Gaikwad RD

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 9792 OF 2023

Kunal Kamra,
Indian inhabitant, aged 34 years, Residing at C-33, Kataria Colony, Caddel Road, Mahim, Mumbai 400 016. ...Petitioner

~ versus ~

Union of India,
Represented by the Secretary, Ministry of Electronics and Information Technology, Having its office at Electronics Niketan, 6 CGO Complex, Pragati Vihar, Lodhi Road, New Delhi 110 003. ...Respondent

WITH

WRIT PETITION (L) NO.14955 OF 2023

Editors Guild of India,
Having their registered office at B-62 Gulmohur Park (first floor), New Delhi 100 049. ...Petitioner

~ versus ~

1. **Union of India,**
Ministry of Electronics and Information Technology, Having office at

Electronics Niketan, 6 CGO Complex,
Pragati Vihar, Lodhi Road,
New Delhi 110 003.

2. **Union of India,**
Ministry of Law and Justice, Having office at 3rd floor, C Wing, Lok Nayak Bhavan, Khan Market,
New Delhi 110 003.

3. **Union of India,**
Ministry of Information and Broadcasting, Having office at Shastri Bhavan, New Delhi 110 003.

...Respondents

WITH
INTERIM APPLICATION (L) NO.17704 OF 2023
IN
WRIT PETITION (L) NO.14955 OF 2023

1. **News Broadcasters & Digital Association,**
Through its Secretary General,
Mrs Annie Joseph, Age – 67 years,
Registered Office at: FF-42, Omaxe Sqaure, Commercial Centre, Jasola,
New Delhi 110 025.

2. **Bennett, Coleman & Company Limited,**
Through its Authorized Signatory
Mr Sanjay K Agarwal, Age – 54 years,
Having Office at Trade House, Ground Floor, Kamala Mills Compound,
Senapati Bapat Marg, Lower Parel West, Mumbai 400 013.

3. **M/s TV 18 Broadcast Limited,**
Through its Authorized Signatory
Mr Satyajit Sahoo, Age – 39 years,
Having Office at Empire Complex, 414,
Senapati Bapat Marg, Lower Parel
West, Mumbai 400 013. **...Applicants**

In the matter between

Editors Guild of India,
Having their registered office at B-62
Gulmohur Park (first floor),
New Delhi 100 049. **...Petitioner**

~ versus ~

1. **Union of India,**
Ministry of Electronics and Information Technology, Having office at Electronics Niketan, 6 CGO Complex, Pragati Vihar, Lodhi Road,
New Delhi 110 003.

2. **Union of India,**
Ministry of Law and Justice, Having office at 3rd floor, C Wing, Lok Nayak Bhavan, Khan Market,
New Delhi 110 003.

3. **Union of India,**
Ministry of Information and Broadcasting, Having office at Shastri Bhavan, New Delhi 110 003. **...Respondents**

WITH

(CIVIL APPELLATE JURISDICTION)

WRIT PETITION NO.7953 OF 2023

Association of India Magazines,
Registered office at E-3, Jhandewalan Estate, New Delhi 110 055.
Through its President Srinivasan B, R/O Gemini House, Old No.58, new No. 36, 3rd Main Road, Gandhinagar, Adyar Chennai 600 020.

...Petitioner

~ versus ~

Union of India,
Through the Secretary Ministry of Electronics and Information Technology, Having office at Electronics Niketan, 6 CGO Complex, Pragati Vihar, Lodhi Road, New Delhi 110 003.

...Respondent

Appearances

For the Petitioner in WPL/9792/2023.	**Mr Navroz Seervai, Senior Advocate**, *with Darius Khambata, Senior Advocate, Arti Raghavan, Vrinda Bhandari, Gayatri Malhotra, Abhinav Sekhri & Tanmay Singh, i/b Meenaz Kakalia*
For the Petitioner in WP/7953/2023.	**Mr Gautam Bhatia**, *with Aditi Saxena.*
For Applicant in IAL/17704/2023.	**Mr Arvind Datar, Senior Advocate**, *with Nisha Bhambani, Rahul Unnikrishnan & Bharat Manghani, i/b Gautam Jain.*

FOR RESPONDENT-UOI.	**Mr Tushar Mehta, Solicitor General**, *with Devang Vyas, Additional Solicitor General, Rajat Nair, Gaurang Bhushan, DP Singh, Ankit Lohia, Vikram Sahay, Additional Secretary, in all matters.*

CORAM : G.S.Patel &
Dr. Neela Gokhale, JJ.

RESERVED ON : 29th September 2023

PRONOUNCED ON : 31st January 2024

JUDGMENT (*Per Dr. Neela Gokhale J*):-

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I have received the draft judgment prepared by my esteemed brother Gautam Patel J. I have perused the draft, which is undoubtedly most erudite and articulate. With profound respect to my learned brother, I find myself unable to, however, concur with his reasoning and conclusion save as will be made clear. Hence the following judgment.

OVERVIEW

1. This batch of Writ Petitions filed under Article 226 of the Constitution of India raises important and far-reaching questions relatable primarily to the fundamental right of freedom of speech and expression guaranteed by the Constitution of India. The Petitioners specifically assail the constitutional validity of Rule 3(i)(II)(A) and (C) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2023 which amend Rule 3(1)(b)(v) of the IT Rules 2021 ("**the impugned Rule**") as being violative of Articles 14, 19(1)(a) and (g) and 21 of the Constitution of India and Section 79 and Section 87(2)(z) and (zg) of the Information Technology Act, 2000 ("**IT Act**"). The thrust of the challenge is that the impugned Rule has a 'chilling effect' upon the freedom of speech and expression of the Petitioners, guaranteed under Part III of the Constitution of India. The Petitioners are aggrieved by the impugned Rule vesting authority in a Fact Check Unit ("**FCU**") to be notified by the Government to identify the veracity or otherwise of 'information', thereby alleging the Government to be the sole arbiter of truth in respect of any business related to itself.

ABOUT THE PARTIES

2. The Petitioner in Writ Petition No.9792 of 2023 professes to be a comedian, whose primary form of comedy is social and political satire. He hosts web-series where he engages in discussions with prominent activists, political leaders, and journalists on various

aspects of Indian socio-political landscape. The Petitioner in Writ Petition (L) No.14955 of 2023 is a society asserting to be a not-for-profit organization. As per this Petitioner, the professional guild founded in 1978 in the aftermath of the emergency era attack on press freedom, has undertaken the responsibility and duty to safeguard the freedom of the fourth estate of democracy and has time and again opposed threats to media freedom from State as well as non-State actors. The Petitioner in Writ Petition No.7953 of 2023 is a registered society under the Societies Registration Act, 1860 which claims to comprise 40 magazine publishers with more than 300 publications across 10 languages reaching readers across print, digital and social media. Several members of this Petitioner offer digital exclusive content on the websites and social media accounts which, according to this Petitioner, is not available in the print edition of their publications. The Respondents are the Union of India through its Ministries concerned.

FACTS OF THE CASE

3. The challenge to the impugned Rule in all these petitions generally being on similar grounds, the facts are being set out collectively. The Parliament enacted the Information Technology Act in the year 2000. The Statement and Objects of the Act as stated is to provide legal recognition for transactions carried out by means of electronic data inter change and other means of electronic communication, commonly referred to as "electronic commerce", which involves the use of alternatives to paper based methods of communication and storage of information, to facilitate electronic

filing of documents with government agencies etc. The General Assembly of the United Nations by a resolution dated 30th January 1997 adopted the Model Law on Electronic Commerce adopted by the U.N Commission on International Trade Law. The resolution recommends that all States give favourable consideration to the Model Law when they enact or revise laws, in view of the need to maintain uniformity in the applicable law.

4. The various provisions in the Act dealing with the issue are set out herein below:

> "**69A. Power to issue directions for blocking for public access of any information through any computer resource.–**(1) Where the Central Government or any of its officer specially authorized by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defense of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offense relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.
>
> (2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

"**79. Exemption from liability of intermediary 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 purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."

Section 79 of the Act as enacted originally reads as follows-

"79. **NETWORK SERVICES PROVIDERS NOT TO BE LIABLE IN CERTAIN CASES.**

For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, Rule or Regulation made thereunder for any third party information or data made available to him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

Explanation: For the purpose of this section,

(a) "network service provider" means an intermediary;

(b) "third party information" means any information dealt with by a network service provider in his capacity as an intermediary"

Thus, it is clear that the scope of Section 79 before its substitution was limited to confer immunity from liability in regard to an offence under the Act or the Rules and Regulations made thereunder *qua* third party actions or data made available. The implication was that they received absolutely no protection from liability under any other legislation for content that they hosted.

In 2008, Section 79 of the Act was revised in line with that provided for similar provisions in the European Act. The said Section as it now stands offers internet intermediaries respite from liability not only under the Act and its Rules, but also under any other legislation as well. A bare reading of Section 79(1) and (2) indicates that the protection from liability is in cases where service providers may not know exactly what their subscribers/users are doing, and they should not suffer penalties for something that they are not aware. Thus, the provision essentially covers cases where the activity undertaken by the Intermediary is of a technical, automatic, and passive nature. For protection under Section 79(2), the intermediaries should neither have knowledge nor control over information transmitted or stored on its computer resource. At the same time, Section 79(3) revives the liability in cases where the intermediary plays a participatory and active role in hosting offensive content.

Section 87 of the IT Act reads as under:

> "**87. Power of Central Government to make rules. –** (1) The Central Government may, by notification in the Official Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:–
>
> (a) …….
>
> (z) the procedures and safeguards for blocking for access by the public under sub-section (2) of section 69A.
>
> (za)……..
>
> (zg) the guidelines to be observed by the intermediaries under sub-section (2) of section 79.

5. Pursuant to the power vested by Section 87 of the IT Act, the Central Government notified Rules to carry out the provisions of the Act. Notably, the Information Technology (Procedures and Safeguards for Blocking for Access of Information by Public) Rules, 2009 ("**2009 Blocking Rules**") notified the procedure and safeguards subject to which blocking for access by the public envisaged in Section 69A of the Act is to be carried out.

6. It is relevant to note here that Section 66A and 69A of the Act and the 2009 Blocking Rules were challenged in ***Shreya Singhal v. Union of India***[1] in the Supreme Court of India. In the same proceeding, one of the Petitioners also assailed Section 79(3)(b) of the Act to the extent that it made the intermediary exercise its own

1 (2015) 5 SCC 1

judgment upon receiving actual knowledge that any information is being used to commit an unlawful act. While striking down Section 66A of the Act as *ultra vires*, the Apex Court upheld Section 69A of the Act and the 2009 Blocking Rules as constitutionally valid. The Court also read down Section 79(3)(b) to mean that an intermediary upon receiving actual knowledge from a Court or on being notified by the appropriate Government or its Agency that unlawful acts relatable to Article 19(2) of the Constitution are going to be committed then fails to expeditiously remove or disable access to such material.

7. The Supreme Court upheld Section 69A of the Act noticing that unlike Section 66A, it is a narrowly drawn provision with several safeguards. It was noticed that the 2009 Blocking Rules are framed under Sub-section (2) thereof. Rule (3) of the 2009 Blocking Rules provides for designation by the Central Government vide a notification in the official gazette, an officer of the Central Government not below the rank of a Joint Secretary as the designated officer for the purpose of issuing directions for blocking for access by the public any information referable to Section 69A of the Act. Rule (4) provides for designation of one officer of every organization as the Nodal Officer. The designated officer is empowered to direct any Government Agency or intermediary, to block for access by the public any information or part thereof generated, transmitted, received, stored, or hosted in any computer resource for any of the reasons set out in Section 69A (1) of the Act, upon receipt of any request from the Nodal Officer or a Competent Court. Rule (6) provides for the procedure to be followed once any complaint is received by the Nodal Officer. The designated officer is

not to entertain any complaint or request for blocking directly from any person. Rule (7) provides for examination of the complaint/request by a Committee of Government Personnel which under Rule (8) are, at the outset, to make reasonable efforts for identification of the originator or intermediary hosting the information and only after following the mandated procedure under the Rules followed by the recommendation of the Committee, that the Secretary, Department of Information Technology shall pass the final order. Additionally, Rule (14) provides for a Review Committee to meet at least once in two months and record its findings as to whether the directions issued are in accordance with Section 69A (1) of the Act and if found contrary, the Review Committee is empowered to set aside the direction and unblock the said information. The Apex Court, taking into consideration the strict procedural safeguards provided before issuing any blocking order, has thus upheld the validity of the 2009 Blocking Rules.

