

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Order delivered on: August 26, 2013*

+ **C.R.P. No.78/2012 & C.M. No.7471/2013**

FACEBOOK INDIA ONLINE SERVICES PVT LTD Petitioner
Through Mr.Prag Tripathi, Sr. Adv. with
Mr.Tejas Karia, Ms.Suman Kutreji,
Ms. Bahaar Dhawan & Mr.Nitish
Goel, Advs.

versus

MUFTY AIJAS ARSHAD QASMI Respondent
Through Mr.Shailendra Singh, Adv. for R-1.
Mr.Akhil Anand, Adv. with
Mr.Praveen Sehraat, Adv. for R-3 to
6.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. By way of the present petition under Section 115 of CPC, the petitioner has assailed the order dated 30th May, 2012 whereby an application under Order 1 Rule 10 CPC for deletion of its name from the array of parties in a suit filed by the respondent No.1 was dismissed.
2. Respondent No.1 filed a suit against the petitioner and other parties who are the defendants in the main suit therein for permanent and mandatory injunction seeking that the Defendants may be directed to remove and permanently be restrained from posting alleged objectionable content/materials that are purportedly damaging the Indian Culture and are

hurting the sentiments of the religious communities. The respondent No.1 alleged to have filed the said suit being a responsible person of the society in the public interest.

3. An ex-parte order directing the defendants to remove the alleged objectionable contents as claimed by the respondent No.1 to be available on various social networking sites was passed when the matter came up for hearing along with another direction to the defendants to file a compliance affidavit.

4. While the petitioner at the time of entering appearance in the suit filed a compliance affidavit in terms of the said order, it also filed an application for deletion of its name from the array of parties wherein it was stated that the Petitioner was not responsible for hosting the content that may appear on www.facebook.com or any website and that it does not control the servers and host the website www.facebook.com which are located in the US. On the same day, the learned trial court observed that the Petitioner i.e. defendant No.1 therein and defendant No.2 were improperly referred to as one and the same party i.e. Facebook in the cause title of the suit, and accordingly, the Respondent No.1 was directed to rectify the memo of parties.

5. In its written statement, the petitioner contended that the petitioner has been incorporated to carry on business in India and abroad of, *inter alia*, online support services, software development, providing technical support and services and that the petitioner does not own or operate any server that hosts the alleged content. It was also contended that no cause of action had been disclosed against the petitioner at all and as to the averments made in

the plaint, no connection had been established between the petitioner and the alleged content.

6. On subsequent dates, Microsoft India Pvt. Ltd. (Defendant no. 7 therein) and Yahoo India Pvt. Ltd (Defendant no. 5 therein) respectively filed applications for deletion of their names from the array of parties and the same were allowed. It is contended by the petitioner that the application by Yahoo India was on similar grounds as that of the petitioner's however the same relief to petitioner was denied without there being any evidence of petitioner's position being different to that of Yahoo India.

7. Subsequently, the Respondent No.1 filed an application for deletion of Defendants no. 4,6,8,10 and 12 in the suit due to duplication of names of the aforesaid defendants being US entities of Google, Yahoo, Microsoft, Youtube and Exbii, respectively. The learned trial court did not take this application on record and returned it to the Respondent No.1 to consider deleting the Indian entities of the parties that had been duplicated. Accordingly the Respondent No.1 gave a no-objection for deletion of Defendants no. 3 , 9, 11, 13, 15 and 17 being Google India (P) Ltd., Orkut India, Youtube India, Blogspot India, Zombie Time and Boardreader, respectively on the basis that these did not run the website allegedly hosting objectionable content. Further the Respondent No.1 filed an application for deletion of Defendants no.8, 16, 18-22 being Microsoft, Exbii, Broadreader, IMC India, My Lot, Shyni Blog and Topix, respectively from the array of parties which was also allowed by the learned trial court.

8. Facebook Inc. (Defendant no.2 therein) in its written statement admitted that it controls and/or operated the social networking website www.facebook.com.

