

Technology Law Analysis

November 25, 2019

COURT ORDERS GLOBAL TAKE DOWN OF CONTENT UPLOADED FROM INDIA

- The Delhi High Court has directed prominent social media companies to take down defamatory content uploaded from India, on a global basis.
- The order interpreted the intermediary safe harbor granted by Section 79 of the Information Technology Act, 2000¹ ("IT Act") in a manner that would require intermediaries to block all unlawful content uploaded from India, on a global basis, upon receiving a valid take down order.
- Affected intermediaries include global majors such as Google, Facebook and Twitter.

BACKGROUND

On October 23, 2019, the Delhi High Court ("Court") issued a global take down order ("Order")², in the matter of Baba Ramdev and Anr. ("Plaintiffs") v. Facebook Inc. and Ors. ("Defendants"). The Order was issued in a suit filed by Baba Ramdev (a famous religious and business personality in India) against various social media intermediaries (including Facebook, Google and Twitter) as their platforms were being used to circulate defamatory content about him.

The Plaintiffs had obtained a separate judgement in the Delhi High Court³ ("Defamation Judgement"), wherein a book on the Plaintiffs was held to be defamatory. While this order banned the sale of the book, content based on the book continued to circulate online on social media websites on a global basis. The Plaintiffs therefore sought for the takedown of content on a global basis. The main apprehensions of the Plaintiffs were that citizens and individuals cannot be expected to enforce their rights in every jurisdiction and that Virtual Private Networks (VPN) allowed users to access the defamatory content through global platforms, even though it was geo-blocked in India.

While several technical aspects were argued in this matter, this hotline focuses on the global take down aspect.

ARGUMENTS BY THE PLAINTIFFS

Some arguments advanced by the Plaintiffs were:

- The Intermediary cannot argue on behalf of the person who has uploaded the content. The principle of an 'intermediary' under the IT Act and the Information Technology (Intermediaries Guidelines) Rules, 2011 ("Intermediary Rules") is that the intermediary cannot be a judge of the content and decide what is defamatory.
- Plaintiffs cannot be forced to avail legal remedy in every jurisdiction. That will be a very high order and would make the remedy granted by the court ineffective.
- The IT Act does not in any way state that the take down of content under Section 79 of IT Act has to be restricted to only within the territory of India.
- The intermediaries have the demonstrated ability to block content globally.
- Plaintiffs argued that a right to reputation has to be balanced against freedom of speech and expression.⁴ This was argued to counter the arguments of the Defendants that a global blocking order would be detrimental to the freedom of speech and expression.

ARGUMENTS BY THE DEFENDANTS

The Defendants did not dispute that they have an obligation to geo-block content declared defamatory in Indian courts. However, arguments were raised by the Defendants as to why global blocking is not justified. While certain arguments were common, Defendants lead arguments on an individual basis as well.

Common arguments by Facebook, Google and Twitter.

- The persons who have actually uploaded the defamatory content have not been impleaded as a party to the suit.
- The imposition of global blocking order would be a regressive step as the Indian court would be exercising jurisdiction over content that is available on global basis via the medium of internet.
- The imposition of a global blocking order would affect the principle of comity of courts because the definition of defamation varies from territory to territory. An order to block the content uploaded from India, on a global basis, would be against the comity principle.

Facebook's arguments

- The Plaintiffs are public figures and should be open to criticism.
- The book deemed defamatory in India continues to be available around the world, which itself shows that any injunctions passed should be restricted to India only.
- While the Constitution of India⁵ grants the Court the power to enforce the law on an extra-territorial basis, this

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power should be used as a last resort.

- A global blocking order should be passed only if the danger or harm that is done to the Plaintiff is proportionate enough.
- Defendants cannot run afoul of foreign law. Global injunction may not be in consonance with law in other jurisdictions.

Google's Arguments

Google's arguments related primarily to Indian Civil and Criminal Procedure Codes. We have set out the key points below:

- Google sought to distinguish between the videos and the book which was deemed defamatory in the Defamation Judgement by arguing that the video is not offensive to the Plaintiff and should not be taken down.
- The specific portion of the uploaded content which are offensive have not been identified by the Plaintiff.
- The IT Act sets out specific criminal provisions for a variety of crimes committed outside India, such as circulation of child pornography, unauthorized disclosure of personal data etc. However, there is no specific reference to defamation in the IT Act.
- Grant of a global injunction at the interim stage of hearing a suit is akin to decreeing a suit. Since Plaintiff's reputation is localized in India, it should be sufficient to block the content in India.