8. Reverting to the exemption provision of Section 79 of the Act, it is pertinent to note that exemption from liability also applies if the intermediary observes due diligence while discharging his duties under the Act and also observes such other guidelines as the Central Government may prescribe in that behalf. The term 'Due Diligence' was nowhere prescribed in the Act or Rules as it stood then. Thus, the Information Technology (Intermediary Guidelines) Rules, 2011 were notified. Thereafter, in supersession thereof, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 ("**the Ethics Code Rules**") came to be notified. Part II of these Rules now prescribe the Due Diligence by Intermediaries and provides for a Grievance Redressal Mechanism.

9. The 2021 Ethics Code Rules were amended on 6th April 2023. By way of the amendment, some content was added to the existing Rule (3)(1)(b)(v). Rules (3), (3A) and (7) are reproduced as under with the impugned amended portion indicated in red color:

> "**3. (1) Due diligence by an intermediary:** An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, shall observe the following due diligence while discharging its duties, namely:—
>
> (a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement in English or any language specified in the Eighth Schedule to the Constitution for access or usage of its computer resource by any person in the language of his choice and ensure compliance of the same;
>
> (b) the intermediary shall inform its rules and regulations, privacy policy and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts by itself, and to cause the users of its computer resource to not host, display, upload, modify, publish, transmit, store, update or share any information that,—
>
> (i) belongs to another person and to which the user does not have any right;
>
> (ii) is obscene, pornographic, pedophilia, invasive of another's privacy, including bodily privacy, insulting or harassing on the basis of gender,

racially or ethnically objectionable, relating or encouraging money laundering or gambling, or an online game that causes user harm, or promoting enmity between different groups on the grounds of religion or caste with the intent to incite violence;

(iii) is harmful to child;

(iv) infringes any patent, trademark, copyright or other proprietary rights;

(v) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature or, in respect of any business of the Central Government, is identified as fake or false or misleading by such FCU of the Central Government as the Ministry may, by notification publish in the Official Gazette, specify;

(vi) impersonates another person;

(vii) threatens the unity, integrity, defense, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognizable offense or prevents investigation of any offense or is insulting other nation;

(viii) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;

(ix) is in the nature of an online game that is not verified as a permissible online game;

(x) is in the nature of advertisement or surrogate advertisement or promotion of an online game that is not a permissible online game, or of any online gaming intermediary offering such an online game;

(xi) violates any law for the time being in force.

Explanation.- In this clause, "user harm" and "harm" mean any effect which is detrimental to a user or child, as the case may be;

(c) an intermediary shall periodically inform its users, at least once every year, that in case of non-compliance with rules and regulations, privacy policy or user agreement for access or usage of the computer resource of such intermediary, it has the right to terminate the access or usage rights of the users to the computer resource immediately or remove non-compliant information or both, as the case may be;

(d) an intermediary, on whose computer resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act, shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offense relating to the above, or any information which is prohibited under any law for the time being in force:

Provided that any notification made by the Appropriate Government or its agency in relation to any information which is prohibited under any law for the time being in force shall be issued by an authorized agency, as may be notified by the Appropriate Government:

Provided further that if any such information is hosted, stored or published, the intermediary shall remove or disable access to that information, as early as possible, but in no case later than thirty-six hours from the receipt of the court order or on being notified by the Appropriate Government or its agency, as the case may be:

Provided also that the removal or disabling of access to any information, data or communication link within the categories of information specified under this clause, under clause (b) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such intermediary, shall not amount to a violation of the conditions of clauses (a) or (b) of sub-section (2) of section 79 of the Act;

(e) the temporary or transient or intermediate storage of information automatically by an intermediary in a computer resource within its control as an intrinsic feature of that computer resource, involving no exercise of any human, automated or algorithmic editorial control for onward transmission or communication to another computer resource shall not amount to hosting, storing or publishing any information referred to under clause (d);

(f) the intermediary shall periodically, and at least once in a year, inform its users in English or any language specified in the Eighth Schedule to the Constitution in the language

of his choice of its rules and regulations, privacy policy or user agreement or any change in the rules and regulations, privacy policy or user agreement, as the case may be;

Provided that an online gaming intermediary who enables the users to access any permissible online real money game shall inform its users of such change as soon as possible, but not later than twenty-four hours after the change is effected;

(g) where upon receiving actual knowledge under clause (d), on a voluntary basis on violation of clause (b), or on the basis of grievances received under sub-rule (2), any information has been removed or access to which has been disabled, the intermediary shall, without vitiating the evidence in any manner, preserve such information and associated records for one hundred and eighty days for investigation purposes, or for such longer period as may be required by the court or by Government agencies who are lawfully authorized;

(h) where an intermediary collects information from a user for registration on the computer resource, it shall retain his information for a period of one hundred and eighty days after any cancellation or withdrawal of his registration, as the case may be;

(i) the intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011;

(j) the intermediary shall, as soon as possible, but not later than seventy two hours and in case of an online gaming intermediary who enables the users to access any permissible online real money game not later than twenty four hours of the receipt of an order, provide information under its control or possession, or assistance to the Government agency which is lawfully authorized for investigative or protective or Cyber security activities, for the purposes of verification of identity, or for the prevention, detection, investigation, or prosecution, of offences under any law for the time being in force, or for cyber security incidents:

Provided that any such order shall be in writing stating clearly the purpose of seeking information or assistance, as the case may be;

(k) the intermediary shall not knowingly deploy or install or modify technical configuration of computer resource or become party to any act that may change or has the potential to change the normal course of operation of the computer resource than what it is supposed to perform thereby circumventing any law for the time being in force:

Provided that the intermediary may develop, produce, distribute or employ technological means for the purpose of performing the acts of securing the computer resource and information contained therein;

(l) the intermediary shall report cyber security incidents and share related information with the Indian Computer Emergency Response Team in accordance with the policies and procedures as mentioned in the Information Technology (The Indian Computer Emergency Response

Team and Manner of Performing Functions and Duties) Rules, 2013.

(m) the intermediary shall take all reasonable measures to ensure accessibility of its services to users along with reasonable expectations of due diligence, privacy, and transparency;

(n) the intermediary shall respect all the rights accorded to the citizens under the Constitution including in the Articles 14,19 and 21.

(2) Grievance redressal mechanism of intermediary:

(a) The intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the name of the Grievance Officer and his contact details as well as mechanism by which a user or a victim may make complaint against violation of the provisions of this rule or sub-rules (11) to (13) of rule (4), or in respect of any other matters pertaining to the computer resources made available by it, and the Grievance Officer shall -

> (i) acknowledge the complaint within twenty four hours and dispose-off and resolve such complaint within a period of fifteen days from the date of its receipt;
>
> Provided that the complaint in the nature of request for removal of information or communication link relating to clause (b) of sub-rule (1) of rule 3 except sub-clauses (i), (iv) and (xi), shall be acted upon as expeditiously as possible and shall be resolved within seventy-two hours of such reporting;

Provided further that appropriate safeguards may be developed by the intermediary to avoid any misuse by users;

(ii) receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority, or a court of competent jurisdiction.

Explanation:- In this rule, "prominently published" shall mean publishing in a clearly visible manner on the home page of the website or home screen of the mobile based application, or both as the case may be or on a web page or an app screen directly accessible from the home page or home screen.

(b) The intermediary shall, within twenty-four hours from the receipt of a complaint made by an individual or any person on his behalf under this sub-rule, in relation to any content which is prima facie in the nature of any material which exposes the private area of such individual, shows such individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such individual, take all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it:

(c) The intermediary shall implement a mechanism for the receipt of complaints under clause(b) of this sub-rule which may enable the individual or person to provide details, as may be necessary, in relation to such content or communication link."

"**3A. Appeal to Grievance Appellate Committee(s).—** (1) The Central Government shall, by notification, establish one or more Grievance Appellate Committees within three months from the date of commencement of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022.

(2) Each Grievance Appellate Committee shall consist of a chairperson and two whole time members appointed by the Central Government, of which one shall be a member ex-officio and two shall be independent members.

(3) Any person who is aggrieved by a decision of the Grievance Officer or whose grievance is not resolved within the period specified for resolution in sub-clause (i) of clause (a) of sub- rule (2) of rule 3 or clause (b) of sub-rule (2) of rule 3 or sub-rule (11) of rule 4A, as the case may be, may prefer an appeal to the Grievance Appellate Committee within a period of thirty days from the date of receipt of communication from the Grievance Officer.

(4) The Grievance Appellate Committee shall deal with such appeal expeditiously and shall make an endeavor to resolve the appeal finally within thirty calendar days from the date of receipt of the appeal.

(5) While dealing with the appeal if the Grievance Appellate Committee feels necessary, it may seek assistance from any person having requisite qualification, experience, and expertise in the subject matter.

(6) The Grievance Appellate Committee shall adopt an online dispute resolution mechanism wherein the entire appeal process, from filing of appeal to the decision thereof, shall be conducted through digital mode.

> (7) Every order passed by the Grievance Appellate Committee shall be complied with by the intermediary concerned or the online gaming self-regulatory body concerned, as the case may be, and a report to that effect shall be uploaded on its website."
>
> "**7. Non-observance of Rules.** —Where an intermediary fails to observe these rules, the provisions of sub-section (1) of section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code."

10. It is the amendment in Rule 3(1)(b)(v) which is the subject matter of challenge in the present petition. The submissions made on behalf of the parties are summarized as under:

(I) <u>Submissions of Mr. Seervai, learned Senior Advocate for the Petitioner in Writ Petition No.9792 of 2023:</u>

(i) The impugned Rule is *ultra vires* Section 79 of the parent Act as it authorizes the deprivation of safe harbor for intermediaries on grounds that go beyond Article 19(2) of the Constitution. Neither Section 87(2)(z) and (zg) nor Section 79(2) of the Act confers powers on the Respondent to frame Rules that enable the Respondent to regulate and restrict content of the internet by arrogating to itself the powers to be the arbiter of truth. The impugned Rule is also contrary to the judgment in *Shreya Singhal (supra).*

(ii) The impugned Rule is not saved by Article 19(2) of the Constitution.

(iii) The Central Government lacks the competence to promulgate the impugned Rule. The creation of a FCU administered by government appointees tasked with classifying information in respect of any business of the Central Government as 'fake, false or misleading' is manifestly arbitrary and unreasonable. The phrase 'fake, false or misleading' is broad and vague and, is predicated on the existence of an objectively discernible truth and a 'true-false' binary to all contents in respect of the business of the Government.

(iv) The impugned Rule fails the test of a proportionality standard that requires the least restrictive alternative to be chosen such as government issued clarification or correction, etc.

(v) The impugned Rule, *ex facie*, is not in public interest and is expressly designed only to serve the interest of the Central Government to shield itself from what it unilaterally deems 'fake, false or misleading'.

(vi) In relation to the Petitioner in particular, his ability to engage in political satire would be unreasonably and excessively curtailed if his content were to be subjected to a manifestly arbitrary fact check by a hand-picked unit of the Central Government. This would defeat the purpose of political satire as he would be constrained to self-censor, failing which he would face suspension or deactivation of his social media account.

(vii) The impugned Rule is violative of Article 14, firstly, as it permits the Central Government to act as a prosecutor and judge in its own cause; secondly, it allows the Central Government to have private entities censor or modify speech as decided by its FCU and thirdly, it fails to afford the user an opportunity to be heard before the FCU determines the content to be 'fake, false or misleading'.

(viii) The impugned Rule undermines a citizen's fundamental right by making the identification of 'fake, false or misleading' by the FCU effectively unassailable.

(ix) The Impugned Rule is coercive and will cause intermediaries to take down information identified as 'fake, false or misleading' by the FCU.

(x) In the event the intermediary fails to take down information identified by the FCU as 'fake, false or misleading', it would automatically lose safe harbor protection provided under Section 79 of the Act.

(xi) The Union of India has attempted to omit the term 'misleading' and has contended that the impugned Rule has nothing to do with anything other than 'fake or false information' which can never be subjective. The Respondent has interpreted 'misleading' to mean 'misleading information or content due to it being fake or false'.

(xii) The Respondent has sought to read down the impugned Rule by asserting that it does not deal with 'any expression of opinion, view, comment, humor, satire or criticism' which is contrary to the plain language employed in the Rule.

(xiii) The Petitioner has relied upon the following decisions of various courts to support his contentions -

1. ***Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors v Union of India & Anr;***[2]
2. ***Shreya Singhal (supra);***
3. ***R. Rajagopal alias R. R. Gopal & Anr. v State of Tamil Nadu & Ors;***[3]
4. ***The New York Times Company v. L. B. Sullivan;***[4]
5. ***Kaushal Kishor v. State of Uttar Pradesh & Ors;***[5]
6. ***Sakal Papers (P) Ltd. & Ors. v. Union of India & Ors;***[6]
7. ***United States v Alvarez;***[7]
8. ***Ramesh s/o. Chotalal Dalal v Union of India & Ors;***[8]
9. ***Ajay Gautam v. Union of India & Ors;***[9]
10. ***Bennet Coleman & Co. & Ors. v Union of India & Ors;***[10]

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2 Writ Petition (L) No. 14172 of 2021.