9. When the petitioner's application for deletion of its name from the array of parties was heard by the learned trial court, it was contended by the petitioner that it is neither a necessary nor a proper party for adjudication of the case. It was contended that Petitioner had been impleaded incorrectly as there is no legal entity by the name of Facebook, in fact its name has not been correctly mentioned in the cause title of the plaint and the correct name of the Petitioner is Facebook India Online Services Private Limited and not Facebook. It was contended that the petitioner had been incorporated to carry out business in India and abroad, *inter alia*, online support services, software development, providing technical support and services it was stated that the plaint contained allegations with respect to content allegedly available on the website www.facebook.com and that the petitioner does not control or operate the servers that host the website available at facebook.com which are located in the US. It was stated that facebook.com is not being operated by the petitioner and hence it had been incorrectly joined as a defendant in the suit and its name ought to be deleted from the array of the parties. The Respondent No.1 however contended that Facebook India not only provides technical support for running the website but it is also a revenue collector for facebook.com and thus, is crucial for running of the website, thus, a necessary party.

10. The learned trial court after considering the submissions made on behalf of the parties, dismissed the application of the petitioner for deletion of its name from the array of parties vide order dated 5th May, 2012, the relevant portion of which is as follows:

“The first contention of learned counsel for the defendant no.1 is that the defendant no.1 should be deleted from the array of

parties as the plaintiff himself has deleted the defendant no. 3 and 9 and other such defendants. I find this contention to be untenable because the said deletion was not done on merits of the case but was done because the plaintiff had conceded to the same. However, in the present case, the plaintiff is not conceding the present application.

The second contention of the learned counsel for the defendant no.1 is that the defendant no.1 is merely a software developing company and has nothing to do with the running of the website. However, during the course of arguments, the court had put a query to the learned counsel for the defendant no.1 to explain the relationship of the defendant no.1 with Facebook Inc (USA), which runs the website facebook.com. The counsel had failed to put forward any answer detailing the relationship of these two entities. Furthermore, the Memorandum of Association of the defendant no.1 shows the object of the company to be to carry on business in India and abroad of on line support service and on line solution and to promote and market the product and technology, provide technical support and services, providing software development, designing etc. A specific query was put by the Court to the learned Counsel for the defendant no.1 that does this include providing the technical support, programming and on line support services for facebook.com? The counsel for the defendant no.1 initially stated that it does not include the same. When the Court specifically asked that can the same be shown to the court in any manner, the counsel could not prima facie convince the court that no such relationship existed between Facebook India and Facebook Inc. Therefore, at this stage, it cannot be said that Facebook India has no say in running of website and there might be a probability that Facebook India provides technical support and programming and developing of the website and also tests the new software for the same and this, can have some say in how this website runs in India. It also might

be possible that the defendant no.1 is raising revenue for the facebook.com by seeking advertisers from India for facebook.com. Thus I find that on the grounds as alleged in the application and argued by the learned counsel for the defendant no.1, defendant no.1 cannot be deleted at this stage. The application is accordingly dismissed.”

11. Petitioner being aggrieved by the impugned order filed the present petition contending that :

- (i) Respondent No.1 has failed to raise any allegations against the petitioner or showing any nexus whatsoever with the alleged objectionable content in the suit.
- (ii) The impugned order overlooks the written statement filed by Facebook Inc. wherein it (and not Petitioner) is admitted to have control over the content available on www.facebook.com.
- (iii) Learned Trial Court has erred in shifting the burden onto Petitioner to prove that it does not have any control over the content available on www.facebook.com , instead of requiring Respondent No.1 to bring out a case against Petitioner and establish that Petitioner hosts and controls the content available on www.facebook.com . It is in fact contended that respondent no.1 has failed to meet his burden of proof.
- (iv) Learned Trial Court completely ignored that the cause of action in the suit refers to websites and allegedly objectionable content hosted on those websites, including www.facebook.com. Therefore, the proper defendant ought to be the owner of website or the person in control of the website. The plaint nowhere states that Petitioner is the owner or person in control of www.facebook.com. Ld. Trial Court proceeded on the erroneous premise

that since Petitioner has a relationship with Facebook Inc, it could be a defendant to the Suit, without there being any nexus with the cause of action alleged in the Suit.

(v) Learned Trial Court decided the application of Petitioner in assumptions and imaginations without taking into account that Petitioner has no direct interest in the present suit.

(vi) Respondent No.1 filed the suit in order to rope the Petitioner along with other defendants into a controversy where there is no cause of action, with the sole motive to cause harm and gain publicity.

(vii) Respondent No.1's dilatory conduct and failure to participate in the proceedings before the trial court and this Court, requires dismissal of this entire suit.

