10] it was observed that it is the one of the core principle of legal jurisprudence that a law must be void of vagueness if its prohibitory application is not clearly defined.

A most basic principle in our legal system is that enactments which regulate persons or entities should give fair and reasonable notice of conduct that is illegal or legal. In case of *Connally v. General Constr. Co.* [11] it was observed that a statute which either forbids or requires the doing of an act in language is so vague that men of common intelligence must necessarily guess or predicts at its meaning and confused as to its application, violates the first fundamental of due process of law. This essentiality of clarity in Regulation is essential to the protections given by the Due Process. It requires the scrapping of laws that are impermissibly vague. A punishment or conviction fails to comply with due process if the law or Regulation under which it is obtained "fails to provide a man of ordinary intelligence fair notice of what is prohibited, or is so vague that it authorizes seriously discriminatory enforcement." In the case of the Goonda Act the invalidity arises from the probability of the misuse of the law to the detriment of the individual.

15. On chilling effect and over breadth

Section 66A is cast so widely that impliedly any views on any subject would be covered by it, as any serious views dissenting with the majority or person with authority of the day would be caught within its scope. The Section 66A is unconstitutional also on the point that it takes within its scope protected speech and speech that is innocent in nature and can liable therefore to be used in such a manner as to have a chilling effect on free speech and would, therefore, have to be invalidate on the ground of over breadth.

16. On presumption in favour of constitutionality of an enactment

The possibility of abuse of an enactment otherwise valid does not implant to it any element of invalidity. The opposite must also imply that a statute which is otherwise not valid as being unreasonable cannot be saved by its being applied in a reasonable manner. The Constitutional validity of the enactment would have to be determined on the basis of its provisions and on the ambit of its application as reasonably construed. If so evaluated it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the enactment itself invalid and similarly if the enactment properly interpreted and tested in the light of the requisites set out in Part III of the Constitution of India does not pass the test it cannot be declared valid only because it is applied in a manner which may not conflict with

the constitutional safeguards. Moreover its reasonable and fair implementation depend upon the law enforcement agency and then it will become subjective to case to case things to be analyzed by the court and this will lead to miscarriage of justice.

17. On doctrine of severability under article 31(1)

In any case Hon'ble Court not being pleased about the constitutional validity of either any expression or a part of the law, the Doctrine of Severability as stated Under Article 13 may be came into play. According to Article 13(1), an existing law not consistent with any Fundamental Right is void only to the proportion of the inconsistency and not further. The rationale given by respondent is vague and ambiguous as it does not clearly point out which part of section 66A can be saved.

That Section 66A assert to sanction the implementation of restrictions on the fundamental right contained in Article 19(1) (a) in language wide enough to shield restrictions both within and without the limits of constitutionally valid legislative action.

In case of *Romesh Thappar v. State of Madras* [12], the question was as to the validity of Section 9(1A) of the Madras Maintenance of Public Order Act, 23 of 1949. That section empowered the Provincial Government to ban the entry and circulation within the State of a newspaper "for the purpose of securing the public safety or the maintenance of public order." Subsequent to the enactment of this statute, the Constitution of India came into force, and the validity of the provision depended on whether it was protected by Article 19(2), which saved "existing law insofar as it relates to any matter which undermines the security of or tends to overthrow the State." It was held by this apex Court that as the purposes enumerated in Section 9(1-A) of the Madras Act were wider in amplitude than those specified in Article 19(2), and as it was not possible to divide Section 9(1-A) into what was within and what was without the protection of Article 19(2), the provision must fail in its entirety. That is really a good decision that the impugned provision was on its own language and contents cannot be severed. This case is also dealing with an Article 19(1)(a) violation; Romesh Thappar's judgment would apply.

18. On article 14

The Petitioners had submitted that Article 14 is also violated in that an offence whose ingredients are vague in nature is unreasonable and arbitrary and would result in discriminatory and arbitrary application of the law. Moreover, there is no intelligible differentia between the medium of broadcast, print, and live speech as contrary to speech on the internet and, therefore, new class of criminal offences cannot be made out on this ground. Similar offences in nature which are committed on the internet have a three year maximum sentence Under Section 66A as contrary to defamation which has a two year maximum sentence in addition to that, defamation is a noncognizable offence at the same time under Section 66A the offence is cognizable.

Apex Court does not agree with the Petitioners that there is no intelligible differentia between the medium of broadcast, print, and real live speech as contrary to speech on the internet. Apex Court held that there is intelligible differentia as the internet gives any person a platform which need very little or no payment by which to air his views and anything posted on a site or website travels with speed of light and reaches to millions of peoples all over the world. Apex court declares that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences may certainly be created by legislation.

Therefore the challenge on the basis of Article 14 fails.