3 (1994) 6 SCC 632.

4 1964 SCC OnLine US SC 43.

5 (2023) 4 SCC 1.

6 A.I.R. 1962 SC 305.

7 567 U.S. 709 (2012).

8 (1988) 1 SCC 668.

9 2015 SCC OnLine Del 6479.

10 (1972) 2 SCC 788.

11. ***Saghir Ahmad v State of Uttar Pradesh & Ors;***[11]

12. ***Mohammed Faruk v State of Madhya Pradesh & Ors;***[12]

13. ***In re Ramlila Maidan Incident;***[13]

14. ***Abrams v. United States;***[14]

15. ***Amish Devgan v. Union of India & Ors;***[15]

16. ***Kenneth M. Zeran v. American Online Incorporated;***[16]

17. ***Srishti School of Art, Design and Technology v. Chairperson, Central Board of Film Certification & Anr;***[17]

18. ***Anand Patwardhan v Union of India & Ors;***[18]

19. ***West Virginia State Board of Education et. al. v. Barnette et. al;***[19]

20. ***Secretary, Ministry of Information & Broadcasting & Ors. v Cricket Association of Bengal;***[20]

21. ***Anuradha Bhasin v Union of India & Ors;***[21]

22. ***State of Rajasthan v. Mukan Chand & Ors;***[22]

23. ***Leelabai Gajanan Pansare & Ors. v Oriental Insurance Co. Ltd. & Ors;***[23]

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11 (1955) 1 SCR 707.

12 (1969) 1 SCC 852.

13 (2012) 5 SCC 1.

14 1919 SCC OnLine US SC 213.

15 (2021) 1 SCC 1.

16 129 F.3d 327 (1997).

17 2011 (123) DRJ 1.

18 1996 (2) Mh. L. J. 685.

19 1943 SCC OnLine US SC 134.

20 (1995) 2 SCC 161.

21 (2020) 3 SCC 637.

22 (1964) 6 SCR 903.

23 (2008) 9 SCC 720.

24. ***A. K. Kraipak & Ors. v Union of India & Ors;***[24]

25. ***State Bank of India & Ors. v Rajesh Aggarwal & Ors;***[25]

26. ***Minerva Mills & Ors. v Union of India & Ors;***[26]

27. ***State of Tamil Nadu & Anr. v P. Krishnamurthy & Ors;***[27]

28. ***Global Energy Ltd & Ors. v Central Electricity Regulatory Commission.***[28]

(II) <u>Submissions of Mr. Arvind Datar, learned Senior Advocate for Applicant in Interim Application (L) No. 17704 of 2023 in Writ Petition (L) No. 14955 of 2023 supplementing the submissions advanced by Mr. Seervai:</u>

(i) By the impugned Rule the Respondent has sought to arm itself with the authority to unreasonably restrict the freedom of speech and expression of the media.

(ii) The impugned Rule attempts to exceed the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution.

(iii) Categorizing any news/article as 'fake, false or misleading' requires taking evidence, hearing affected parties, etc. Only the judiciary or a quasi-judicial Tribunal should undertake such an exercise.

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24 (1962) 2 SCC 262.

25 Civil Appeal No. 7300 of 2022 decided on 27th March 2023 (SC).

26 (1980) 3 SCC 625.

27 (2006) 4 SCC 517.

28 (2009) 15 SCC 570.

(iv) The impugned Rule is a direct attempt to regulate the right of free speech of the media and censor opinions that are critical of the Government.

(v) Taking down the content of the members of the Applicant for being allegedly 'fake, false or misleading' affect the media's right to do business under Article 19(1)(g) of the Constitution. This manifestly arbitrary action by the Respondent is likely to result in a loss of revenue.

(vi) An entirely new censorship framework is created for the digital news media through the intermediary which is at variance with Section 69A of the Act which contains restrictions enumerated in Article 19(2) of the Constitution rendering the impugned Rule *ultra vires* the parent Act.

(vii) The Applicants have relied upon the following decisions of various courts in addition to precedents cited by Mr. Seervai.

1. ***Bennet Coleman & Co. & Ors. (supra);***
2. ***Express Newspapers Pvt. Ltd. & Ors. v. Union of India & Ors;***[29]
3. ***LIC v. Manubhai Shah;***[30]
4. ***Madhyamam Broadcasting Limited v. Union of India & Ors.***[31]

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29 (1986) 1 SCC 133.

30 (1992) 3 SCC 637.

31 2023 SCC OnLine SC 366.

(III) Submissions of Mr. Shadan Farasat, Advocate for the Petitioner in Writ Petition (L) No.14955 of 2023 supplementing the submissions advanced by Mr. Seervai:

(i) The moment that the FCU disagrees with any social media post concerning the business of the Central Government, this disagreement alone, automatically without further ado, effectively obliterates a publisher's freedom of speech and expression.

(ii) Such disagreement of the FCU threatens the safe harbor protection afforded to social media intermediaries till such time the intermediary decides to take down the offending post.

(iii) The existence of an alternate view beyond that of the Government is prohibited. The very *raison d'être* of a free press is obliterated in a democratic polity. Various news items have been illustrated to emphasize the censor by the impugned Rule. E.g. reporting about trained economists' disagreement with the Government's growth figure; reportage questioning credibility of Government's figures on fatalities and vaccination during COVID-19 pandemic; reportage of the opposition's claim of corruption in the Government.

(iv) The impugned Rule selectively targets and silences dissenting political speech on social media, effectively granting the most popular platform exclusively to conformist speech and information.

(v) The right to comment on, disagree with, hold, and publicize one's diverse opinion about the business of the Government is upset. The Respondent's claim of strengthening the right to accurate and true information is a misconception and the right to information under Article 19(1)(a) is a right to access the diversity of information and opinion available on a matter, **not** a right to be told only what is deemed accurate by the Government.

(vi) The impugned Rule has no rational nexus to its stated object and is designed to achieve a skewed political discourse in favor of information approved and sanitized by the Government.

(vii) The phrase 'any business of the Central Government' is vague.

(viii) There is no procedural safeguard against abuse of the impugned Rule.

(ix) The Petitioner has relied upon the following decisions of various courts:

1. ***Bennet Coleman & Co. & Ors. (supra);***
2. ***Kaushal Kishor (supra)***;
3. ***Dun & Bradstreet Inc. v. Greenmoss Builders, Inc;***[32]
4. ***Buckley v. Valeo, Secretary of United States Senate, et. al;***[33]

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32 472 US 749 (1985).

33 424 U.S. 1 (1976).

5. ***Subramanian Swamy v. Union of India;***[34]

6. ***Secretary, Ministry of Information & Broadcasting, Government of India & Ors. (supra);***

7. ***Anuradha Bhasin (supra);***

8. ***Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors;***[35]

9. ***Chintaman Rao v. The State of Madhya Pradesh;***[36]

10. ***Cellular Operators Association of India & Ors. v. Telecom Regulatory Authority of India & Ors.***[37]

(IV) <u>Submissions of Mr. Gautam Bhatia, Advocate for the Petitioner in Writ Petition No.7953 of 2023 supplementing the submissions advanced by Mr. Seervai:</u>

(i) The phrase 'fake, false or misleading' is not defined in the impugned Rule.

(ii) The vague and over-broad Rule induces a chilling effect on freedom of speech of citizens. The lack of clarity will potentially result in censorship as intermediaries will be compelled to take down any content flagged by the FCU rather than losing their safe harbor protection. The threat of an attenuated reach on social media platforms will coerce users to self-censor and alter the content of their post. Thus, the right of the user and the general public to receive information is affected.

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34 (2016) 7 SCC 221.

35 (2016) 7 SCC 353.

36 1950 SCR 759.

37 (2016) 7 SCC 703.

(iii) There is no gradation in the penalty based on the seriousness of the violation.

(iv) The Petitioner has relied upon the following decisions of various courts to support his contentions:

1. ***Shreya Singhal (supra);***
2. ***Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd;***[38]
3. ***Bennet Coleman & Co. & Ors. (supra);***
4. ***Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Anr. v. Union of India & Ors;***[39]
5. ***Sakal Papers (P) Ltd. & Ors. (supra);***
6. ***Kaushal Kishore (supra);***
7. ***Raghu Nath Pandey & Anr. v. Bobby Bedi & Ors;***[40]

American Judgements:

8. ***United States v. Alvarez;***
9. ***44 Liquormart Inc v Rhode Island;***[41]
10. ***American Booksellers Association v. Hudnut;***[42]
11. ***Chaplinsky v. New Hampshire;***[43]

South African Judgements:

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38 (1995) 5 SCC 139.

39 (1960) 2 SCR 671.

40 ILR (2006) 1 Delhi 927.

41 517 U.S. 484 (1996).

42 771 F.2d. 323, 330-331 (7th Circuit, 1985).

43 315 U.S. 568 (1942).

12. ***Democratic Alliance v. African National Congress;***[44]

13. ***Qwelane v. South African Human Rights Commission and Anr;***[45]

14. ***Laugh it Off Promotions CC v. South African Breweries International (Finance) BV t/a Sabmark International and Anr;***[46]

15. ***Islamic Unity Convention v. The Independent Broadcasting Authority.***[47]

(V) Submissions of Mr. Tushar Mehta, learned Solicitor General for the Respondent-Union of India:

(i) The contention of the Petitioners that the government has arrogated to itself the power to decide and is thus the sole arbiter of what is false, fake, or misleading, is fallacious and imaginary. The medium which is sought to be regulated by the impugned Rule has the largest possible reach within and beyond the country as compared to other medium of communication. The said medium is anonymous but all-encompassing and transcends boundaries of nations. The government apprehends a serious potential of devastating public mischief; creation of law and order, public order, national security situations and spreading chaos in the country that requires regulations within the scope and ambit of Article 19(2) of the Constitution.

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44 (2015) 3 BCLR 298.

45 2022 (2) BCLR 129.

46 (2005) 8 BCLR 743.

47 (2002) 5 BCLR 433.

(ii) Information, which is known to be patently false, untrue, and misleading being passed off as true information through deceptive and delusionary means is an abuse of free speech that cannot be constitutionally protected. The public at large have a constitutional right to receive true and correct information.

(iii) Genuine information leads to an informed decision and misinformation leads to misled decisions. Audio-visuals made up of a bundle of facts shared through the internet has an actionable impact on the recipient of the information which forms the basis of a citizen's decision. The provisions have harmoniously balanced competing interests of *the user*, who exercises his freedom of expression by sharing information across the intermediary; *the intermediary*; and *the recipient* of the information.

(iv) The impugned Rule neither prohibits nor places any embargo on the freedom of speech and expression of an individual and there is no pre-publication censure. Section 79(2)(c) of the IT Act mandates the intermediary to have an inbuilt system to check for patently false or misinformation, knowingly and intentionally appearing on its platform. The impugned Rule does not create any obligation on the intermediary to either take down flagged content or block the same. The only statutory change is to lift the safe harbor protection conferred under Section 79 of the Act if any information which is known to be misleading or patently false and untrue, is intentionally continued to be communicated. Even then, a recourse is provided in the form of a grievance redressal mechanism of the intermediary in the first instance followed by an appellate

authority. Thereafter, all legal remedies before a Court of law continue to be available to an aggrieved person. It is only the competent Court which will then decide whether the information was misleading or patently false and untrue and was communicated knowingly or intentionally. What has been withdrawn is only the automatic protective shield of Section 79 of the Act.

(v) The impugned Rule merely provides for identification of fake or false or misleading information by a FCU where such information which is knowingly and intentionally shared via an intermediary. The only consequence is a wide dissemination of a public announcement that such information is either fake or false or misleading, to enable the intermediary to employ due diligence. Once the intermediary is made aware of such information, it has the sole discretion to either take steps to prevent its further spread or to continue to host the same with a disclaimer regarding such information.

(vi) The object of amending the rule is to curb the deception of the masses by a supply of distorted and misleading information, the spread of which presents a real, clear, and specific danger, squarely falling within the restrictions laid down under Article 19(2). The threat of misinformation being weaponized by State and Non-State actors as part of an information warfare poses a real danger to the security of the State. Examples of misinformation as authenticated by various fact check groups, that caused a disruption of public order are set out as under:

a. Images of Syrian Civil War were passed off as those from Kashmir following the abrogation of Article 370 leading to tensions in some parts of the country.

b. Disinformation campaigns launched by Khalistani groups following government actions against separatists' organizations.

c. Flare up of communal tensions in a State following fake news item showing the killing of a woman by armed men stating that the same was done during communal violence in the State, with women from a particular community. It was later found that the content was an old video from Myanmar being passed off as a current video in the State.

d. A fake post depicting army officials of one community killing people from another community.