(viii) Respondent no. 1 has no locus to file the suit, which requires dismissal if the entire suit.

(ix) The impugned order ought to be set aside because it is inconsistent with the trial court's other orders in which similarly situated entities were deleted from the array of parties.

12. It is the admitted position that the plaintiff/respondent No. 1 or his counsel failed to appear at hearings on several occasions even on 4th December, 2012 and 23rd February, 2013 when the matter was fixed for evidence/cross-examination. The learned Trial Court gave respondent No. 1 the last and final opportunity to appear and participate in the Suit, at his cross-examination before the learned Trial Court on 23rd February, 2013, at trial. In spite of this opportunity, respondent No. 1 failed to appear to give his own testimony. The learned Trial Court closed Respondent No. 1's right to lead evidence vide order dated 23rd February, 2013. Accordingly,

respondent No. 1 has failed to prove his case before the learned Trial Court. However, inspite of passing of order under Order 17 Rule 3 CPC and to proceed further with the matter in order to decide the suit even in the absence of evidence. Not only that in the present case, the respondent No.1 has not shown any interest to contest the present petition when the matter was listed from time to time. The details are as under:

- i) On 6th July, 2012, this Court issued a Notice to Respondent and scheduled a hearing for 30th July, 2012. Despite being served with notice of the hearing, respondent No. 1 failed to appear on 30th July, 2012.
- ii) Then, at subsequent hearings before this Court on 29th November, 2012, and 31st January, 2013, respondent No. 1 again failed to appear.
- iii) On 8th April, 2013, when Respondent No. 1 again failed to appear, this Court issued a default notice against Respondent's counsel. In such default notice, this Court ordered respondent No. 1's counsel to appear at the next hearing, scheduled for 12th July, 2013.
- iv) Despite this Court vide order dated 8th April, 2013 issuing a default notice against respondent No. 1's counsel, respondent No. 1's counsel still failed to appear at the hearing scheduled on 12th July, 2013. It is only after this Court vide order dated 12th July, 2013 directed that service of notice be effected through the police (SHO-Station House Officer) located where respondent No. 1 resides, that respondent No. 1 appeared for the first time before the Court on 29th July, 2013 and failed to give any explanation to the issue raised by the petitioner in the present case. Respondent No.1 has failed to give

any explanation before this Court as to why he did not produce any evidence in the main suit except he admitted that his right to produce the evidence has been closed and he may file an application for recalling the said order.

13. It is the admitted fact that the respondent No.1 has filed the Suit against Petitioner and other Respondents, *inter alia*, seeking that Respondents be directed to remove and permanently be restrained from posting alleged objectionable content/materials that are purportedly damaging to Indian culture and are hurting the so-called sentiments of the religious communities. Respondent No. 1 claims that he filed the Suit in the public interest as an affected and responsible person of the society. He is able to establish in evidence as to how he is personally affected. He has filed the Suit in the capacity of a member of the community by claiming that he is not only individually harmed, but also believes that if the alleged content is not removed, it will cause irreparable loss and damage to the Indian culture. But to file a suit in the public interest, a person must comply with the provisions of Section 91 of the CPC. This provision provides that in cases relating to public nuisance or other wrongful acts affecting, or likely to affect, the public, a suit seeking declaration and injunction may only be instituted with leave of the Court by two or more persons. But here, Respondent No. 1 filed the present Suit (1) alone, and (2) without leave of the Court. It is doubtful that respondent No. 1 is entitled to litigate issues of public interest in the present Suit.

14. It is settled law that a *necessary* party is one without whom an order cannot be made effectively. A *proper* party is the one in whose absence an effective order can be made, but whose presence is necessary for the Court

to render a complete and final decision in the proceeding. There are two tests to determine whether a person or entity is a necessary and proper party:

- (1) there must be a right to some relief against such party in respect of the proceedings, and
- (2) it should be impossible to pass an effective decree in the absence of such party.

15. In assessing whether a party is necessary or proper, Order 1 Rule 10 (2) of the CPC empowers the Court to strike out or add parties at any stage. This may be done either upon the application of either party or on the court's own accord. In the name of justice, the Court may strike off any party improperly joined, whether as plaintiff or defendant. The following decisions are referred to :

- a. ***Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and Others***, (2010) 7 SCC 417 (Paras 13, 14 and 15).
- b. ***Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar***, AIR 1963 SC 786 (Para 7).
- c. ***Rath v. David Ball & Ors.***, 138 (2007) DLT 284, (Paras 20,21 and 23).
- d. ***Deputy Commr. v. Rama Krishna Narain***, AIR 1953 SC 521, (Para 13).