19. On section 69a and 79

According to Section 69A blocking of internet site can take place only by a clear and reasoned order after following with several procedural rules and safeguards which also includes a hearing to the originator and intermediary. There are two ways in which a blocking order for a website can be passed - first by the Designated Officer after complying with the 2009 Rules and second by the Designated Officer when he has to act on an order passed by a competent court. The intermediary using its own prudence to whether information must or must not be blocked is notably absent in Section 69A read with 2009 Rules.

Exemption from liability of intermediary is enumerated under section 79(3)(b) says that the intermediary upon having actual knowledge (certified copy of order) that a court order has been passed directing it to promptly remove or block access to specific material if they fail to expeditiously remove or block access to that material. This is on the ground that otherwise it would be very hard for intermediaries like facebook, Google etc. to follow order when lakhs of requests are pending and the intermediary is then to verified as to which of such requests are reasonable and which are not. It has been noticed that in other countries worldwide this view has gained acceptance (exemption of intermediaries under similar condition)

Apex Court held that Court order or the notification and direction by the Government or by its appropriate agency should strictly be in accordance to the subject matters laid down in Article 19(2). Unlawful acts beyond what is stated in Article 19(2) clearly cannot form any part of Section 79. With these two condition/restriction, Supreme Court reject from striking down Section 79(3)(b).

20. Market place of ideas by justice holes

The marketplace of ideas theory says that, with minimal or no state intervention a laissez faire policy approach to the law for speech and expression, propositions, ideas, theories, and movements will fail or succeed on their own merits if left to their own prudent devices, free individuals have the logical capability to filter through competing views in an free atmosphere of exchange and deliberation, giving ground to truth, or the best possible results, to be achieved in the end.

John Stuart Mill expanded this concept, by reasoning that free expression is valuable for individual and society because it assist to sustain and develop the rational mental faculty of man and, is a contributory tool, advanced the search for truth. The impact of Milton and Mill is clearly seen in Justice Oliver Wendell Holmes, dissent opinion in Abrams v. United States, 250 U.S. 616 (1919), the case that conventionally established the marketplace of ideas as a legal notion. Without any doubt,

Holmes never used this phrase of "marketplace of ideas." What he wrote in *Abrams* was this:

The best test of truth is the power of the thought to get it accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Even though attractive, the idea is highly optimistic because of the fact that there is no concrete evidence to prove that good, rational just arguments always beat and win over unjust and bad arguments. Psychological research proves that people are very prompt in accepting the opinion that he/she prefer or already hold, and not to change it only on rational grounds. so, casteist, sexist, communally charged, class ideologies will dominate a society, not on the strength of its truth but on the strength of its dominance over the society

21. Judgement in a glance

1. Section 66A is struck down in its entirety being violative of Article 19 (1) (a) and not saved under Article 19(2).
2. Section 69A and IT (procedure & safeguard for blocking for access of info by public) rules are constitutionality valid.
3. Section 79 is valid subject to reading down of Section 79(3) (b).
4. Section 118(d) of Kerala Police Act is struck down (public order).

22. Overview of the judgement

The judgment has preserved and saved the freedom of speech and expression given to people under article19 (1) (a) of Indian Constitution and also restraining state from arbitrary apply of power in context to freedom mentioned under article 19 of the constitution, at the same time Given clear guidelines for further enacting law in relation to reasonable restriction on fundamental right and freedom given by Indian constitution But miss to implore the principle of transparency for rules to block the website. Needs some further interrogation and fine tuning in regard to viewers right as he/she must know why state is not allowing them to have certain information and that reason can be challenged by the viewers also

However, the Apex Court has put a lot of faith in technical and complicated government process based on dicey understanding of the capabilities and capacities of the different parties involved. For example, the law regarding content-blocking procedure have been declared effective on the belief and presumption that the blocking of website rules (2009) gives a reasonable chance and opportunity to be heard and to challenge an unconstitutional blocking order.

This is, many times, misleading. It presumes that the originator of content will be contacted and informed about the blocking of his/her content and a reasonable opportunity will be given to challenge the blocking of the content. Secondly, the assumption that the intermediary will give reason and defend the content before the concerned government body. Both assumptions are practically far off the mark.

The very technical nature of the Internet, with its geographic spread and anonymity, makes it likely possible that the originator of the content may not be contacted, because of content- originator may be in foreign country or can lack the resources to argue and pursue his/her case. Intermediaries will not reasonably defend the content since they prefer to avoid spending resources on protecting third-party content. The cumulative impact of this is that the information available to access will continue to be affected by unreasonable government blocking orders.

The blocking procedure continues to be covered in secrecy by the application of Rule 16 of the Blocking of Access rules, which demands that confidentiality must maintained in case of any blocking orders. This rule was contested in the *Shreya Singhal* case but the Apex Court left this rule untouched. For originators of content and viewers to notice that their content has been ordered to be blocked by government or its agency, the hosting page must carry a notification of the order for blocking along with reasons.

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