It is thus submitted that fake news and misinformation pose a clear and tangible threat to the country's security requiring regulation to effectively combat the same. The submission of the Central Government is that it is an established fact that fake information, disinformation, and misinformation travels faster than true information and the adverse effects of the same entail a legitimate state interest to prevent dissemination of such fake information.

(vii) The Press Information Bureau ("**PIB**") is already carrying on fact checking of information relating to Central Government for the benefit of the public. This unit verifies claims about Central government policies, regulations etc. and helps in dispelling myths and false claims by providing accurate information. Since 2019 the PIB has responded to about 40,000 queries from public and issued more than 1,200 fact checks through its websites.

(viii) In response to the argument that truth is not binary but, on a spectrum, it is submitted that while subjective truth may be a part of interpretation, the impugned Rule only seeks to cure the mischief caused by false information that is promulgated as the truth. The impugned Rule seeks to proscribe dissemination of fabricated non-existent facts, which is distinct from subjective interpretation of objective facts and figures appearing in official documents of the government.

(ix) In response to the various judgments relied upon by the Petitioners, it is submitted that reliance on American judgments importing the American doctrine on free speech has been rejected by the Apex Court in a series of judgments, and this understanding has remained consistent since the time of the draft constitution. In a stark departure from the scheme of the US Constitution, the framers of the Indian Constitution have empowered the Parliament to legislate on the restrictions to be imposed on the freedom of speech and expression under Article 19(2). These restrictions are to be interpreted in light of the express language used therein and the cultural and societal ethos prevalent in India. In no circumstances

under the Indian Constitution can fake and false statements enjoy constitutional protection and the same will fall foul of all the heads mentioned in Article 19(2).

(x) In response to the decision of the US Supreme Court in the matter of *United States v. Alvarez (supra)* relied upon by the Petitioners to contend that even a *per se* false speech cannot be restrained, it is submitted that the Alvarez rule does not lay down a blanket proposition and in fact, the US Supreme Court has accepted that the false information which results in harm could legitimately be legislated against. Furthermore, justification for restricting false speech in other arenas of Court and government functions, i.e., perjury and impersonation being legally cognizable harm associated with a false statement has been upheld by the US Supreme Court in *Alvarez (supra).* Juxtaposing the Alvarez ratio, the impugned Rule aims to prevent the very same 'legally cognizable harm' which the US Supreme Court recognized as a legitimate restriction on free speech. The learned Solicitor General hence draws a parallel, and says that the harms in the Indian context of the Indian constitutional scheme is clearly defined under Article 19(2) and what the impugned Rule targets is only that information which has a direct causal link between harm to the public at large. Unlike the United States, under the Indian Constitution, speech can be restrained on the grounds prescribed under Article 19(2) without criminalizing, and the vires of the impugned Rule cannot be challenged on a vagueness doctrine.

(xi) The learned Solicitor General emphasizes that the impugned Rule will only function in accordance with Article 19(2) and every cause of action will have to be justified on the touchstone of Article 19(2). The direct causal link in the rules is to the restrictions under Article 19(2) and not beyond them, which is the inbuilt limitation. Thus, given the demonstrable ill-effects of fake information, there is a link between its prevention and the impugned Rule.

(xii) Referring to the decision of the Apex Court in the matter of *Tata Press Limited (supra)* as relied upon by the Petitioners, learned Solicitor General submits that the Apex Court has in fact held that a speech or expression which is deceptive, unfair, misleading and untruthful would be hit by Article 19(2) and can be regulated by the State. He also relies upon the ratio of the judgment of the Apex Court in the matter of *Secretary Ministry of Information and Broadcasting (supra)* which lays down that when a speech is sought to be propagated through use of airways, it can be regulated by a public authority in the interest of the public. The Apex Court has also drawn a distinction between electronic media and print media.

(xiii) The learned Solicitor General further relies upon the Constitutional Bench decision of the Apex Court in the case of *Kaushal Kishore (supra)*. In para 193.4, the Supreme Court has held that the extent of protection of speech would depend on whether such speech constitutes a 'propagation of ideas' or would have any social value. If the answer to the question is in the affirmative, such speech would be protected under Article 19(1)(a), but if it is in the

negative there will be no such protection and the State has no duty to abstain from interference having regard to Article 19(2).

(xiv) It is also contended that in view of the Apex Court holding no unbridled liberty to utter statements which are vitriolic, derogatory, unwarranted and in no way amounts to communication of ideas, then a fortiori, no citizen has a right to peddle false or fake information.

(xv) In reference to the contention of the Petitioners regarding the chilling effect of the impugned Rule in context of the profession of the Petitioner being a satirist, the learned Solicitor General answers that a satire is a genre of speech involving visual, literary and performing arts in which vices, follies, abuses, and short comings are used to ridicule or expose perceived flaws of individuals, corporations, governments or society and its main aim is to compel the targeted person to improve himself. Similarly, the bundle of facts in the form of news, fact check, educational documentary, opinion, political parody, political sarcasm, political criticism etc. intended for communication of progressive ideas are completely permissible and constitutionally protected forms of speech. These are not restrained under the impugned Rule. What is affected by the impugned Rule is only a patently false bundle of facts and misleading information communicated having knowledge of its falsehood which is sought to be deceptively passed off as authentic. In fact, the Central Government agrees that satire or criticism, having an occasional element of falsity due to its dramatization, enjoys the breathing space and is not restricted unless it is *per se*

false. The learned Solicitor General relies upon the decision of the Supreme Court in the matter of *Anuradha Bhasin (supra)* to buttress the government's case that allegation of a subjective **chill** is not an adequate substitute for a claim of specific, present, objective harm or a threat of specific future harm. Therefore, to say that restrictions are unconstitutional because of a 'chilling effect' on the freedom of press generally, is to say virtually nothing at all unless evidence is brought before the Court clearly indicating the occurrence of an actual harm.

Pointing to the functioning of the prevalent fact checking mechanism i.e. the PIB, the Petitioners have not pointed out any chilling effect suffered by them on their freedom of expression on account of the fact checking activities undertaken by the PIB and thus, the fear of possible misuse of the proposed FCU cannot be a ground to declare the impugned Rule as *ultra-vires*.

(xvi) None of the Petitioners have any cause of action since neither any information or content posted by them on social media has been a subject matter of any action and there is no injury caused to the Petitioners. No *prima facie* violation of Petitioners' Article 19(1)(g) rights has been made out.

(xvii) In response to the contention of Petitioners regarding the words 'fake, false, and misleading' being vague, the learned Solicitor General has relied upon the traditional definitions of the words as defined in the Webster's dictionary, Black's law dictionary, P. Ramanatha Aiyer's Law Lexicon, Stroud's judicial dictionary, Prem

Sahay's traditional dictionary and KJ Aiyer's dictionary. He says that not every word used in the statute is required to be defined, and the words are to be understood in their common grammatical sense and cognate expression. The words fake, false, and misleading seen in the light of principles of statutory interpretation are specifically used in the context of deceptive, deceitful, and patently untrue information. Thus, the context of statute and the mischief it targets can in no way apply to satire, parody opinions or commentaries. The definition of the words is not overbroad, imprecise, or vague. Summing up his contention, the learned Solicitor General says that the word 'fake' denotes information which is not original and what is false, or misleading is in the context of wrong and erroneous. All actions taken by the FCU are based on evidence. Moreover, the impugned Rule does not enter the domain of information which is not related to the business of the government. What the FCU under the impugned Rule will do, is to confirm information available over the internet with the evidence on the same matter as on record with the government and only then determine whether such information is factually correct or fake/false/misleading.

(xviii) In response to the other limb of challenge to the rule on the ground of vagueness in the term 'business of the Government of India', the learned Solicitor General makes a statement that the same is defined under the Constitution of India to mean the business transacted officially by the government under the Government of India (Transaction of Business) Rules, 1961 and the same definition is to be adopted. The Government of India is in the best position to provide the correct facts with an accountability mechanism. It is also stated that the impugned Rule does not violate

Article 14 at all as no manifest arbitrariness is made out in the said rule.

(xix) In reference to the challenge to the impugned Rule on the ground that the Union of India has arrogated to itself to be a judge in its own cause, it is submitted that this argument is legally untenable. It is submitted that just because the members of FCU are to be appointed by the government, it cannot be said that they would work actively at the behest of the government or under its dictation. In this regard, a reference is made to the decision of the Supreme Court in the case of ***Crawford Belly and Co. v. Union of India***,[48] where the challenge was to a provision which allowed the government to appoint a person as Estate Officer in the Public Premises Act. It is held that bias does not attach to any person merely on being a government appointee but personal bias or connection or personal interest must be shown to alleged animus and motivation for bias.

(xx) The learned Solicitor General has also given illustrations pertaining to curbing circulation of fake information or misinformation in other jurisdictions of the world such as the European Union, United States of America, Germany, Spain, Indonesia, Vietnam, Greece, Ethiopia, Guinea and Estonia to support the validity of the impugned Rule by illustrating that the efforts made at regulating misinformation in India are part of a global trend of recognition and regulation of the channels by which misinformation spreads. In fact, it serves a salutary purpose insofar

48 (2006)6 SCC 25.

as it aims to check the spread of clearly false, harmful, and malicious information. Thus, the learned Solicitor General concludes by saying that the impugned Rule neither falls foul of Article 19(1)(a) nor is it vague. He urges us to dismiss the petition.

(xxi) The learned Solicitor General has relied upon the following decisions of various courts:

1. ***People's Union for Civil Liberties (PUCL) v. Union of India;***[49]
2. ***S. P. Gupta v. Union of India;***[50]
3. ***Babulal Parate v. State of Maharashtra;***[51]
4. ***Madhu Limaye v. Sub-Divisional Magistrate;***[52]
5. ***Ramlila Maidan Incident, In re (supra);***
6. ***M. C. Mehta v. Union of India (Shriram – Oleum Gas);***[53]
7. ***Automobile (Rajasthan) Transport Ltd. v. State of Rajasthan;***[54]
8. ***State of Bihar v. Union of India;***[55]
9. ***Ashoka Kumar Thakur v. Union of India;***[56]
10. ***Pathumma v. State of Kerala;***[57]
11. ***Tata Press Ltd. (supra);***

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49 (2003)4 SCC 399.
50 1981 Supp SCC 87.
51 (1961)3 SCR 423.
52 (1970)3 SCC 746.
53 (1987)1 SCC 395.
54 (1963)1 SCR 491.
55 (1970)1 SCC 67.
56 (2008)6 SCC 1.
57 (1978)2 SCC 1.

Analysis:

11. The principal ground of challenge to the impugned Rule in all these petitions is the loss of safe harbor by the intermediaries on account of failure to observe due diligence as provided in Part-II of the Rules. The loss of immunity under Section 79(1) and 79 (2)(c) of the Act is a consequence of the failure of the intermediary to exercise due diligence to make reasonable efforts [by itself, and to cause the users of its computer recourse] to not host, display, upload, modify, publish, translate, store, update or share any information that, knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature [or, in respect of any business of the Central Government, is identified as fake or false or misleading by such FCU of the Central Government as the Ministry may, by notification published in the official gazette specify].

12. In a nutshell, the Petitioners are aggrieved by the vesting of power in a FCU of the Central Government to identify fake, false or misleading information and thereupon obliging the intermediary to make reasonable efforts to ensure that such information does not continue to remain as it were, on its platform. Failure to take reasonable efforts as above, results in the loss of safe harbor under Section 79 of the Act. The Petitioners contend that this unbridled power vested in the FCU of the Central Government makes the Central Government an arbiter in its own cause and may result in the government compelling intermediaries to take down information that may be unfavorable to it. This, the Petitioners say will choke

the flow of information to the public, which goes against the principles of participatory democracy. In this context, the impugned Rule transgresses the freedom of speech or expression guaranteed by the Constitution.

13. The controversy in the present matter, therefore, raises questions of contemporary importance touching upon the rights of the user of any intermediary to express views freely, without the intermediary pulling down content identified by the FCU as fake, false or misleading, being afraid of an automatic loss of immunity from liability as contemplated under Section 79 of the Act. Based on the submissions made by the parties, the following issues arise for consideration.

(a) Whether the impugned Rule is ultra vires Section 79 of the parent Act, authorising automatic deprivation of safe harbour for intermediaries on grounds beyond Article 19(2) of the Constitution and contrary to the judgment in *Shreya Singhal, (supra).*

(b) Whether the impugned Rule violates Article 14 of the Constitution by making the Central Government an arbiter in its own cause requiring the intermediaries to act pursuant to identification of information as fake, false or misleading by the FCU of the Central Government.

