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A LEAF IN THE BOOK OF FREEDOM OF SPEECH AND EXPRESSION

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1. Introduction

The High Court of Bombay (“**the Court**”), in the clubbed matter of Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors. v. Union of India and Anr¹. & Nikhil Mangesh Wagle v. Union of India², passed an interim order dated 14th August 2021 putting a stay on the operation of Rule 9(1) and 9(3) of the Information Technology (Guidelines for intermediaries and Digital Media Ethics Code) Rules, 2021 (“**IT Rules 2021**”) on account of it being violative of the fundamental right to freedom of speech under Article 19(1)(a) of Constitution of India (“**COI**”) and also transcending the substantive provisions of the Information Technology Act, 2000 (“**IT Act, 2000**”).

2. Background

The IT Rules 2021 were framed in exercise of powers granted by sub section (1) and clauses (z) and (z) (g) of sub section 2 of Section 87 of the IT Act. Rule 9 is encapsulated in Part III of the IT Rules 2021 that

¹ Writ Petition (L.) No.14172 of 2021

² Public Interest Litigation (L.) No.14204 of 2021

regulates publishers of news and current affairs content and publishers of online curated content (“**Digital Media Platforms**”). By the virtue of Rule 9(1), the IT Rules 2021 mandates the observance and adherence to the “Code of Ethics” set out in the Appendix of the rules by the Digital Media Platforms. The Code of Ethics *inter alia* requires the Digital Media Platforms to comply with the Norms of ‘Journalistic Conduct’ of Press Council of India under the Press Council Act, 1978 (“**PCI Act**”) and ‘Programme Code’ under Section 5 of the Cable Television Networks (Regulation) Act, 1995 (“**CTVN Act**”) and requires the Digital Media Platforms to not publish or transmit the content which is prohibited under any law.

In order to deal with complaints of violation of the Code of Ethics, Rule 9(3) creates a three-tier grievance redressal mechanism. This redressal mechanism comprises of (a) Level I - Self-regulation by the publishers; (b) Level II -Self-regulation by the self-regulating bodies of the publishers; and (c) Level III- Oversight mechanism by the Central Government. Any person can file a complaint against the publisher for violating the said Rule, and if dissatisfied with the response received, the complainant can take it up through the levels.

3. Key Issues

Rules 9, 14 and 16 of the IT Rules 2021 were challenged before the Court in the said matter owing to the unfettered and arbitrary powers conferred on the government to regulate the Digital Media Platforms and violation of freedom of expression and privacy of users of internet and digital news media platforms. However, the Court only accepted the stay in operation of Rule 9(1) and Rule 9(3). The Court was of the opinion that there was no urgency and need to put a stay on other rules since the rules were not yet operative or were in line with the existing rules of blocking content that are already in effect pursuant to the IT Act, 2000.

The key issues raised before the Court in respect to Rule 9 were that:

- i) a subordinate legislation in the form of Rule 9 cannot provide for restrictions travelling beyond the provisions of Section 69A³ of the IT Act;
- ii) it surpasses the ambit of restrictions imposed under Article 19(2) of COI and violates the freedom of speech and expression; and
- iii) Section 87 the IT Act, 2000, doesn’t confer the power on the government to make such Rules.

4. Analysis of the decision of the Court

While putting a stay in the operation of Rule 9(1) and Rule 9(3), the Court made the following observations:

- I. The restrictions imposed under Section 69A of the IT Act, 2000 are limited in nature as they prohibit transmitting or publishing or exhibiting any content against the interest of sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. However, the restrictions laid down in Rule 9 are more extensive

³Section 69A of IT Act, 2000-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 authorised 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, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence 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.

and it is impermissible to have a subordinate legislation which travels beyond the restrictive ambit of Section 69A of the IT Act, 2000, the parent act.

