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CASE REVIEW

M/s. SHREE KRISHNA INTERNATIONAL ETC. v. GOOGLE INDIA PVT.
LTD. AND OTHERS

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ABSTRACT

It is indisputable that in the present scenario, internet websites have become a major source of entertainment for the public as they get the share of their daily dose of movies, songs and other materials, free of cost. Millions of people rely on such internet websites for viewing and sharing audiovisual works, cinematograph films etc. Most of the content being uploaded and shared in such sites might be subject to copyright. This calls into perplex issues mainly pertaining to the juxtaposition between the freedom of the users to upload, view and share such copyrighted content in these sites, and the rights of the copyright owners to prevent such infringing activities on their copyrighted content in such sites. The liability of the intermediaries for the infringing acts done by its third party users in its platform is a major question to be answered in the wake of millions of such cases happening daily. The case had called for a close scrutiny of the ambit of infringement done by the third part users and the knowledge required by the intermediaries with regard to such activities done by its users in their sites.

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I. BRIEF FACTS OF THE CASE

The plaintiffs are the producers of cinematograph films and owners of copyright in different works, such as cinematograph films and other audio visual works, and sound recordings. The defendants are the owners and proprietors of the internet website www.youtube.com, which is used as a platform for uploading, sharing and viewing different types of works and other materials, without charge. The defendants generate profit, mainly from advertising revenues through their website. The plaintiffs allege direct infringement charges against the defendants, since the works which are uploaded and shared on the website of the defendants include copyrighted content of the plaintiffs, and the same are being reproduced, publicly performed and communicated to the public, without obtaining any permission, authorisation or license from the plaintiffs. The plaintiffs further impute infringement claims on the defendants as they permit for downloading content from their website, by using mechanisms such as “Youtube Downloader”. Consequently, the plaintiffs claim infringement of their rights granted under Sections 14 (a) (i), 14 (a) (iii), 14 (d) and 14 (e) (iii) of the Copyright Act, 1957. The plaintiffs claim considerable loss of revenue due to such infringing activities facilitated by the defendants in their website.

II. ISSUES ADDRESSED BY THE COURT

The main issues sought to be addressed by the Hon’ble Court were, whether the defendants through their website, have permitted for profit, a place/platform to be used for communication of the plaintiffs' works to the public, which amounts to infringement of copyright under Section 51 of the Copyright Act, 1957. Also at issue is “whether the defendants have directly or indirectly infringed the plaintiffs' copyright; as well as whether the defendants are entitled to immunity under Section 79 of the Information Technology Act, 2000”, and the effect of such immunity.

III. RATIO OF THE CASE

The Hon’ble Court in this judgment has held that the defendants have infringed the copyright of the plaintiffs by uploading the movies and other audiovisual works of the plaintiff on their website. It was also held that the defendants did not remove the infringing content, despite being fully aware of the titles of the same. Thus, according to the Court, it is not necessary to locate the

exact URLs to remove the infringing content. It was further held that the defendants are not entitled to immunity from liability for infringement under Section 79 of the Information Technology Act, 2000, as they indulge in modifying the content of the videos by inserting advertisements in the videos.

IV. APPRAISAL OF THE JUDGMENT

The Court has erroneously identified that the defendants being the owners and proprietors of the website, have committed infringement by permitting to upload the copyrighted content of the plaintiffs on their website. Even if it is admitted that the defendants are earning huge profits from their advertising revenues in the website, the defendants cannot be held liable for direct infringement of the plaintiffs' copyright by providing a platform for its users to upload their content on the website. In fact the sole premise on which the judgment is based seems to be the amount of profit generated by the defendants, rather than an analysis of compliance with the due diligence measures required to be taken by the defendants.

The Court also seems to be confused about the difference between direct and indirect infringement of copyright, as is evident from the ratio in the first issue that "the plaintiff... has never granted any authority/license or consent and permitted for profit the defendants' place/platform to be used for communication of the plaintiffs work/films to the public."¹ Though the first issue is whether the defendants are permitting a place for profit by permitting the uploading of infringing content on their website, nothing in this regard has been dealt with by the Hon'ble Court, and it was simply held that the defendants have committed infringement. However, the court has misconstrued the level of knowledge required by the defendants in this regard. The Court has consequently held that the defendants have infringed the plaintiffs' copyright by communicating the films of the plaintiff without their license or consent.

The Court has also held that the defendants are capable of removing the infringing content, even without obtaining the URLs of the content which is to be removed. This calls into question the prime issue of the level of knowledge required by the intermediaries regarding the infringing content being uploaded on their websites. It is observed by the Court here that the defendants

¹ Para 21, p.16, of the judgment.