(c) Whether loss of safe harbour for Intermediaries has a direct 'Chilling Effect' on Free Speech of the 'User' where the right is directly stifled by compelling the intermediary to act in aid of a direction by the FCU, failure of which results in an automatic loss of immunity under Section 79 of the Act to the Intermediary.

(d) Whether the terms 'fake', 'false' and 'misleading' and 'business of the Government' are over-broad and vague, vulnerable to subjective determination and are predicated on a true-false binary.

(e) Whether the impugned Rule fails the test of proportionality and whether it addresses competing interests of an individual on one hand and the interests of the State on the other.

(f) Whether there is a direct nexus between the impugned Rule and the mischief that it seeks to address being the object of the Rule, thereby validating the same.

Question (a):

14. It is settled law that a subordinate legislation is *ultra vires* the enabling or the Parent Act when it is found to be in excess of the power conferred by the enabling/Parent Act. The Supreme court in

State of Tamil Nadu vs P. Krishnamurthy (supra) has laid down the test to ascertain the constitutionality of a delegated legislation:

> "15. There is a **presumption in favour of constitutionality or validity of subordinate legislation and the burden is upon him who attacks it to show that it is invalid**. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:
>
> **(a)** Lack of legislative competence to make subordinate legislation.
>
> **(b)** Violation of fundamental rights guaranteed under the Constitution of India
>
> **(c)** Violation of any provision of the Constitution of India
>
> **(d)** Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
>
> **(e)** Repugnancy to the laws of the land, that is, any enactment.
>
> **(f)** Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules)"
>
> *(emphasis supplied)*

15. Justice R. F. Nariman (as he then was), referring to the Consitution Bench decision in the ***Natural Resources Allocation in***

Re., Special Reference No.1 of 2012,[58] has observed in the ***Shayara Bano v. Union of India*** (triple talaq case),[59] that the test to determine manifest arbitrariness is to decide whether the enactment is drastically unreasonable and/or capricious, irrational or without adequate determining principle, with favouritism and nepotism and not in pursuit of promotion of healthy competition and equitable treatment. To test this and for better understanding, the unamended portion and the amended impugned portion of Rule 3(1)(b)(v) is analysed separately. Due Diligence under the unamended Rule obliged the intermediary to make 'reasonable efforts' to cause the user of its computer resource not to host any information that knowingly or intentionally communicates any misinformation or information patently false and untrue or misleading in nature. Thus, if an intermediary learns of any offensive information, suo-moto or upon a complaint, it is expected to make 'reasonable effort' to cause the user not to host the same. The Intermediary, as per its existing policy is bound to put it through its various filters and act accordingly. This, the intermediary does in case of any of its user or subscriber. Even a Government Department or a Ministry as its 'user' or 'subscriber' can report a complaint being aggrieved by any offensive content and the intermediary follows the same practice as in the case of any individual user or complainant. Upon failure to act and discharge due diligence even as per the unamended Rule, it stands to lose safe harbour.

16. Now, what the amendment adds is constitution of a FCU to identify fake, false or misleading information, which is ***knowingly***

58 (2012) 10 SCC 1.

59 (2017) 9 SCC 1.

and intentionally communicated in respect of Government business. Thus, instead of any department or ministry as an individual user, reporting any offensive content, it is the FCU constituted as such, representing various departments/ministries as 'user' that will report a complaint. The Intermediary is then to act as per its existing policy and take appropriate action. The 'reasonable effort" it is expected to take is of the same degree as it would in case of any individual user, including an individual government department. No reasonable effort of a higher degree is expected from the Intermediary. This interpretation of the amended Rule stands to reason and aligns with the explanation proffered by Mr. Mehta while answering our query regarding none of the intermediary having posed any challenge to the impugned Rule especially since it is the intermediary which loses immunity. His answer is that the amendment was at the behest of the intermediaries themselves, and for their convenience alone that constitution of a 'FCU' was envisioned with a view to coordinate with various Government departments and collectively bring to the notice of the intermediaries any fake, false or misleading content about its policies etc. The intermediary otherwise will have no way of being made aware of the veracity of content on social media pertaining to Government policies, considering the vastness of content on social media. The intermediaries will then act as per its policies.

17. Another submission of Mr. Mehta is that there is no 'take down' mandate issued to the Intermediary. An option available to it is to issue a disclaimer. In my opinion, the Rule read in its entirety merely obliges the intermediary to make 'reasonable effort' by itself,

and cause the user to not host, share etc., any information communicating misinformation etc. Making 'Reasonable effort' saves an Intermediary from losing safe harbour. The option of a 'disclaimer' to that of a 'take down' falls within the meaning of 'reasonable effort' as contemplated in the Rule. There is nothing in the Rule that rules out options other than a take down. The Rule is clear and speaks for itself. Even in the absence of the amendment, the intermediaries, pursuant to their existing practices and policies contained in their Terms and Agreement, act in the form of issuing a disclaimer, warning, caution to its user in respect of any offensive content. The user is then directed to their grievance redressal mechanism. From this interpretation of the Rule, the procedure for deprivation of exemption is fair, just and reasonable. Thus, it cannot be said that the provision suffers from manifest arbitrariness. Notably, the grievance of the Petitioners is based on second guessing the intent of the government, attributing to it an invidious motive to ensure repression of criticism of its policies or as the Petitioners put it, the all-pervasive business of the Central Government. The insistence of the Petitioners to deny the availability of an option of a 'disclaimer' inherent in the Rule is incomprehensible. With greatest respect, I am unable to subscribe to the interpretation that 'to not host' only means a 'take down'. Thus, the Petitioners' challenge to the curtailment of their free speech right by a direction of take down fails.

18. More so ever, it is important to remember that along with Section 66A, Section 69A was also a subject of challenge in the *Shreya Singhal (supra)* matter along with the 2009 Blocking Rules, also framed as relating to matters under clause (z) of the Section

87(2). The Supreme Court struck down Section 66A and upheld Section 69A by drawing a distinction between the two provisions and held the latter to be a narrowly drawn provision with several safeguards. It further held that blocking of access by the public to information can only be resorted to where the Central Government is satisfied that it is necessary to do so. The blocking rules framed under clause(z), provided for reasons to be recorded in writing to make them assailable in a writ petition under Article 226 of the Constitution and these rules have already passed the scrutiny of the Apex Court. Thus, even in the event that the intermediary chooses to block content, it can be done only by following the due procedures prescribed in the 2009 Blocking Rules. This is so because the source of both, the 2009 Blocking Rules and the Ethics Code Rules containing the impugned Rule is Section 69A. Both these Rules complement each other, one does not eclipse the other. That being a settled position of law, I have no hesitation in holding that the impugned Rule is neither *ultra vires* the provisions of the Act nor is it contrary to the judgment in *Shreya Singhal (supra).*

19. Akin to a procedure laid down in the Blocking Rules of 2009, Rule 3(2) of these Ethics Code Rules also provides for a grievance redressal mechanism of the intermediary, and it is binding on the intermediary to resolve a complaint of its user within a period of 15 days from the date of its receipt. Rule 3(2)(c) also makes it mandatory on the intermediary to implement a mechanism for receipt of complaint from its user to enable redressal of the complaint. As part of due diligence by intermediaries, Rule 3(1)(n) also makes it mandatory on the intermediaries to ensure protection of all rights accorded to the citizens under the Constitution,

including rights under Articles 14, 19 and 21. Thus, the concern of the Petitioners in respect of automatic deprivation of safe harbour of the intermediaries, leading to the intermediaries taking down content of the users *de hors* any procedure, is unfounded.

20. As already stated above, Section 79 of the Act was also the subject of challenge in *Shreya Singhal (supra)*. Section 79(3)(b) curtailing safe harbour in certain cases, now also includes failure to conduct due diligence under the Impugned Rule. It is pertinent to note that Section 79 (3)(b) was read down in *Shreya Singhal (supra)* to include only those matters relatable to the restrictions in Article 19(2). Paragraph 124.3 in *Shreya Singhal (supra)* reads as thus:

> "124.3. Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material..."

21. In that view of the matter, loss of safe harbour results only if the offensive information is beyond any restriction under Article 19(2) of the Constitution. Therefore, the Impugned Rule framed to carry out the provisions of Section 69A and relating to the guidelines to be observed by intermediaries under sub section (2) of Section 79 of the Act is neither ultra vires the Parent Act nor contrary to the *Shreya Singhal (supra)* judgment. The consequence of failing to discharge due diligence as per the impugned Rule is treated as an exception to 79(1) and included in Section 79(3)(b).

The Apex Court upheld the validity of Section 79, subject to reading down Section 79(3)(b) restricting offensive information within the ambit of Article 19(2). This therefore saves the impugned Rule from being constitutionally invalid.

22. In the case of *Agij Promotion of Nineteenonea Media Pvt Ltd (supra)* wherein related provisions of the same IT Act and the Blocking Rules were assailed, this Court held the blocking provisions to be valid by saying that blocking of information in case of emergency as provided by Rule 16 is on the grounds traceable in Sub section (1) of 69A of the IT Act, which is a provision falling in line with the restrictions imposed under Article 19(2) of the Constitution, namely, when the authority finds that blocking of public access of any information is in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relations to commission of any cognizable offence in relation to such issues.

23. The impugned Rule therefore satisfies the test laid down in P. Krishnamurthy's case and is not in excess of the power conferred by the Parent Act. There is no automatic depravation of safe harbour on grounds beyond Article 19(2) and is in consonance with the judgment in Shreya Singhal.

QUESTION (b):

24. In reference to the grievance of the Petitioners relating to the government being both the prosecutor and the judge in its own

cause, by arrogating to itself the power to determine information as being 'true' or 'false', a closer look at the impugned Rule reveals that the FCU is merely tasked with identifying information concerning any business related to the government, shared via the intermediary. The intermediary loses immunity only if *firstly,* it fails to make reasonable efforts to rectify the situation and *secondly*, if the offensive information is intentionally communicated, the user knowing it to be false, fake, or misleading. The impugned Rule does not in any manner, confer any authority on the FCU to direct the intermediary to take down any such information. It is left entirely to the discretion of the intermediary concerned to make reasonable effort so that the user is encouraged not to continue to post, share etc. such information. There is also a redressal mechanism available for the intermediary as well as the user and ultimately it is the Court of Law which is the final arbiter of the grievance. There are no direct penal consequences for either the intermediary or the user. It is not just any information either in the form of news, fact check, opinion, satire, parody, sarcasm, and criticism, which is subject to the rule but only that information which is known to be fake or false or misleading and knowing as such, is intentionally shared on the intermediary.

25. Another limb of the challenge is to the constitution of the FCU yet to be notified by the Central Government. It is submitted that the FCU will comprise of persons hand-picked by the Government rendering the unit biased, acting at the behest of and serving the cause of the Government. The Unit cannot be presumed to be biased only because the power to notify is vested in the Government. Logically, the persons comprising of the Unit will

necessarily have to be those having knowledge of the working of the Government and having access to data maintained by the Government as the function of the FCU is to identify content that is fake or communicates misinformation. This alone is not sufficient to presume the Government to be an arbiter in its own cause. The FCU is not yet constituted pursuant to the undertaking of the Learned Solicitor General to this Court. The charter of the FCU, the extent of its authority, the manner of its functioning in ascertaining fake, false or misleading information, etc, is yet unknown. In case of any actual bias exhibited by the FCU, recourse to the courts of law is always open to the aggrieved person. Thus, a challenge to a potential violation of Article 14 on the basis of an apprehension is not maintainable and to that extent it is pre-mature.

26. The Supreme Court in the case of ***Crawford Belly and Co. v. Union of India***,[60] where the challenge was to a provision which allowed the government to appoint a person as Estate Officer in the Public Premises Act held that bias does not attach to any person merely on being a government appointee but personal bias or connection or personal interest must be shown to alleged animus and motivation for bias. Admittedly, the FCU has not yet been notified and the grievance is only an apprehension that the FCU will be a biased body comprising of persons hand-picked by the Government, actively acting at the behest of the government without any objective adjudication of issues. It will be a great disservice to the members of the FCU to attribute bias and predisposition to them, merely on account of them being

60 (2006) 6 SCC 25.

government appointees. The mere fact that they happen to be appointed by the Government will not divest their character as independent persons. The task vested in the FCU is to test the veracity of information complained to be false, fake, or misleading or misinformation or patently untrue information and in terms of the amendment relating to the 'business of the government'. Obviously the FCU shall comprise of persons who are privy to the business or policies of the government and who have access to authentic information from Government departments concerned, to authoritatively determine any information to be misinformation, fake etc. Such persons cannot be categorized as 'biased.' In a decision of the apex court in the matter of ***State of AP vs Narayana Velur Mfg Beedi Factory,***[61] it has been held in paragraph 178 as under:

> "178……We are not impressed with the reasoning adopted that a government official will have a bias, or that he may favor a policy which the appropriate government may be inclined to adopt because when he is a member of an advisory committee or board he is expected to give an impartial and independent advice and not merely carry out what the Government may be included to do. Government officials are responsible persons, and it cannot be said that they are not capable of taking a detached and impartial view."

