

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

RESERVED ON : 19th MARCH, 2015

DECIDED ON : 31st AUGUST, 2015

+ CRL.REV.P. 127/2015 & CRL.M.A.No.3194/2015

SHARAT BABU DIGUMARTI

..... Petitioner

Through : Mr.Siddharth Luthra, Sr.Advocate
with Ms.Ruby Singh Ahuja,
Mr.Vijay Sondhi, Mr.Rajat Bali,
Mr.Saleem Hasan, Mr.Shri Singh,
Mr.Rohit Sharma, Ms.Aakanksha
Singh, Mr.Karan Dev Chopra &
Mr.Abhinav Sekhri, Advocates.

VERSUS

STATE, GOVT. OF NCT OF DELHI

..... Respondent

Through : Ms.Kusum Dhalla, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The instant revision petition has been preferred by the petitioner – Sharat Babu Digumarti to challenge the legality and propriety of an order dated 22.12.2014 of learned Chief Metropolitan Magistrate (South), by which charge under Section 292 IPC was ordered to be framed against him. Revision petition is contested by the State.

2. Sequence of events relevant to the present case has been discussed elaborately in case ‘Avnish Bajaj vs. State’, 2008 (105) DRJ 721, decided on 29.05.2008 by this Court. The facts are not in dispute. In the evening of 27.11.2004 (Saturday), co-accused Ravi Raj placed on baazee.com website a listing offering an MMS video clip for sale at ₹125 per piece adopting the seller’s name as Alice Electronics at 12-A/39, Roshpa Tower, Main Road, Malanche, Kharagpur. Ravi Raj included the clip under the category ‘Books and Magazines’ and sub-category ‘e-books’ to avoid its detection by the filters installed by baazee.com. The electronic website baazee.com when visited had the following item description on its site. “Item 27877408 – DPS Girls having fun!!! Full video + Baazee points.” The price was ₹125. Under the column “seller’s details” the name indicated was : “alice elec” and Location : “Kharagpur”. The seller was shown as a member since 21.07.2004. Upon clicking on the item description, the listing read as under :

*“DPS Girls having fun!!!
Do you want to see that video clip which has rocked
the whole DELHI and now has become a hot point
of discussion in the entire Nation?
YES, Then what are you waiting for!!!
Just order for this product and it will be delivered to
you within few hours.*

This video is of a girl of DPS RK PURAM which has been filmed by his boyfriend in very sexual explicit conditions.

Please note : This video clip of around 2.30 Minutes and will be send to you as an email attachment.”

3. The buyer interested in getting a copy had to click on the ‘buy now’ option; make a payment through credit card or ‘paisa pay’ option. The buyer had to pay ₹128 per clip which included a commission of ₹3 that went to Baazee.com India Pvt. Ltd. (‘BIPL’). This was deducted from the amount received from the buyer and the balance of ₹125 per clip was remitted to the seller by the HDFC bank. The seller, on receiving confirmation that payment had been made, would send the video clip by an email attachment by a zip-file with the description ‘dps_rkpuram-sex-scandle.zip’. Between around 8.00 pm or so of 27.11.2004 when the listing went on line till around 10 am on 29.11.2004 when the listing was de-activated, eight transactions of sale of the said video clip took place to buyers located in various parts of the country. At around 8.20 pm on 27.11.2004 information was received on email from one Amit Vohra using emailed threadsincp@sify.com for Community Watch. It was informed that the user of Item ID : 27877408 was trying to sell a video which was illegal in India as it was shot on two people below the legal age

of 18 & pornography was illegal in India. The site was advised to sort the issue and report it to the legal authorities to avoid trouble. He received a confirmatory reply at 8.30 p.m. This email was assigned to Namrata of BIPL at around 8.25 pm on 27.11.2004 itself. At around 6.25 pm the next day i.e. 28.11.2004, Sunday, it was assigned to Swapna Sawant of the BIPL and the priority was shifted to the 'high alert' category. On 29.11.2004 at 10.10 am baazee.com wrote to Alice Electronics that they had closed the item as it was against the User Agreement. The video clip was removed on 29.11.2004 at around 10.38 a.m.

