

**AVNISH BAJAJ V. STATE (N.C.T.) OF DELHI**

(2005) 3 CompLJ 364 Del

BAIL APPLICATION NO. 2284 OF 2004

-Bhumi Sharma

**Court** – High Court of Delhi

**Judge** – Vikramjit Sen, J.

**Decided On** – December 21, 2004

**Relevant Sections** – Section 67 and 85 of IT Act, 2000; Section 292 and 294 of IPC, 1860

**FACTS OF THE CASE**

The case involved a student of IIT Kharagpur - Ravi Raj, who placed on the baazee.com a listing offering an obscene MMS video clip for sale with the username 'Alice-elec'. The fact that the website (baazee.com) has a filter for the posting of objectionable content, the listing nevertheless took place with the description, "DPS Girls having fun"!

The item was listed online and was deactivated, in 2 days. The Delhi Police Crime Branch took cognizance of the matter and registered a FIR. After investigation, a charge sheet was filed showing Ravi Raj, Avnish Bajaj, CEO of Baazee.com website and Sharat Digumarti, the person responsible for handling such content, as accused.

Since Ravi Raj absconded; Avnish Bajaj filed a petition for the quashing of the criminal proceedings against him. He contended, among other grounds, that the MMS was transferred directly between the seller and buyer without the intervention of the Website because it is a

customer-to-customer website, which facilitates the online sale of a property. The website receives a commission from such sales and also generates revenue from advertisements carried on its web pages.

Avnish Bajaj was arrested under section 67 of the IT Act, 2000, and his bail application was rejected by the trial court. After then he approached Delhi High Court for bail.

## **ISSUES**

### **1. Whether Section 67 of the Information Technology Act on which a prima facie case was made out is against the petitioner?**

Section 67 of the IT Act relates to the publication of obscene material. It does not relate to the transmission of such material. Since the MMS was transferred directly from the seller to the buyer without the intervention of the website, they can at most be responsible for the listing placed on the website which by itself was not obscene and did not attract the offence under Section 67 of the Information Technology (IT) Act.

The scope of Section 67 of the IT Act is only restricted to publication and does not cover the transmission of such material.

### **2. Whether the contentions for the offense under Section 292 (2) (a) and 292 (2) (d) IPC is made against the website are objectionable or not?**

The petitioner contended that due diligence was taken by the website to immediately remove the video clip once it was brought to its knowledge that it was objectionable. On coming to learn of the illegal character of the sale, remedial steps were taken within 38 hours since the intervening period was a weekend.

But Offence under Section 292 of Indian Penal Code includes not only overt acts but illegal omissions within the meaning of Sections 32, 35 and 36 IPC.

The failure to have an adequate filter in a system that is entirely automated entails serious consequences and a website cannot escape such legal consequences. The mere fact that payment was made to the seller even as on 27th December 2004 shows that no such attempt was made to prevent or stop the commission of the illegality by the website.

## **RULE**

- There was a prima facie case against the Website in respect of the listing of the video clip and its contents and an offence, under certain sub- sections of Section 292 of the IPC was made out.
- Avnish Bajaj could not be held liable as the company was not arraigned as a plaintiff.
- The IPC did not recognize the concept of automatic criminal liability of a director of a company, when the company itself was not a party to the suit.
- A prima facie case was made out against Avnish Bajaj for an offence under section 67 of the IT Act since the law recognizes the deemed criminal liability of the directors even where the company is not arraigned as an accused. This is because; Section 85 (1) of the IT Act provides that, when a company commits an offence under the IT Act, every person who was in charge of the company at the time may be proceeded against.

However, the SC, in 2012, overturned this finding while holding that, vicarious liability cannot be fastened to Avnish Bajaj and he could not be held guilty under the IT Act provisions as the company was not arraigned as an accused. In this respect, the SC drew a parallel between section 141 of the Negotiable Instruments Act, 1881 ("NI Act"), and section 85 of the Information Technology Act. Section 141 of the NI Act is of the same substance as section 85 of the IT Act, in the context of certain offences by companies under the NI Act. In interpreting section 141 of the NI Act, the SC held that the commission of an offence by the company was an express condition precedent to attract the liability of others in charge of the company, hence, since there was no case made against the company, Avnish Bajaj was acquitted.

## **ANALYSIS**

- It has not been established from the evidence that any publication directly or indirectly took place by the accused.
- After analysis, it is observed that the actual obscene recording/clip could not be viewed on the portal of Baaze.com.
- The sale consideration was not chained through the accused.
- Prima facie of the website (Baaze.com) had endeavored to plug the loophole.
- The accused had actively participated in the investigation proceedings.
- The nature of the alleged offense is such that the evidence has already crystallized and may even be tamper-proof.
- The evidence that has been collected shows that only the obscene material may have been unwittingly offered for sale on the website.
- It also indicates that the heinous nature of the alleged crime may be attributable to some other person.

## **CONCLUSION**

The Delhi High Court observed that a prima facie case for the offense under Section 292 (2) (a) and 292 (2) (d) IPC is made out against the website both in respect of the listing and the video clip respectively. The court was of opinion that “by not having appropriate filters that could have detected the words in the listing or the pornographic content of what was being offered for sale, the website ran a risk of having imputed to it the knowledge that such an object was, in fact, obscene”, and thus the Court held that as per the strict liability imposed by Section 292 of IPC, knowledge of the listing can be imputed to the company.

However, as far as Avnish Bajaj is concerned, the court held that since the IPC does not recognize the concept of an automatic criminal liability attaching to the director where the company is an accused, the petitioner can be discharged under Sections 292 and 294 of Indian Penal Code, but not the other accused. But the conditions of bail are to be furnished with two sureties of Rs. 1 lakh each. And also, the court ordered Mr. Bajaj to surrender his passport and not to leave India without the permission of the Court.

As regards, S. 67, read with Section 85 of the Information Technology Act, the Court, observed that a prima facie case was made out against the petitioner Avnish Bajaj since the law recognizes the deemed criminal liability of the directors even where the company is not arraigned as an accused. However, Avnish Bajaj was not declared guilty.



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