Twitter's Arguments

- India has processes under its' civil procedure code to implement judgements of foreign courts through treaties. Similarly, processes exist in foreign jurisdictions to implement orders of Indian courts. A global blocking order would have the effect of circumventing these processes.
- In response to the Plaintiff's apprehensions that VPNs can be used to access the defamatory content, Twitter argued that the mere apprehension of use of VPNs and proxy servers to access global websites is not sufficient to seek global injunction.
- Global standard of protecting free speech may be low in some jurisdictions. Indian courts, which have a higher standard, should not impose such standards internationally. Injunctions against the dissemination of content online have to be in the narrowest terms as per the judgement of the Supreme Court of India in *Shreya Singhal v. Union of India*.⁶

RULING OF THE COURT

At crux of the issue was the question of whether the global removal of content was permitted under the IT Act or if geo-blocking of the defamatory content in India was sufficient. Geo-blocking was described in the Order to mean the selective blocking of content in a particular jurisdiction using tools such as IP Address locations and GPS Location to identify the location of the user.⁷

Various judgements from foreign courts were considered, such as: (i) *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*⁸ of the European Court of Justice, (ii) *Equustek Solutions Inc. vs. Jack* of the Supreme Court of British Columbia, Canada⁹ and (iii) *X v. Twitter Inc.*¹⁰ of the Supreme Court of New South Wales, Australia. All of these judgements contemplated the global blocking of content from online intermediaries as an appropriate remedy.

The Court held that:

- The content which was defamatory against the Plaintiffs and uploaded from IP Addresses within India had to be taken down, blocked/restricted, disabled for access' on a global basis.¹¹
- In case of content uploaded from outside India, the court declined to exercise its jurisdiction and stated that in such a case the Defendants were directed to block access and disable URLs/links from being viewed in the Indian domain and ensure that users in India are unable to access the same.¹²

In reaching this conclusion, the Court took into account following aspects:

- 1. Process of dissemination of Content:** The Court wanted to understand the process of dissemination of content online, since the intermediaries maintained a global network of interconnected computers and content uploaded from India was instantly available across the global network. However, the Court highlighted that none of the Defendants could shed sufficient light on the process of geo-blocking from a technical perspective.¹³
- 2. Availability of content in India:** The content, in spite of geo-blocking, was still available in India. The Court refers to technologies such as VPN and other mechanisms which could allow Indians to access international websites and hence, access the defamatory content. Hence, the Court apprehended that an order for geo-blocking the content only in India would not be 'effective' and that the disablement has to be 'complete'.
- 3. Jurisdiction to issue global take down:** The Court examined Section 79 of the IT Act and the definitions used therein. The Court concluded that it can exercise jurisdiction over the information uploaded from India and issue a global take down order since the act of uploading the data or information from a computer resource in India results in the data being disseminated on a global basis. The Court further relied on Section 75 of the IT Act (which grants extra-territorial jurisdiction) to state that it has jurisdiction over content which is uploaded from India and that the removal or disablement of access to the content related to a computer resource which was a global network of interconnected computers. The Court also stated that "*any other interpretation of Section 79 would result in reducing the efficacy of the provision which equates the computer resource which initially created the information and the resource from where it is to be disabled or removed*".¹⁴

- 4. Definition of Computer Resource:** 'Computer resource' under the IT Act is defined as "computer, computer system, computer network¹⁵, data, computer data base or software". Relying on these definitions, the Court held that the obligation of the Defendants would be to take down any "information, data or communication link residing in or connected to a computer resource", which could also include a global system of interconnected computers.

- 5. Intermediaries take down content on global basis:** Intermediaries already take down content on The Court also

noted that intermediaries already block content for the violation of their own content policies and that such blocks are done on a global basis. Hence, the Court held that:

*"There is no reason as to why court orders ought not to be global. All offending material which has therefore, been uploaded from within India on to the Defendants' computer resource or computer network would have to be disabled and blocked on a global basis. Since the unlawful act in case of content uploaded from India is committed from within India, a global injunction shall operate in respect of such content"*¹⁶ (emphasis supplied)

ANALYSIS

These issues are not exactly new for the Delhi High Court and similar issues have also been discussed in the case *YouTube v. Geeta Shroff*¹⁷ in the past, which was referred to in this Order as well

On an overall analysis of the views given in the judgement, there are several issues which arise, which we have set out below:

1. Section 75 of the IT Act should apply only in relation to offences under the IT Act. Defamation is not an offence under the IT Act. Therefore, the reference to Section 75 of the IT Act as a means to justify jurisdiction over locally uploaded content may not be appropriate since the publication of defamatory content is not an offence under the IT Act.

2. Section 79 of the IT Act is intended to cover the removal **or** disablement of access to material that may be illegal. The bare text of the provision does not specifically refer to whether the removal or disablement of access should be global or restricted to India. In such a circumstance, the interpretation that respects the comity of nations ought to have been chosen. A more pragmatic interpretation that could have been taken is that the content is 'disabled' for access from India, rather than removed from their global platforms, especially when 'disablement' is an option pursuant to Section 79 of the IT Act.