- II. Though Rule 9 is enacted pursuant to the IT Act, 2000, it mandates adherence to Code of Ethics under two completely different statutes i.e., norms of journalistic conduct under the PCI Act and Programme Code under the CTVN Act. The sanction behind the Norms of Journalistic Conduct envisages a moral obligation and not a statutory obligation. The Court observed that the IT Rules cannot impose an obligation on publishers to follow a code that was previously advisory in nature. Furthermore, the Court also noted that the code doesn't envisage anything more than to warn or admonish the non-complying entity. On the contrary, the Code of Ethics provides for mandatory compliance and prescribes more stringent actions in case of non-compliance. Therefore, it is *prima facie* difficult to comprehend that how these two independent legislations can be brought under the purview of the IT Rules, 2021 and substantive actions can be taken for their violations under the IT Rules, 2021. Moreover, the Court emphasized that the idea behind laying down IT Act, 2000 was never to censor content on the internet except to the extent mentioned in section 69A of IT Act, 2000.
- III. Regarding the three-tier grievance redressal mechanism under Rule 9(3) of IT Rules 2021, the Court expressed that people would be starved of liberty of thought and feel suffocated to exercise their right of freedom of speech and expression as guaranteed under Article 19(1) (a) of COI. The Court mentioned that there might be a probability where the publisher publishes content criticizing any public figure which the inter departmental committee finds inappropriate, in such an instance, the publisher faces the risk of punishment and loses its right of freedom of speech and expression as guaranteed under Article 19(1) (a) of COI. The Court noted that Article 19(2) of COI imposes reasonable restrictions upon the freedom of speech as to the extent of Section 69A of the IT Act, 2000 and any other restriction beyond this leads to unreasonable restriction.
- IV. The Court further observed that the said rule is found to transgressing the rule making power provided under Section 87 of IT Act. The provisions of Section 87(2) (z) and (zg) of the IT Act, 2000 which is invoked to frame the IT Rules, 2021 speaks of rule that could be framed in regard to the Procedure and Safeguard for blocking of access by the public under subsection-(2) of Section 69A and sub section (zg) of Section 87(2) provide for framing rules in the nature of guidelines to be observed by intermediaries. The Court opined that there already exists rules namely, Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, despite which new rules have been framed as if it were a substantive legislation. Therefore, subordinate legislation is seeking to subsume the parent act i.e., IT Act, 2000 but it cannot result in new rights, liabilities and obligations which are not traceable in the very enactment which conferred the rule making power. i.e., the parent act.

Thus, the Court concluded that Rule 9 *prima facie* appears to be ultra vires the IT Act, 2000 and in violation of Article 19(1)(a) of COI and therefore, for the purpose of interim relief, the present challenge was regarded as an exception to the general rule of presumption in favour of constitutionality of Rule 9.

Conclusion

Several conditions in the IT Rules 2021 suffered unconstitutionality and illegality. The said rules acted as a threat to the freedom of speech and expression of digital media houses and internet users. The Court correctly noted that Rule 9 requires compliance with the Code of Ethics and the Programme Code, which,

in turn, mandates the compliance of PCI Act and CTVN Act. Though Rule 9 is a subordinate legislation, it provides for compliance with two independent substantive legislations.

Further, the Court correctly observed that the three-tier grievance redressal mechanism gives unfettered power to the Central Government to oversee and arbitrarily regulate all the materials published by digital media houses violating the freedom of speech and expression as guaranteed under the COI. The enactment of the impugned rule goes beyond the power of the Central Government to make any legislation in the nature of Rule 9 and therefore, government doesn't have the legislative competence to make such a rule.

Further, Part II Clause A (b) of Code of Ethics provides for restrictions on transmitting or publishing or exhibiting any content that is against the integrity, sovereignty, security of the country, detrimental to India's friendly relations with foreign countries and that incites violence or disturb the maintenance of public order. These limitations are akin to the reasonable restrictions provided in Art 19 (2) of COI and Sec 69A of the IT Act, 2000. While we appreciate the order of the Court, it, *in our opinion*, erred in putting stay on the said part of the Code of Ethics as it was in line with the parent act and COI.

The said decision by the Court provides much need relief to the digital media houses and publishers across the country, however, it remains to be seen how the Supreme Court takes up this matter.

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