

Right to Free Speech versus Right to Reputation
Legal implications for Social Media Platform providers in India
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The constitution guarantees Right to Life with dignity to all persons. The Supreme Court has time and again reiterated the importance and significance of 'Right to Reputation' as a very integral part of a person's right to life under Article 21. In fact, right to reputation has always been considered higher than life from the oldest known texts for human beings from time immemorial across cultures¹. In fact, 'Right to Reputation' is also recognised in Article 12 of the Universal Declaration of Human Rights, 1948. The Supreme Court has quoted with approval from Bhagavad Gita as follows,

*“Akirtinchapibhutanikathaishyantite-a-vyayam, Sambha-
 vitasyaChakirtirmaranadatirichyate. (2.34) (Bhagavad Gita)*

(Men will recount thy perpetual dishonour, and to one highly esteemed, dishonourexcceedeth death.)”²

The Internet Revolution introduced virtual publishing platforms where people could express themselves fearlessly beyond the geographical limitations by way of speech, print or in digital medium. Subsequently, social media expanded the reach even beyond through the mobile revolution which has changed the way people communicate. These virtual platform providers are recognised as Intermediaries by Law.

The law, which recognises a person's 'Right to Reputation' as a basic human right and integral to his Right to Life, cannot be a mute spectator and allow people's reputation being damaged irreparably in the eyes of their family, friends, society. Infact, serious financial consequences also visit upon professionals and Businesses as a consequence, which are irreversible. The least one expects from law is to provide a efficacious remedy against the wrongdoer, be it the author or the Intermediary, but for whom the quick dissemination would not have been possible, more so when put on notice by the “affected person in writing”.

Regulations have been put in place governing certain aspects of the relationship between the Intemediaries and the end users.The Information Technology Act, 2000 and Information Technology (Intermediaries Guidelines) Rules, 2011 are steps in this direction. The 2011 Rules recognise defamation, libel, invasion of privacy etc., as the non permissible activity. Statutory duty is cast on the

¹Subramanian Swamy vs. Union of India; 2016 (7) SCC 221; Para 25-30 at page 273-274.

²Smt Kiran Bedi vs. Committee of Inquiry; (1989) 1 SCC 494 at page 514, para 22.

Intermediaries to frame rules and regulations of conduct/user agreements, before they allow their users to post, publish etc.

The recent judgment of the Supreme Court of India in ‘Google India Private Limited vs. M/S Visakha Industries Ltd³’ has once again affirmed the right to judicial remedy before a competent court of law, where opportunity to lead evidence will be given to both sides to prove their charge and the defence against the charge. Further, the culpability or liability of the person accused is to be determined in Trial and cannot be determined in proceedings seeking to summarily quash the proceedings under Section 482 of Cr.P.C. The case was decided on the basis of law applicable before the 2009 Amendment to the I.T. Act, 2000. The protection granted to Intermediaries under the pre 2009 legal regime under the I.T. Act, 2000 vide section 79 was confined to liability under the I.T. Act, 2000, rules or regulations made there under for any third party information or data made available by actual user, if the intermediary proves that the offence or contravention was committed without its knowledge or that it had exercised all due diligence to prevent commission of such offence or contravention.

However, the 2009 Amendment replaced the old section 79 with the new section 79 which gave exemption from liability of intermediary in certain cases. The exemption given under sub-section (1) is from liability under any law for any third party information, data, or communication link made available or hosted by him. The exemption so given is made subject to sub-section (2) and (3) thereof. Sub-section (2) prescribes the conditions for having the benefit of exemption. Vide Clause (c) of sub-section (2) the intermediary is required to observe due diligence while discharging his duties under this Act. While, sub-section (3) prescribes when the exemption under section (1) shall not apply.

In Google’s judgment the Supreme Court had an occasion to examine the import of the judgment in Shreya Singhal Vs. UOI⁴, which dealt with the constitutional validity of certain provisions of Information Technology Act, 2000 and also the amended provisions of section 79 and Intermediaries Guidelines Rules, 2011. While referring to the judgment in Shreya Singhal’s case the Court observed that, what was laid down in Shreya Singhal’s case was premised upon the challenge to Section 79(3)(b) and challenge to the Intermediary Rules of 2011, both of which provisions came to be read down by the court. In fact the

³2019 SCC Online SC 1587

⁴2015 5 SCC 1

Supreme Court has categorically held that Defamation would be governed by Section 500 of Indian Penal Code.

In *Dr. Subramanian Swamy Vs. UoI*⁵ the Supreme Court reiterated that right to reputation is inextricable aspect of right to life under Article 21 of the Constitution and the state has kept the provision under Section 499 IPC alive as part of law in order to sustain and protect the said reputation of an individual. Further, it was held that Right to Free speech cannot mean that a citizen can defame the other. The court further observed that liberty to have a discordant note does not confer a right to defame the others. This judgment also considered the import of the law laid down in *Shreya Singhal* and has proceeded to uphold the remedy to sue for criminal defamation.

The Law on the issue of apparent conflict in one's right under Article 19(1)(a) as against the others right to life under Article 21 of the constitution was considered in the case of *In re Noise Pollution*, wherein the Supreme Court has held that Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21.⁶ A person's free speech stops where the other person's reputation begins. Freedom always comes with responsibility and all civilised nations recognise this principle.

The Intermediaries cannot shrug off their responsibility, especially when they are in a position to control the content being posted by a user under the Rules and Regulations, Privacy Policy and User Agreements framed by them, subject to which a user is permitted to utilize their services. The statutory exemption under section 79 is not a blanket protection from legal scrutiny by competent courts. The exemption is conditional and subject to the provisions of the I.T. Act, 2000 and Rules and Regulations framed there under.

The argument against Intermediaries exercising their own judgment upon receiving actual knowledge of unlawful acts could result in curtailing free speech, was the basis for reading down the provisions of Section 79(3)(b) and Rule 3(4) in *Shreya Singhal's* case.

However, is it not equally true about the Intermediaries being allowed to sit in judgment on the sense of loss of reputation of individuals, who report to them about defamatory publications being posted and shared on their platforms?

⁵ 2016 (7) SCC 221 at page 351, para 210.

⁶ 2005 5 SCC 733, @ 746 para 11

In such cases free speech necessarily has to give way to Right to reputation. Delay in taking down defamatory content causes not only irreparable but also irreversible damage to reputation which cannot be compensated in any manner. The Intermediaries will be well within their rights to remove such defamatory content. They would not be sitting in judgment over the offending posts, but will be acting under their user agreements, which do not permit defamatory content.

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