Only because the content is on the internet, the rationale for operation of Indian court order should not be altered. If similar situation were to happen in real world, could Indian court have exercised jurisdiction? For instance, if defamatory books are shipped from India to distributor outside India, could the Indian court ask foreign distributors not to distribute books outside India on the ground that books were exported from India? The answer to these questions should be similar in a digital and non-digital world.

3. This order could create a conflict of law situation.

To illustrate, an Indian company ABC Limited has a trademark 'Alphabet' in India. The same trademark, for the same class of goods is owned by an unrelated entity, XYZ Inc. in the US.

XYZ Inc., a U.S. Company, appoints an Indian entity to maintain its website.

Later, a trademark dispute arises between XYZ Inc. and ABC Limited when XYZ Inc. tries to launch its products in India.

In such a circumstance, can an Indian court ask for the global blocking of a foreign website just because the website was maintained and content on it was uploaded by the Indian outsourcing company? The Indian entity was merely a service provider to a US company in this case, and its presence in the equation should not affect the judicial decision of the courts.

4. The Court has emphasized¹⁸ that where information has been uploaded from India, then Indian courts can exercise jurisdiction over such content. In light of the example in the preceding Paragraph, such global blocking orders merely on because the content was uploaded from India could cause great harm to India's role as an outsourcing destination. On a related note, the implications of aspects such as the jurisdictions where server is based, data is stored or maintained etc., were also not considered by the Court, which relied merely on the fact that the content was uploaded in India.

5. If the Court's primary concern was to ensure that the defamatory content is not accessible in India, then the Court could have also contemplated requiring the intermediaries to build in the adequate technical safeguards to ensure that the illegal content is not accessible in India. Such technologies are already available and there are sufficient reports to show that Netflix has been able to successfully block VPNs from circumventing territory wise licensing restrictions for content on its platform.

6. The Court has also not gone into the practical effects of enforceability of such an Order. For instance, while the Court may be able to successfully enforce the Order against the Defendants in this case (since they have an entity in India), it may be difficult to enforce such orders against websites which have no presence in India.

It is possible that if the Court had received more information on the geo-blocking process from the Defendants, then possible outcome of this case could have been different.

Overall, there is no clear trend that has emerged from the foreign cases that have been cited to support the cause of global blocking. In grave cases such as national security, courts may grant such orders. This is because any information detrimental to national security is of grave importance to the nation and it is understandable that such information cannot be allowed to be disseminated in any jurisdiction. However, standard of defamation varies across the world, and therefore global injunctions may not be in such cases.

CURRENT DEVELOPMENTS

The Delhi High Court admitted Facebook's appeal against the Order¹⁹. It will now be interesting to see whether the appeals bench will agree with the same view or if it will be able to justify taking a different view. In this regard, a detailed explanation of the geo-blocking process and necessary technical testimony in Court may be able to enlighten the judges and enable to take a more balanced approach.

¹ Section 79 of the IT Act reads as under:

“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, and
(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 purposes of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary.”

² CS (OS) 27/2019

³ Swami Ramdev v. Juggernaut Books and Ors. CM (M)

⁴ Article 19 of the Constitution of India grants citizens of India the freedom of speech and expression subject to certain reasonable restrictions. Article 21 states that no person shall be deprived of their life and liberty except according to procedure established by law.

⁵ Article 245 of Constitution of India lays down that a law laid down by Parliament shall not be deemed to be invalid simply because it's application is extra-territorial in nature. Note: The Order refers to Articles 244 and 246. However, this reference appears to be incorrect and the correct reference is Article 245.

⁶ Writ Petition (Criminal) 167 of 2012, Supreme Court of India.

⁷ Para 50 of the Order

⁸ Case C-18/18 of the ECJ

⁹ 2018 BCSC 610

¹⁰ 2017 NSW 1300

¹¹ Paragraph 96 (i) of the Order

¹² Paragraph 96 (iii) of the Order

¹³ Para 46 of the Order

¹⁴ Para 78 of the Order

¹⁵ 'Computer Network' is further defined under Section 2 (j) of the IT Act to mean:

“the inter-connection of one or more computers or computer systems or communication device through–

(i) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and

(ii) terminals or a complex consisting of two or more interconnected computers or communication device whether or not the inter-connection is continuously maintained;”

¹⁶ Para 94 of the Order

¹⁷ FAO 93/2018

¹⁸ Para 81 and 82 of the Order

¹⁹ FAO (OS) 212 of 2019 in the Delhi High Court.

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