27. It is also open for a person aggrieved by the FCU identifying any information as offensive in terms of the impugned Rule, to invoke the grievance redressal mechanism notified by the

61 (1973) 4 SCC 178.

intermediary against any such act of the FCU. Furthermore, only the exemption from liability is withdrawn, and in any case, the ultimate arbiter is a jurisdictionally competent court which adjudicates the guilt or otherwise of the intermediary. Hence, the impugned Rule is not violative of Article 14 on the basis of the FCU comprising of government officials thereby making the Government the final arbiter in its own cause.

QUESTION (c):

28. The Petitioners express their fear of the impugned Rule having a **chilling effect** on a citizen's right to circulate information in the form of news, opinion, political satire, political parody, political sarcasm, political criticism, etc. The argument is that as soon as the FCU of the Central Government flags any information to be offensive of the impugned Rule, the intermediary fearing a loss of its safe harbor or for any other reasons, commercial or otherwise, is compelled to take down the content. The user in turn, has no recourse to a legal remedy which in turn is a blatant violation of his freedom of speech and expression. The Petitioners finally say that, not only is an intermediary directly implicated upon the identification of content as fake, false or misleading by the FCU, but a user is also directly affected, as the intermediary may terminate access to the platform on the usage rights under the IT Rule. This is the 'chilling effect' as is canvassed by the Petitioners.

29. First and foremost, a plain reading of the Rule does not indicate any direct implication of an intermediary. Unlike the

wording of Section 66A of the IT Act which was struck down in *Shreya Singhal (supra)*, the impugned Rule does not directly penalize either the intermediary or the user, without recourse to a Court of law. Rule 3A even as it existed prior to the amendment, provides for a Grievance Redressal Mechanism of the intermediary which include a Grievance Officer and an Appeal to a Grievance Redressal Committee, which is mandated to resolve the complaint of any aggrieved person, in a time-bound manner. The impugned Rule contains sufficient procedural safeguards. Furthermore, Clause (n) of the same due diligence Rule mandates the intermediary to respect all the rights accorded to the citizens under the Constitution, including Articles 14, 19 and 21.

30. The specific grievance of the Petitioner in the first petition is that the impugned Rule violates his fundamental right under Article 19(g). As a political satirist, he necessarily engages in commentary about actions of the Central Government and its personnel. He says that his ability to engage in political satire will be unreasonably and excessively curtailed, if his content were subjected to a manifestly arbitrary fact check. In the scheme of the Rule, this apprehension of the Petitioner is sufficiently taken care of. Mere flagging of information as offensive under the Rule does not necessarily prompt action. The immunity under Section 79 of the Act continues to apply if the intermediary observes due diligence while discharging its duties under the Act and observes such other guidelines as the Central Government may prescribe in this behalf. The safe harbor is lost only under Section 79(3)(b) of the Act. In fact, as explained in detail herein above, Section 79 is declared as valid, subject to Section 79(3)(b) of the Act being read down to mean, that an

intermediary upon receiving actual knowledge from a Court order or **on being notified by the appropriate Government or its agency** that unlawful acts relatable to Article 19(2) are going to be committed, then fails to expeditiously remove or disable access to such material. Thus, the Apex Court has already contemplated enforcement of due diligence by an order of an appropriate government or its agency, or a court order.

31. It is relevant to note here that there is no intermediary before us complaining of a 'chilling effect'. As mentioned supra, the Learned Solicitor General clarified that the Central Government had engaged with the intermediaries in an exhaustive consultation process and in fact the intermediaries themselves had requested the Central Government to notify an agency to identify and authenticate information relating to its own business to assist the intermediaries in the due diligence exercise. In these circumstances, none of the intermediaries have assailed the impugned Rule. Be that as it may, the Rule plainly read merely targets misinformation, patently untrue information, which the user knows to be fake, or false or misleading and yet is communicated with a mala fide intent. The qualification to the offensive information is **knowledge** and **intent.** Political satire, political parody, political criticism, opinions, views etc does not form part of the offensive information. Then too, if such content is wrongly flagged by the FCU, it is always open to the user/aggrieved person to raise a complaint before the redressal mechanism of the intermediary and agitate his grievance before it and ultimately before a court of competent jurisdiction.

32. In the discussion relating to the 'chilling effect', the Petitioners have referred to a marketplace of ideas, not being a forum only for agreement. Undoubtedly, it is a forum for exchange of ideas, views, opinions, perspectives, a place for disagreements. The impugned Rule, however, is not about dissent or disagreement on existing policies or of facts. It sets bounds only for 'fake information', a discussion on policies that do not exist. It seeks to impede spread of information that communicates misinformation. The impugned Rule in fact, is a forum for exchange of ideas, debates, dissent, discussions as a marketplace, but based on real and existing facts, which render discussions and debates productively effective, meaningful, and vibrant. Dissuading dissent/discussion on something which does not exist, or which is only in the realm of imagination of some person, perhaps having a perfidious interest in spreading fake, false and misleading information, does not take away from the concept of a marketplace, as a platform to debate or dissent or criticise etc. In fact, the impugned Rule encourages debates and discussions on facts bereft of fakery. In this context, I agree with my brother Judge's reference to the remark of Dr D.Y Chandrachud J (as he then was) that a discourse of law is a discourse of civility is apt, considering that civility is based on authenticity.

33. The deprivation of safe harbor only entails withdrawal of the exemption from liability of the intermediaries. The intermediary is entitled to defend itself by challenging the identification of content as fake, false or misleading by the FCU and the final arbiter is a jurisdictionally competent Court. It is Rule 7 of the Ethics Code Rules which provides that failure to observe these Rules will invite liability for punishment under any law for the time being in force

including the Indian Penal Code. Firstly, Rule 7 is not challenged and secondly, this Rule does not create a new offence other than the existing offences in the IPC and the IT Act. Hence, apprehension of the Petitioners that the intermediary being compelled to refuse to continue to post content of a user flagged by the FCU fearing loss of safe harbor is unfounded and premature.

34. In the entire scheme of the Rule, there is neither any restriction on the free speech of the user, such as the Petitioners nor any penal consequence to be faced by them. What the Petitioners apprehend is an indirect intrusion on their right by the intermediaries who they say, may take down their content for fear of loss of safe harbour. Enforceability of the Petitioners' rights lies against the intermediary, in terms of a user agreement executed by and between the parties, independent of any government agency.

35. In the recent Constitution Bench decision in the case of *Kaushal Kishor (supra),* in the partly concurring opinion and supplementing opinion, Nagarathna J. has held as under:

> "d) As is evident from the above illustrations, the extent of protection of speech would depend on whether such speech would constitute a 'propagation of ideas' or would have any social value. If the answer to the said question is in the affirmative, such speech would be protected under Article 19(1)(a); if the answer is in the negative, such speech would not be protected under Article 19(1) (a). In respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference

having regard to Article 19(2) of the Constitution and only the ground mentioned therein.

……..

25. It is clarified that at this juncture that it is not necessary to engage in the exercise of balancing our concern for the free flow of ideas and the democratic process, with our desire to further equality and human dignity. This is because no question would arise as to the conflict of two seemingly competing rights, being the right to freedom of speech and expression, vis-à-vis the right to human dignity and equality. The reason for the same is because, the restraint that is called for, is only in relation to unguided, derogatory, vitriolic speech, which in no way can be considered as an essential part of exposition of ideas, which has little social value. This discourse, in no way seeks to pose a potential danger to peaceful dissenters, who exercise their right to freedom of speech and expression in a critical, but measured fashion. The present cases pertain specifically to derogatory, disparaging speech, which closely resembles hate speech. Such speech does not fall within the protective perimeter of Article 19(1)(a) and does not constitute the content of the free speech right. Therefore, when such speech has the effect of infringing the fundamental right under Article 21 of another individual, it would not constitute a case which requires balancing of conflicting rights, but one wherein abuse of the right to freedom of speech by a person has attacked the fundamental rights of another."

36. It may be apposite to refer to another recent decision of the apex court in the matter of *Amish Devgan (supra),* wherein the court speaking through Sanjeev Khanna J. undertook an analysis of the term 'hate speech' as being antithetical to, and incompatible with the foundations of human dignity. The court observed as under:

> "47. Preamble to the Constitution consciously puts together fraternity assuring dignity of the individual and the unity and integrity of the nation. Dignity of individual and unity and integrity of nation are linked, one in the form of rights of individuals and other in the form of individual's obligation to others to ensure unity and integrity of the nation. The unity and integrity of the nation cannot be overlooked and slighted, as the acts that 'promote' or 'likely' to 'promote' divisiveness, alienation and schematism do directly and indirectly impinge on the diversity and pluralism, and when they are with the objective and intent to cause public disorder or to demean dignity of the targeted groups, they have to be dealt with as per law. The purpose is not to curtail right of expression and speech, *albeit* not to gloss over specific egregious threats to public disorder and in particular to the unity and integrity of the nation. Such threats not only insidiously weaken virtue and superiority of diversity but cut back and lead to demands depending on the context and occasion, for suppression of freedom to express and speak on the ground of reasonableness. **Freedom and rights cannot extend to create public disorder or armour those who challenge integrity and unity of the country or promote and incite violence. Without acceptable public order, freedom to speak and express is challenged and would get restricted for the common**

> **masses and law-abiding citizens. This invariably leads to State response and, therefore, those who indulge in promotion and incitement of violence to challenge unity and integrity of the nation or public disorder tend to trample upon the liberty and freedom of others".**
>
> *(emphasis supplied)*

37. Thus, so long as the content of the Petitioners as shared on a platform of any intermediary does not offend restrictions under Article 19(2), be it political criticism or parody or satire or critical opinion of the government, etc., the intermediary will continue to enjoy the safe harbour and right of free speech of the user is not impinged even indirectly by any State action against the Intermediary. However, the minute the same falls within the category of offensive information as set out in the impugned Rule, qualified by knowledge and intent of the user, and where the intermediary fails to observe due diligence, the exemption from liability of the intermediary is lost. No content is restrained by the impugned Rule, unless the content is patently false, untrue and is communicated with "actual malice" i.e., with knowledge of its falsehood and with reckless disregard for the truth and is deceptively passed off as and statement of truth.

38. The application of the words 'knowingly' and 'intentionally' cannot be severed. The interpretation of the Petitioners that the said words apply only to the unamended portion of the Rule and does not apply to the amended portion is not correct. For clear comprehension, the Rule is re-reproduced as under-

> "**3. (1) Due diligence by an intermediary:** An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, shall observe the following due diligence while discharging its duties, namely:—
>
> (b) the intermediary shall inform its rules and regulations, privacy policy and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts by itself, and to cause the users of its computer resource to not host, display, upload, modify, publish, transmit, store, update or share any information that,—
>
> (v) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature or, in respect of any business of the Central Government, is identified as fake or false or misleading by such FCU of the Central Government as the Ministry may, by notification publish in the Official Gazette, specify;

39. The relevant portion of the Rule for the purposes of this interpretation reads as under:

> ***The intermediary shall make reasonable efforts to cause the users to not host, display…., share any information that -***
>
> ***i) Knowingly and intentionally communicates any misinformation***

> ***ii) Knowingly and intentionally communicates information which is patently false and untrue or misleading in nature or,***
>
> ***iii) Knowingly and intentionally communicates information in respect of any business of the Central Government, is identified as fake or false or misleading by such FCU of the Central Government as the Ministry may, by notification publish in the Official Gazette, specify;***

40. The interpretation of the Rule cannot be but to qualify every information by the words 'knowingly and intentionally' even applying to the amendment regarding government business. It may be recalled that the exemption from liability to an intermediary is based on the intermediary being a passive third party, and its functions being limited to providing access. But as soon as its passive role ceases and becomes participatory, safe harbor is lost but that too, only if the Intermediary fails to observe due diligence. Hence it is the knowledge and intent which results in the loss of safe harbor and reading the Rule *dehors* application of the words 'knowledge' and 'intent' is not a correct interpretation.

