

IN THE HIGH COURT OF DELHI AT NEW DELHI

(EXTRA ORDINARY WRIT JURISDICTION)

WRIT PETITION (C) No. 13275 of 2019

IN THE MATTER OF :

Sanjay R Hegde

... Petitioner

Versus

Ministry of Electronics and Information Technology

and Anr

... Respondents

PAPERBOOK

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Filed By:

Pranjal Kishore

Advocate for the Petitioner

Dated: ____ 2020

Place: New Delhi

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Rejoinder to the Counter-Affidavit filed by Respondent No.1

I, Sanjay R Hegde, S/o Mrs. Vasanthi Hegde, aged about 54 years do hereby solemnly affirm and state on oath as under:

1. I have read and understood the contents of the Counter Affidavit filed by the Respondent No.1 herein. In response thereto, I am filing this brief rejoinder affidavit to controvert where necessary the contents of the said counter affidavit. At the outset I reiterate the contents of the Writ Petition and deny all the averments, contrary thereto contained in the counter affidavit filed by the Respondent.

Preliminary Submissions:

2. The Hon'ble Supreme Court in its judgment in *Anuradha Bhasin v Union of India, 2020 SCCOnline SC 25* has held "*that freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible.*" The Court has also

recognized that *“the freedom of speech and expression through the medium of internet is an integral part of Article 19(1)(a)”*.

3. It is submitted that organizations such as Respondent No.2 are essential to the exercise of the freedom of speech on the internet. Further, there exists a positive obligation on the state to facilitate the exercise of such rights.

4. Respondent No.1 in its counter-affidavit has sought to contend that it has performed all its statutory functions. It has also relied on the ‘Information Technology (Intermediary Guidelines) Rules, 2011’ (*“2011 Rules”*) to contend that the guidelines/rules as prayed for by the Petitioner have already been notified. The Petitioner’s submissions in this regard are two-fold:

- i. The 2011 rules prescribe conditions as to when an intermediary is to take down or remove content. The Petitioner’s prayer is for guidelines/rules proscribing overbroad and illegal censorship by an intermediary. No such guidelines exist. As such, Respondent No.1 has failed to comply with its positive obligation to facilitate the exercise of Article 19 (1) (a) rights.
- ii. The posts put up by the Petitioner on his Twitter profile were not in violation of any of the rules prescribed by Respondent No.1. The same goes to show that the suspension of his account has been done in an arbitrary and illegal manner.

Re’: Positive Obligation on Respondent No.1

5. The Hon'ble Supreme Court in *Indibility Creative Pvt. Ltd. v Govt. of West Bengal and Ors.*, (2019) SCCOnline SC 520 has stressed on the positive obligation of the state to facilitate the exercise of the freedom of free speech and expression. The Hon'ble Court has held:

"50.....But, apart from imposing 'negative' restraints on the state these freedoms impose a positive mandate as well. In its capacity as a public authority enforcing the rule of law, the state must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the state cannot look askance when organized interests threaten the existence of freedom. The state is duty bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the state must be utilized to effectuate the exercise of freedom. When organized interests threaten the properties of theatre owners or the viewing audience with reprisals, it is the plain duty of the state to ensure that speech is not silenced by the fear of the mob. Unless we were to read a positive obligation on the state to create and maintain conditions in which the freedoms guaranteed by the Constitution can be exercised, there is a real danger that art and literature would become victims of intolerance. In the present case, we are of the view that there has been an unconstitutional attempt to invade the fundamental rights of the producers, the actors and the audience. Worse still, by making an example out of them, there has been an attempt to silence criticism and critique. Others who embark upon a

similar venture would be subject to the chilling effect of 'similar misadventures'. This cannot be countenanced in a free society."

6. It is humbly submitted that the State has both a duty and the power to facilitate the exercise of the freedom of speech and expression. It can lay down guidelines in exercise of its powers under Section 79 (2) (c) read with Section 87 (2) (zg) of the Information Technology Act to ensure that any censorship on social media is carried out strictly in accordance with the provisions of Article 19. However, no guidelines have been laid down in exercise of such power.
7. It is submitted that in the absence of any steps taken by the State in exercise of its obligation under Article 19, intermediaries such as the Respondent No.2 take down/remove content in an arbitrary and opaque manner. This has a chilling effect on free speech. Over the last year, many such instances have been reported by the media. A copy of one such report dated 03.10.2019 appearing in 'The Hindu' is attached herewith and marked as **Annexure R-1**.
8. The arbitrary takedown of content by Respondent No.2 was taken note of by the 'United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' ("*UN Special Rapporteur*"). In his letter dated 10.12.2018 addressed to the CEO of Respondent No.2, the Special Rapporteur expressed concern regarding "*actions against Twitter users for posting or sharing Kashmir-related content.*" A copy of the letter dated 10.12.2018 sent by the UN Special Rapporteur to the CEO of Respondent No.2 is attached herewith and marked as **Annexure R-2**.