could have removed the infringing content from their website after the injunction which was passed in 2011, and the same was not removed in spite of knowing the titles of the infringing contents, from the plaintiff. The Court is of the opinion that the knowledge of the titles of infringing content would suffice to get hold of the URLs of such infringing content. This finding of the Court comes as a surprise as it is quite evident that unless the exact URLs of the content are provided, it is not possible to identify as to whom it belongs to. The same justification though raised by the defendants was paid no heed to by the Hon'ble Court. It is unjustifiable to demand automated filtering mechanisms for identifying and barring infringing content from such websites due to the huge amount of content being uploaded in such websites every minute. The chances of such automated filtering mechanisms may also lead to confusion, and ultimately removal of content being uploaded even by legitimate users, such as persons who may have acquired licenses from the copyright owners. This will only lead to further chaos in the matter. Thus the Hon'ble Court in this judgment has diluted the level of knowledge required by the intermediaries of the infringing content uploaded on their website. The ruling of this Hon'ble Court on this point marks a strict departure from the ratio of the Delhi High Court in *Myspace Inc. v. Super Cassettes Industries Limited*². In *Myspace* case, it was observed that only when the intermediary has specific or actual knowledge, or has reasonable belief based on the information provided by the content owners, and in spite of having such knowledge or reasonable belief, it has failed to remove the infringing content, and it can be held liable for infringement of copyright. The Hon'ble Court in this judgment has failed to appreciate that general awareness of the infringing content is not sufficient to locate the exact infringing content, and actual or specific knowledge of the same is required by the intermediaries to take action on such infringing content.

The next issue pertains to whether the defendants are entitled to immunity under Section 79 of the Information Technology Act, 2000. The Hon'ble Court in this judgment has categorically held that the defendants are not entitled to immunity under Section 79 of the Information Technology Act, 2000. However, the Court has not provided sufficient reasons as to why the immunity does not accrue to the defendants in this case. Taking cue from the judgment of the

² 2017 (69) PTC 1 Del (DB).

Delhi High Court in *Christian Louboutin SAS v. Nakul Bajaj and others*³, the Court in this judgment has erroneously reached the conclusion that the defendants are not entitled to immunity under the Information Technology Act, 2000, without citing proper reasons for arriving at such a conclusion. The reason accorded could be that the insertion of advertisements by the defendants leads to modification of the uploaded content. However, in *Myspace* judgment, it was clearly held that insertion of advertisements through automated process does not result in modification of content, but only a modification to the format of the video. Though the Hon'ble Court in this judgment makes a mention of this dictum in *Myspace* case, the Court has reached a conclusion opposite to it, and has rendered the defendants with no immunity under the Information Technology Act, 2000. The Hon'ble court should have appreciated that insertion of advertisements through an automated process, which has no manual interference does not result in modification of the content uploaded in the website.

An intermediary like Youtube which follows the requirements for exemption from liability for the third party information, data or communication hosted by it, under Section 79 (2) and (3) of the Information Technology Act, 2000, it is doubtful as to how the defendants could be held liable for infringement for the activities of its users in its website. It is clear from the evidence provided by the defendants, and the modalities of such intermediaries which was explained in detail in *Myspace* judgment, that such intermediaries neither initiate the transmission nor select the receiver of the transmission, or select or modify the information provided in the content. Hence it is untenable that the defendants were denied immunity from infringement under Section 79 (2) of the Information technology Act. Moreover, the policy of Youtube being clear on the due diligence it takes with regard to the content uploaded in the website, it is also entitled to immunity under Section 79 (3) of the Information technology Act. Unless the exact URL of the infringing content is provided to the website, the technical difficulty of getting such content removed must have been appreciated by the Hon'ble Court.

Though the Court makes a mention of the Information Technology (Intermediaries Guidelines), 2011, in the context of the *Christian* judgment mentioned above, it has failed to take the effort to understand the policies and practices followed by Youtube with respect to the due diligence it takes with regard to the content being uploaded in their website. Moreover, the Court seems to

³ MANU/DE/4019/2018.

have avoided further discussions on the relevance of Section 79(3)(b)⁴ of the Information Technology Act, 2000 in the instant case. In case the intermediary has failed to take down or disable the material even after receiving actual knowledge or on being notified by the Government or its agencies, Section 79(3) (b) could have been invoked so as to establish that Youtube is not eligible for the safe harbor under the Information Technology Act, 2000. Hence the decision of the Hon'ble Court in reaching at a conclusion against the defendants seems to be hastily taken, without proper appreciation of the evidence provided.

Also it was held in this case that the defendants are not liable to get the benefit of Section 52 (1) (b) and (c) of the Copyright Act, since the provision was inserted into the Act by the amendment in 2012. The issue having occurred in 2011, the defendants cannot claim benefit of the said provisions of the Copyright Act. Thus the defendants are not entitled to claim benefit under Section 81 of the Information Technology Act also.

V. CONCLUSION

This decision being consequent to the rationale decision in Myspace judgment, the least this Hon'ble Court could have done is to correctly appreciate the evidence adduced by the defendants with regard to the modalities followed by them in their website. Unfortunately, the Court in this judgment has failed to consider the technical difficulties that such intermediaries face while locating and removing the infringing content, without being provided with the URLs of such content sought to be removed. The due diligence followed by the intermediaries in this case has been ignored by the Court, and they have been barred from claiming the immunity which they should have got legitimately as per the laws applicable in the country. The repercussions that such judgments have on the freedom of expression of the millions of people in India who rely on such websites is yet to be answered.

⁴ Section 79(3)(b) of the Information Technology Act provides that the exemption from liability of the intermediary shall not apply, if the intermediary fails to expeditiously remove or disable access to the material in case "it has received actual knowledge or has been notified by the Government or its agencies 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."