41. An important aspect of these proceedings cannot be lost sight of which is that it is the 'users' who are Petitioners before us. It is their right of free speech that is in contest. The genesis of apprehension of violation of the user's right of free speech is based on the intermediary taking down content fearing loss of their immunity. There is no gainsaying that the intermediary has no way of determining the knowledge and intent of the user. It is not the

intermediary before us canvassing its loss of immunity. The right to share fake, patently untrue, false information is not a part of the free speech right and it is incongruous to seek protection in this perspective. Right of speech will not enjoy protection if the user knowingly and intentionally shares fake, false or misleading information, flagged albeit by a FCU of the Central Government, resulting in a disclaimer or take down or any other action. No user can canvass a right to abuse the right of another. Whether any content is fake or otherwise; whether it was knowingly and intentionally shared etc., are all questions which will need to be determined by adducing evidence by following the procedure established by law in a jurisdictionally competent court. The user is free to enforce the terms of the User agreement with its intermediary by recourse to law.

42. In the light of the discussion above, I am of the view that the impugned Rule does not bring a chilling effect on the right of the user.

QUESTION (d):

43. Another concern of the Petitioners is that the operative words of the impugned Rule, i.e., 'fake, false or misleading' and 'business of the Government' are over-broad and vague, and thus vulnerable to subjective determination and are predicated on a true-false binary. An example was given of a person criticizing the Government's economic policy by quoting data from sources, which may be flagged by the FCU as fake information. The learned Solicitor General

allays this apprehension by saying that the Rule does not attack 'false information' by itself. A closer look at the Rule reveals that false information *per se* is not branded 'offensive', but it is the failure to make reasonable efforts to cause the user to not share that false information which the user knows to be false and, knowingly and intentionally causes the same to be communicated through the intermediary which the Rule addresses. Truth is the opposite of false and truthfulness or falsity of information may be relative, however, a fact cannot be fake. Fake is something which is non-existent. Here, a question of subjective interpretation of fact does not arise, because the very fact itself is non-existent. Thus, an information based on fabricated or non-existent facts falls within the mischief which is sought to be addressed by the impugned Rule. At the cost of repetition, it is once again reiterated that a person must have knowledge that the information which is communicated is fake, false or misleading and yet intentionally shares it to make it offensive. Intent is a *sine qua non* for bringing into play the impugned Rule. The intermediary may forgo the exemption from liability of prosecution, but it is only the jurisdictionally competent Court which will have the final say as it is the Courts which have the jurisdiction to establish 'knowledge', 'intent', etc. of a person sharing and communicating information known to him as being fake, false or misleading.

44. Thus, content comprising of a critical opinion or a satire or parody, howsoever critical of the Government or its business, based on 'existent' and not fake or known to be false or misleading, does not fall within the mischief sought to be corrected by the impugned Rule. In this perspective, the challenge to the Rule on the argument

that truth is not a binary and hence, any opinion, satire, parody, sarcasm, criticism, etc. will fall within the realm of the impugned Rule, is not justified.

45. Another limb of question no. 4, is a challenge to the Rule on the ground of vagueness of the term 'business of the Government'. The learned Solicitor General has taken pains to explain that the term 'business of the Government of India' is mentioned in Article 77 of the Constitution and has pointed to Article 77(3) which provides for the President to make rules for convenient transaction of the business of the Government and for allocation among ministers of the said business. Mr. Mehta referring to the Press Information Bureau ("**PIB**") says that presently the PIB is the Nodal Agency of the Government which disseminates information to the media on Government policies etc. The mission of the PIB is to maximize governance effectiveness through communication and amongst other functions also acts as a FCU with a stated object of acting as a deterrent to creators and disseminators of misinformation. The Charter of PIB has defined the word 'fake, misleading and true'. However, admittedly these words are not defined in the impugned Rule. Whether these words will find their definition in the FCU notification remains to be seen.

46. Be that as it may, the un-amended Rule already deals with misinformation or information which is patently false and untrue or misleading in nature which the user knows to be such and yet intentionally communicates the same. Out of this larger pool of information, a category of specific information relatable to 'business

of the Government' is culled out and is termed as 'offensive' only if flagged as fake or false or misleading by the FCU. The Rule as it earlier existed accepted a government department or a ministry as an individual 'user' alike any other 'user' and dealt with them in accordance with the terms of the user agreement. The addition brought out by the amendment is to bring the various government departments under one umbrella called the 'FCU' which will be a one-point interaction with the intermediaries. Since it is the Government which will be in the best position to provide correct facts on any aspect related to the conduct of its own business, the vagueness of the term by itself is not sufficient to strike down the entire Rule as *ultra vires*. Moreover, the offensive information related to the business of the government is only that which is known to be false, fake, or misleading and yet intentionally communicated. Thus, the vagueness of the term 'business of the Government' does not take away the validity of the Rule.

47. It has also been urged on behalf of the Petitioners that the words 'fake', or 'false', or 'misleading' are not defined in the Act nor the impugned Rule and on this ground the Rule suffers an infirmity. The learned Solicitor General has relied upon the ordinary meaning of the offensive words as defined in various dictionaries. A perusal of the definitions appearing in these universally accepted dictionaries indicate that the word 'false' is understood in its ordinary sense to mean '*something which does not correspond to the truth*', 'fake' to mean '*something which is non-existent'*, and 'misleading' to mean '*to give an incorrect interpretation or delusive'*. These words are also to be understood in the context of their use in a sentence or phrase. It is settled law that it is not a sound principle

in interpretation of statutes to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The argument that the said words are ambiguous and the user/intermediary may not be able to correctly comprehend precisely which content is covered under the offensive words is not justified. The words are to be understood in the ordinary sense of their meaning. Furthermore, the content being false, fake, or misleading *per se* is not hit by the impugned Rule. The qualification is that the content must be known to be false, fake, or misleading and yet shared with malicious intent to attract the applicability of the Rule. Seen in that light, the words 'fake', 'false', or 'misleading' are used specifically in the context of deceptive, deceitful and patently untrue information. The context of the statutes and the mischief it targets can in no way be understood to apply to satire, parody, commentaries, or opinions. Thus, the impugned Rule does not suffer from the vice of vagueness and its validity cannot be refuted on that ground.

QUESTIONS (e) & (f):

48. The questions (e) and (f) being interrelated are being taken together for discussion. The first part of the issue is whether the impugned Rule fails the test of proportionality. In the case of *Anuradha Bhasin (supra)*, the Supreme Court has dealt with the principle of proportionality in depth. Paragraphs 53 to 59 read as thus:

"53…. It goes without saying that the Government is entitled to restrict the freedom of speech and expression guaranteed under Article 19(1)(a) if the need be so, in compliance with the requirements under Article 19(2). It is in this context, while the nation is facing such adversity, an abrasive statement with imminent threat may be restricted, if the same impinges upon sovereignty and integrity of India. The question is one of extent rather than the existence of the power to restrict.

54. The requirement of balancing various considerations brings us to the principle of proportionality. In the case of K. S. Puttuswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1, this Court observed:

> "310…Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law..."

55. Further, in the case of *CPIO v Subhash Chandra Aggarwal*, [62] the meaning of proportionality was explained as:

> "225…It is also crucial for the standard of proportionality to be applied to ensure that neither right is restricted to a greater extent than necessary to fulfill the legitimate interest of the countervailing interest in question…"

62 (2019) SCC OnLine SC 1459.

56. At the same time, we need to note that when it comes to balancing national security with liberty, we need to be cautious. In the words of Lucia Zedner:[63]

> "Typically, conflicting interests are said to be 'balanced' as if there were a self-evident weighting of or priority among them. Yet rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear. Balancing is presented as a zero-sum game in which more of one necessarily means less of the other … Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake."

57. The proportionality principle can be easily summarized by Lord Diplock's aphorism 'you must not use a steam hammer to crack a nut, if a nutcracker would do. In other words, proportionality is all about means and ends.

58. The suitability of proportionality analysis under Part III, needs to be observed herein. The nature of fundamental rights has been extensively commented upon. ……..

59. The doctrine of proportionality is not foreign to the Indian Constitution, considering the use of the word 'reasonable' under Article 19 of the Constitution. In a catena of judgments, this Court has held "reasonable

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63 (Lucia Zedner, "securing liberty in the fact of terror: reflection from criminal justice", (2005) 32 Journal of Law and Society 510.

restrictions" are indispensable for the realization of freedoms enshrined under Article 19, as they are what ensure that enjoyment of rights is not arbitrary or excessive, so as to affect public interest. This Court, while sitting in a Constitution Bench in one of its earliest judgments in ***Chintaman Rao v. State of Madhya Pradesh,***[64] interpreted limitations on personal liberty, and the balancing thereof, as follows:

> "7. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."
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> *(emphasis supplied)*

49. A Constitution Bench of the Supreme Court in the case of ***Mohd. Faruk v. State of M.P.***[65] while determining the rights under Article 19(1)(g) of the Constitution discuss the doctrine of proportionality in the following words:

> "10…… The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of

64 AIR 1951 SC 118.

65 (1969) 1 SCC 853.

> a business or profession **attempt an evaluation of its direct and immediate impact upon the fundamental right of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizens' freedom…… the possibility of achieving the object by imposing a less drastic restraint……or that a less drastic restriction may ensure the object intended to be achieved."**
>
> *(emphasis supplied)*

50. Dr. Chandrachud, Chief Justice of India in ***K. S. Puttuswami (Aadhar-5 J) v. Union of India,***[66] laid down the tests that would need to be satisfied under the Constitution in the following words:

> "325. ……. The third principle adopts the **test of proportionality to ensure a rational nexus between the object and the means adopted to achieve them**. The essential rule of the test of proportionality is to enable the Court to determine whether a legislative measure is disproportionate in its interference with the fundamental rights. In determining this, the Court will have regard to whether a less intrusive measure could have been adopted consistent with the object of the law and whether the impact of the encroachment on a fundamental right is disproportionate to the benefit which is likely to ensue."
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> *(emphasis supplied)*

51. Sanjay Kishan Kaul, J in his concurring opinion, suggested a four-pronged test as follows:

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66 (2019) 1 SCC 1.

> "(i) the action must be sanctioned by law.
>
> (ii) the proposed action must be necessary in a democratic society for a legitimate aim.
>
> (iii) the extent of that interference must be proportionate to the need for such interference, and
>
> (iv) there must be procedural guarantees against abuse of such interference."

52. Having observed the law on proportionality and reasonable restrictions, we need to analyze and apply the test to the facts in the present case and specifically to the argument of the Petitioners that the impugned Rule fails the test of proportionality. Undoubtedly, the freedom of an individual to communicate and express opinions on various digital platforms without fear of repercussions is an essential component of a thriving democracy. This freedom is not only limited to the press but also to other vehicles of information. In the case of *Indian Express Newspapers (supra)* the Apex Court has made the following observations:

> "The expression "Freedom of Press" has not been used in Article 19, but it is comprehended within Article 19(1)(a). The expression means freedom from interference from authority which would have the effect of interference with the contend and circulation of newspapers….. Freedom of press is the heart of social and political intercourse."

53. The Right to Freedom of Speech and Expression carries with it the right to publish and circulate one's ideas, opinions, and views

with complete freedom and by resorting to any available means of publication, subject only to such restrictions as could be legitimately imposed under Article 19(2). The first decision of the Apex Court in which this is recognized is ***Romesh Thapar v*** **State of Madras**[67] wherein the Supreme Court held that the freedom of speech and expression includes the freedom of propagation of ideas and this freedom is ensured by the freedom of circulation. The Court also pointed out that this freedom is the foundation of all democratic organizations and is essential for the proper functioning of the process of democracy and very narrow and stringent limits are set to permissible legislative abridgment. Later, in ***State of Madras v. V. G. Row***,[68] the question of reasonableness of restrictions which could be imposed upon a fundamental right was considered. The Supreme Court pointed out that the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and scope of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions at that time should all enter in the judicial verdict. In ***Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co. Ltd.,***[69] the Apex Court pointed out that in construing the Constitution, it is the substance and the practical result of the act of State that should be considered rather than its purely legal aspect. Thereafter in the case of *Sakal Papers (supra)* while declaring Section 3(1) of the Newspaper (Price and Page) Act, 1956 as unconstitutional, the Supreme Court held that it may well be within the power of the State to place, in the interest of the general public, restrictions upon

67 (1950) SCR 594.

68 (1952)1 SCC 410.

69 (1954) SCR 674.

a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as set out in Article 19(6). Freedom of speech can be restricted only in the interest of security of the State, friendly relations with Foreign State, public order, decency, or morality or in relation to contempt of Court, defamation, or incitement of an offense. Thus, Article 19(1)(a) of the Constitution bestows upon every citizen the right to indulge in free speech, as well as the right to receive and spread information on various topics of his choice, subject only to the restrictions falling under the eight heads set out in Article 19(2) of the Constitution. The impugned Rule falls within the restrictions set out in Article 19(2) of the Constitution for the very reason that as discussed in detail above, the loss of safe harbor is in terms of Section 79(3)(b) of the Act which is read down by the apex court in the Shreya Singhal matter to apply only in matters relatable to Article 19(2).