9. It is pertinent to note that Respondent No.1 is in the process of notifying fresh guidelines/rules to replace the 2011 Rules. A submission to this effect has already been made before the Hon'ble Supreme Court. Further, the said respondent has notified the draft rules, i.e. the Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 on its website on 24.12.2018. These rules are similar to the 2011 rules in as much as they do not prescribe guidelines against overbroad and illegal censorship.
10. It is further submitted that the UN Special Rapporteur has written to the State authorities expressing his concern about the draft 2018 amendment rules, and the negative effect they are likely to have on free speech. In particular, the Rapporteur has commented on draft rule 3 (9) which deals with automated content removal and monitoring. The relevant part of the letter is reproduced below:

Draft Rule 3(9) states that an “intermediary shall deploy technology based automated tools or appropriate mechanisms, with appropriate controls, for proactively identifying and removing or disabling public access to unlawful information content.”

I am concerned that this proposed rule change would impose an affirmative obligation on intermediaries to regularly monitor content and restrict content at the point of upload, based on their own determinations of legality under highly subjective criteria (such as threats to “public safety” and “critical information infrastructure” as outlined above). As I discussed above, content review systems deployed by private intermediaries, which lack the due process

safeguards and democratic legitimacy of the judicial process, are ill-equipped to make such determinations. The threat of criminal or civil penalties is also likely to incentivize intermediaries to err on the side of caution and restrict content that is perfectly legitimate or lawful.”

A copy of the letter dated 14.02.2019 sent by the UN Special

Rapporteur is attached herewith and marked as **Annexure R-3**.

11. In light of the above, it is humbly submitted that far from facilitating the exercise of the right under Article 19 (1) (a), Respondent No.1 is in the process of notifying rules that are likely to further inhibit free speech. It is thus submitted that the said Respondent has failed to fulfill its constitutional and statutory obligations.

Re': Compliance with existing rules

12. It is submitted that the 2011 rules direct an intermediary to not publish/ remove any information that:

a) belongs to another person and to which the user does not have any right to;

b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

c) harm minors in any way;

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

(e) violates any law for the time being in force;

f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

g) impersonate another person;

h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation

13. A bare perusal of the two posts that have led to the suspension of the account of the Petitioner go to show that none of these conditions are met. It is submitted that the suspension of the Petitioner's account is ex-facie illegal. Neither the poem 'Unko Phaansi De Do' nor the picture of August Landmesser violate any of the Respondent No.2's terms or the 2011 Rules. The poem by revolutionary Indian poet Gorakh Pandey was written against the first death penalties meted out (to two peasant revolutionaries), in independent India. It is a comment against a capitalist system which denies basic rights to the poor. The photograph of August Landmesser is seen as a symbol of resistance

for his refusal to perform the “sieg heil” salute before Hitler who was at the shipyard.

Parawise Reply:

14. The contents of Paragraphs 1 to 4 of the Counter-Affidavit are a matter of record and merit no response.

15. The contents of Paragraph 5 and 6 of the Counter-Affidavit are admitted. It is however submitted that Respondent No.1 is in the process of formulating fresh intermediary guidelines/rules to replace the rules formulated in 2011. The announcement of notification of the draft guidelines of 2018 on the website of Respondent No.1 is enclosed herewith as **Annexure R-4**.

It is pertinent to note that Respondent No.1 has on 24.12.2018 published a draft notification containing the Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018. Comments on the same have been invited from various stakeholders. A copy of the Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 dated 24.12.2018 is attached herewith and marked as **Annexure R-5**.

It is further submitted that Respondent No.1, in proceedings before the Hon'ble Supreme Court has undertaken that it is in the process of formulating fresh guidelines and the same would be done by 15.01.2020. The same has been recorded by the Hon'ble Court in its order dated 24.09.2019 in *Facebook Inc v Union of India and Ors, Transfer Petition(s) (Civil) No(s).1943-1946/2019*. A copy of the order

dated 24.09.2019 in Facebook Inc v Union of India and Ors, Transfer Petition(s) (Civil) No(s).1943-1946/2019 is attached herewith and marked as **Annexure R-6**. A copy of the order dated 22.10.2019 in in Facebook Inc v Union of India and Ors, Transfer Petition(s) (Civil) No(s).1943-1946/2019 is attached herewith and marked as **Annexure R-7**.

16. The contents of Paragraphs 7 and 8 of the counter-affidavit are a matter of record and need no response.
17. The contents of Paragraph 9 of the counter-affidavit are disputed and denied. It is submitted that Respondent No.1 has failed to discharge its statutory and constitutional obligations. Detailed submissions in this regard have been made at Paragraphs 5 to 11 of this rejoinder-affidavit. The same are not being repeated herein in order to avoid repetition. The Petitioner craves liberty to rely on the averments made in Paragraphs 5 to 11 at the time of arguments.
18. The contents of Paragraph 10 of the counter-affidavit are admitted in as much as they are a part of record. It is however submitted that the suspension of the Petitioner's account is contrary to Respondent No.2's own policies and the existing guidelines laid down by Respondent No.1. Further, by failing to prevent the repeated infractions against freedom of speech committed by the Respondent No.2, Respondent No.1 has failed to meet its obligations under statute as well as under Article 19 (1) (a) of the Constitution.
19. In view of the submissions made above, the submissions made in response to the prayer clause are disputed and denied. It is submitted

that the Respondent No.1 is both a necessary and a proper party to these proceedings.

DEPONENT

VERIFICATION:

Verified at New Delhi on thisday of February, 2020 that the contents of the above rejoinder to the counter affidavit are true and correct which based on records maintained by the petitioner nothing is false and no material has been concealed there-from.

DEPONENT