16. In these cases, it is held that where there is merely a generic allegation without any specific relief being sought against any defendant, no decree can be passed against them. Therefore, when no claim against a defendant has been made out, it cannot be said that it has been properly

joined as defendant. In the present case there is no averment in the Suit against the Petitioner to make Petitioner either necessary or a proper party to the Suit.

17. In view of the abovementioned reasons, this court is of the considered view that the impugned order is not sustainable and liable to be set aside on the following reasons :

- i) The petitioner has specially alleged that it does not control or operate the servers that host the website www.facebook.com who has also filed its affidavit of compliance in terms of orders.
- ii) The petitioner's written statement dated 21 February, 2012 remained uncontroverted as no Replication to the same has been filed and even in evidence on the following averments made in the written statement, the details of the same are:
 - "It is stated that petitioner is not responsible for hosting the content that may appear on any website. Petitioner also does not own or operate any server that host content as alleged or otherwise."
 - "It is stated that petitioner does not control or operate the servers that host the website Facebook.com, which are located in the United States."
 - "Since petitioner is not responsible for hosting the content that may appear on Facebook.com or any website and does not own or operate servers that host content on Facebook.com, there is no question of hosting any contents as alleged or otherwise."

18. Section 101 of the Indian Evidence Act, 1872 defines 'burden of proof' and clearly provides that the party initiating the law suit based on

facts asserted has the burden to prove that those facts exist. Thus, the Evidence Act has clearly stated that the burden to prove a fact always lies upon the party who asserts it. Until such burden is met, the other party is not required to prove his case. The court must determine whether the burden has been satisfied. The court must determine the burden has been met before proceeding. The other party's perceived weakness cannot be a basis to continue the Suit.

19. The learned Trial Court has completely ignored a settled position of law, which provides that the Court cannot decide a question that is not part of the pleadings that the parties do not disagree about, or which is not the subject matter of any issue. In the case of ***Union of India Vs. E.I.D. Parry (India) Ltd.*** (2000) 2 SCC 223 at Para 4, it was held as under :

“This view is contrary to the settled law that a question, which did not form part, of the pleadings or in respect of which the parties were not at variance and which was not the subject matter of any issue, could not be decided by the Court. The scope of the suit was limited. The pleadings comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the Rule struck down by the High Court. The High Court, therefore, travelled beyond the pleadings in declaring the Rule to be ultra vires. The judgment of the High Court, therefore, on this question cannot be sustained.”

20. It is also a matter of fact that respondent No. 1, himself, filed an application for deletion of defendant Nos. 4, 6, 8, 10, and 12 due to duplication of their names in the Suit. These entities were the US entities of Google, Yahoo, Microsoft, Youtube, and Exbii, respectively. Respondent No. 1 did not object to the deletion of defendant Nos. 3, 9, 11, 13, 15, and 17 (Google India (P) Ltd., Orkut India, Youtube India, Blogspot India,

Zombie Time, and Boardreader) on the basis that these entities did not run the websites allegedly hosting objectionable content.

21. It is also pertinent to mention that the respondent No.1 filed an application for deletion of defendant Nos. 8, 16, and 18-22 (Microsoft, Exbii, Boardreader, IMC India, My Lot, Shyni Blog, Shyni Blog, and Topix respectively) from the array of parties. The learned Trial Court vide order dated 12th April, 2012 deleted the aforesaid Defendants in the Suit.

22. Petitioner is the only Indian entity remaining as a Defendant despite that it does not operate or control www.facebook.com as per the case of petitioner. There is no contradiction to the said statement of the petitioner. Therefore, in view of discussions mentioned above, the present Revision Petition be allowed. The impugned order is set aside. The prayer made by the petitioner in its application for deletion of its name is allowed. However, the statement made in the compliance affidavit filed by the petitioner in suit proceedings shall continue during the pendency of the suit.

23. The present petition is accordingly disposed of with no order as to costs.

(MANMOHAN SINGH)
JUDGE

AUGUST 26, 2013