54. The necessity of amending the Rule arises out of the concern of the government pertaining to an increase in use of social media as a communication medium which has a reach, unparalleled to any other medium of communication and the danger of spread of misinformation and fake information, the negative impacts of which present a real, clear, and specific danger to public order. The learned Solicitor General has also shown us a video clip showing deep fakes of the famous Hollywood actor Morgan Freeman and other well-known personalities to demonstrate the degree of danger and the manifold negative effects of proliferation of fake news. He has also

placed on record a plethora of material including research papers, studies, and surveys to supplement his arguments regarding the implications of propagation of fake information. He places reliance upon research papers which identify misinformation being a major contributor to various contentious contemporary events ranging from elections and referenda to the response to the COVID-19 pandemic. Not only can belief in misinformation lead to poor judgments and decision making, but it also exerts a lingering influence on people's reasoning even after it has been corrected.

55. Indeed, the right to free expression is a crucial and indispensable component of a nation having adopted democracy. Democracy is not simply about a vote-based election system, it entails far more than just voting. Citizens have a right to participate in the country's functioning even after elections and after administrations are created.[70] Citizens are allowed to express their opinions about the democratic processes well after the elections. It does not only mean that a citizen can express his views only in an eloquent, logical, or courteous manner but can very well include discourteous, insulting, illogical, and even puzzling expressions. However, this right does not permit freedom to share information which a person knows to be false yet intentionally communicates as authentic. Decisions and actions taken by a citizen based on deceptive information is likely to result in deleterious consequences in society and has capability of destroying a body quality and societal harmony thereby endangering national security. This has, therefore, required the Constitution to put reasonable restrictions on this right

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70 Pujarani Behera, *An Analysis of Right to Freedom of Speech and Expression*, 11 PEN ACCLAIMS 1, 1-12 (2020).

so that it can be regulated by the State in a proper manner, and then too only within the restrictions of Article 19(2) of the Constitution. Thus the due diligence expected of the intermediary vide the impugned Rule is reasonable and not arbitrary.

56. In the decision in the matter of ***Facebook v. Delhi Legislative Assembly,***[71] the Supreme Court has noted the attempts of countries like Australia, U.K. and the U.S.A. in reigning in social media platforms, given complaints about their manipulated behavior in a free speech advocating democracy. It said that such platforms with potential to influence public opinion must be held accountable for spread of disruptive messages and hate speeches. Writing the judgment, Justice Kaul said, "while Facebook has played a crucial role in enabling free speech by providing a voice to the voiceless and means to escape State censorship, we cannot lose sight of the fact that it has simultaneously become a platform for disruptive messages, voices and ideologies". The Court further said, "the significance of this is all the more in democracy which itself rests on certain core values. This unprecedented degree of influence (wielded by social media platforms) necessitates safeguards and caution in consonance with democratic values. Platforms and intermediaries must subserve the principal objected as a valuable tool for public good upholding democratic values", thus cautioning about the experience of Western democracies where social media platforms were suspected to have been used for influencing core democratic processes. The Court added, "election and voting processes, the very foundation of democratic Government, stand

71 (2022) 3 SCC 529.

threatened by social media manipulation, and it is difficult to accept the simplistic approach by Facebook- that it is merely a platform posting third party information and has no role in generating, controlling or modulating that information." Referring to Brexit and US presidential elections and the role of social media, the Supreme Court referred to a new word "Post-Truth" and said, "obfuscation of facts, abandonment of evidentiary standards in reasoning, and outright lying in the public sphere left many aghast. A lot of blame was sought to be placed at the door of social media, it being a source of this evolving contemporary phenomena where objective truth is becoming a commodity with diminishing value. George Orwell, in his 1943 Essay titled, '*Looking back on the Spanish War*', had expressed '……. the very concept of objective truth is fading out of the world. After all, the chances are those lies or at any rate similar lies will pass into history'…… the words have proved to be prophetic." The Court noted the acknowledgment by Facebook that they had removed 22.5 million pieces of hate speech content in the second quarter of 2020, which showed that they exercised a substantial degree of control over the content that is allowed to be disseminated on its platform. "To that extent, a parallel may be drawn with editorial responsibility cast on other mass circulation media", the Supreme Court said.

57. Right of citizens to participate in the representative and participative democracy of the county is meaningless unless they have access to authentic information and are not misled by misinformation, information which is patently untrue, fake, false or misleading, knowingly communicated with malicious intent. In the judgment rendered by the Supreme Court in the matter of ***People's***

Union for Civil Liberties vs Union of India[72] it has been held that one-sided information, disinformation, and misinformation, all equally create an uninformed citizenry which makes democracy a farce.

58. Presently, the threat of disinformation and hoaxes has evolved from mere annoyance to warfare that can create social discord, increase polarisation and in some cases, even influence election outcome. State and non-state actors with geopolitical aspirations, ideological believers, violent extremists, and economically motivated enterprise can manipulate social media narratives with easy and unprecedented reach and scale. This dis-information now also has a new tool in the form of Deep fakes. The dangers of fake news on social media intermediaries cannot be played down any longer. It is in this scenario that the Government appears to have framed the impugned Rule to curb the menace of fake, false, and misleading information related to business of the government. On an exacting understanding of the Rule, the information to be offensive must be shared with the knowledge that it is not genuine and is shared with malicious intent. In such a vibrant and largest democracy in the world and the wide reach and merits of social media, there is bound to be a suspicion regarding the intent of the government in introducing a provision such as the impugned Rule. The apprehensions of the Petitioners are also justified and cannot be swept away as frivolous or motivated. But regulating free speech to the limited extent of fake, false and misleading information in a way has the potential to create better conditions for citizens to sift facts

72 (2003) 4 SCC 399.

from fake and make informed decisions about what and how they want their societies to be, based on an opportunity to receive unadulterated information. Undoubtedly, rapidly changing information environment makes it easier for misinformation to spread at an unprecedented speed and scale. The requirement of a nuanced regulation underscores the cost of free speech absolutism in this "infodemic" era. There is thus a rational nexus between the impugned Rule and the object it seeks to achieve.

59. The question as to who is to decide what is fake or false and what is authentic is important. But more pertinent is the question as to whether breach of constitutional morality arising out of 'manipulation of information' needs urgent deterrence and whether the impugned Rule termed as, 'State imposed limits' as a way to combat this, itself is a breach. The entire canvass of the Petitioners is based on an apprehension that the amendment reveals an intent of the Government to seize 'control of digital media'. There is no quarrel with the fact that a citizen is entitled to question the government, its decisions, especially if any decision is likely to affect the rights guaranteed him by the Constitution. In the decision of ***S.P Gupta v. Union of India,***[73] the Supreme Court has held that once the society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed, and they are entitled to call on those who govern them on their behalf to account for their conduct. It is only if people know how their government is functioning that they

73 (1981) Suppl. SCC 87,

can fulfill the role which democracy assigns to them and make democracy an effective participatory democracy. 'Knowledge is power', it is said but the knowledge to be of any use must comprise information that is authentic. Present and apparent danger of the spread of fake, false, patently untrue, misinformation cannot be denied, calling for ways and means to combat the malaise. The contest before this Court is a challenge to the shape, manner, and form of the impugned Rule and not a 'battle for control over digital content'. A citizen is entitled to his right of free speech as all other rights guaranteed by the Constitution. But can one canvass a right to share misinformation or fake content without being met with a resistance by the administration, on behalf of and in the interest of the rest of its citizen, is a question that can be answered only in the negative. This is the contest before us; to examine the canvass of the impugned Rule and whether it goes beyond its object and trample any fundamental right of the Petitioners. To test the proportionality of the rigour of this Rule vis-a-vis its stated object is the challenge, as answered accordingly.

60. From the foregoing discussions it is clear that the Rule cannot be struck down as invalid merely on concerns of its potential abuse. The Petitioners/users always have a right to approach the court in case any action is taken by the intermediary affecting their fundamental rights under Articles 14, 19 and 21, despite the information shared by them not falling within the meaning of 'offensive information' in terms of the Rule. There is no unconstitutionality in the Impugned Rule.

Conclusion

61. In conclusion, what has been held is summarised herein below:

i) Section 79 providing for exemption from liability of intermediary was also the subject of challenge in *Shreya Singhal (supra)*. Section 79 (3)(b) itself is read down in the *Shreya Singhal (supra)* case to include only those matters relatable to the restrictions in Article 19(2). Thus, the exemption ceases to operate only if the offensive information as provided in the impugned Rule affects any restriction under Article 19(2) of the Constitution. The impugned Rule is neither ultra vires the Parent Act nor contrary to the *Shreya Singhal (supra)* judgment.

The words 'reasonable effort' do not mean only 'take down' as the Rule does not pre-empt the option of issuance of a 'disclaimer'.

ii) The impugned Rule is not violative of Article 14 based on the FCU comprising of government officials thereby making the Government the final arbiter in its own cause. The rights of a user or any aggrieved person to approach the grievance redressal mechanism and the appellate authority is contemplated under the Rules and it is only a jurisdictionally competent court which is the final arbiter of the issue.

Secondly, alleging bias against the members of the FCU only for the reason of their being government appointees is unfair and this by itself does not divest their character as independent persons.

The charter of the FCU, the extent of its authority, the manner of its functioning in ascertaining fake, false or misleading information, etc, is yet unknown. In case of any actual bias exhibited by the FCU, recourse to the courts of law is always open to the aggrieved person. Thus, a challenge to a potential abuse by the FCU on the basis of an apprehension is not maintainable and to that extent it is pre-mature.

iii) The Rule plainly read targets misinformation, patently untrue information, which the user knows to be fake, or false or misleading and yet is shared with a mala fide intent. The qualification to the offensive information is **knowledge** and **intent.** Political satire, political parody, political criticism, opinions, views etc does not form part of the offensive information.

The impugned Rule does not directly penalize either the intermediary or the user, without recourse to a Court of law. There is an entire mechanism provided in the form of the grievance redressal officer and the appellate committee.

It is Rule 7 that takes away the exemption in case of contravention of these Ethics Code Rules. This Rule does not create any new offence and exemption from liability ceases only in respect of existing offences under the IPC and the IT Act itself.

No content is restrained by the impugned Rule, unless the content is patently false, untrue and is communicated with "actual malice" i.e., with knowledge of its falsehood and with reckless disregard for the truth and is deceptively passed off as and statement of truth. In this context, the impugned Rule does not bring any chilling effect on the right of either the intermediary or the user.

iv) Content comprising of a critical opinion or a satire or parody, howsoever critical of the Government or its business, if it 'exists' and is not fake or known to be false or misleading, does not fall within the mischief sought to be corrected by the impugned Rule.

Truth is the opposite of false and truthfulness or falsity of information may be relative, however, a fact cannot be fake. Fake is something which is non-existent. The question of subjective interpretation of fact does not arise, because the very fact itself is non-existent. The argument that truth is not a binary and hence, any opinion, satire, parody, sarcasm, criticism, etc. will fall within the realm of the impugned Rule making the Rule unconstitutional is rejected.

v) The un-amended Rule already deals with misinformation or information which is patently false and untrue or

misleading in nature which the user knows to be such and yet intentionally communicates the same. Culled out of this is a category of information relatable to 'business of the Government' which is available for scrutiny by the FCU. Since it is the Government which is in the best position to provide correct facts on any aspect related to the conduct of its own business, the vagueness of the term by itself is not sufficient to strike down the entire Rule as *ultra vires*.

The words 'Fake', 'False', or 'Misleading' are to be understood in the ordinary sense of their meaning. The qualification to the said words is that the content must be known to be false, fake, or misleading and yet shared with malicious intent to attract the applicability of the Rule. Thus, the impugned Rule does not suffer from the vice of vagueness and cannot be struck down on that ground.

vi) The impugned Rule meets the test of proportionality. Right of citizens to participate in the representative and participative democracy of the county is meaningless unless they have access to authentic information and are not misled by misinformation, information which is patently untrue, fake, false, or misleading, knowingly communicated with malicious intent. The measures adopted by the Government are consistent with the object of the law and the impact of the encroachment on fundamental right is not disproportionate to the benefit which is likely to ensue.

62. In these terms, the Petitions are dismissed. There will be no order as to costs.

63. In view of disposal of the Petitions, pending Interim Application also stands disposed of.

64. While concluding, sincere thanks and compliments deserve to be placed on record for the learned counsel for the respective parties, their associates, and their researchers, whose erudite and scholarly presentation of respective viewpoints has rendered invaluable assistance to me in arising at a finding, which I believe to be the right conclusion in the matter.

(Dr. Neela Gokhale, J)