4. FIR No.645/2004 was registered by Crime Branch of Delhi police on receiving credible information on 09.12.2004. The police sent notices under Section 91 Cr.P.C. to the petitioner, Senior Manager, Trust and Safety, BIPL and Avnish Bajaj (since discharged) and obtained information on the working of the website. On 10.12.2004, in response to it, the petitioner provided details of the seller (alice_elec) and the buyers who had purchased that item and stated that they had already disabled the ability of the seller and the buyers in modifying their contact details. On 11.12.2004, the petitioner furnished details of the payments received from the buyers and confirmed that a sum of ₹ 17,787.87/- was disbursed to the seller 'alice_elec' through the HDFC Payment Services. On 14.12.2004,

the petitioner wrote to the police about his role and responsibility. Statements of the witnesses conversant with the facts were recorded during subsequent investigation. On 17.12.2004, Ravi Raj was arrested at Kharagpur and certain recoveries including the CPU containing hard-disk of the computer from where the email attachments of the offending video clip were effected from him. Avnish Bajaj was arrested on the same day to be released on bail on 21.12.2004. Upon conclusion of the investigation, a charge-sheet was filed showing Ravi Raj, Avnish Bajaj and Sharat Babu Digumarti as accused. On 14.02.2006, learned Metropolitan Magistrate took cognizance for commission of offences under Sections 292 and 294 IPC and Section 67 IT Act against all of them.

5. Avnish Bajaj filed Crl.M.C. 3066/2006 for quashing of the proceedings on various grounds. By a comprehensive order dated 29.05.2008, this Court came to the conclusion that no prima facie case under Section 294 IPC was made out; the petitioner (Avnish Bajaj) was not liable to be proceeded under Section 292 IPC as BIPL subsequently named as EIPL was not an accused in the charge-sheet. Consequently, Avnish Bajaj was discharged of offences under Sections 292 and 294 IPC. He was, however, prima facie, found to have committed offence under Section 67 read with Section 87 IT Act and the Trial Court was directed to

proceed to the next stage of passing of the order on charge uninfluenced by the observation in the order.

6. In Crl.A.1483/2009 filed by Avnish Bajaj, by an order dated 27.04.2012, Hon'ble Supreme Court quashed the proceedings initiated against him.

7. The petitioner, thereafter, moved the Trial Court for discharge on the ground of parity and to drop the proceedings qua him in view of the judgment of this Court and that of Hon'ble Supreme Court. Consequently by an order dated 19.05.2014, the petitioner was discharged of offences only under Section 67 read with Section 85 of IT Act and Section 294 IPC. It appears that the petitioner did not challenge the said order. Subsequent to that, after hearing arguments on charge, the impugned order was passed.

8. Learned Senior Counsel would urge that the Trial Court committed grave error in relying upon 'observations' in the case '*Avnish Bajaj vs. State*' (supra) despite specific caution to proceed to the next stage of passing an order on charge uninfluenced by it. The Trial Court ignored the judgment dated 27.04.2012 of Hon'ble Supreme Court whereby the judgment delivered by this Court in '*Avnish Bajaj's* case (supra) was overruled; it ceased to have any legal effect due to the

doctrine of merger. Moreover, the petitioner was not a party to it. It was further contended that ingredients of Section 292 IPC are not made out against the petitioner as he is being prosecuted solely because of his status as Manager, Trust and Safety of the company. Indian Penal Code does not provide any provision for deeming criminal liability upon the person merely upon his holding a designation. The protection granted to Avnish Bajaj was available to the present petitioner in similar circumstances. The petitioner was never in possession of the alleged obscene video clip or obscene listing. He did not perform any act that had allowed Ravi Raj to advertise or make known by any means as to the sale of the video clip. Mere negligence/omission in removing the obscene listing immediately after getting an alert from Community Watch was not sufficient to attract criminal prosecution. Moreover, as per statutory regulations introduced in 2011, Rule 3(4) of the Information Technology (Intermediaries Guidelines Rules, 2011), action required to be taken by the intermediaries is within 36 hours of the complaint. At the time of the commission of the alleged offence, there were no standard determining what conduct would be considered illegal. Learned Senior Counsel further urged that electronic evidence relied upon by the prosecution was not admissible for want of certificate under Section 65 B of the Evidence Act. Comparison of Section

67 of the Information Technology Act, 2000 read with Section 292 IPC establishes the identical nature of the test employed to determine obscenity. Section 67 of the Information Technology Act permitted only those instances of obscenity which are published, transmitted and caused to be published or transmitted in the electronic form. Since the petitioner was discharged under Section 67 of the Information Technology Act, prosecution under Section 292 IPC was not permissible.

9. Learned Addl. Public Prosecutor urged that at the stage of consideration of charge, no detailed enquiries are required to be conducted. There are specific and definite allegations against the petitioner to prima facie attract commission of offence under Section 292 IPC.

10. I have considered the rival contentions and written submissions coupled with judgments on record filed on behalf of the petitioner. The judgments relied on are *Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke* 2015 (1) SCALE 457; *Aniruddha Bahal vs. CBI* 210 (2014) DLT 292; *Moti Lal vs. CBI* 2002 (4) SCC 713; *P.V. Hemlatha vs. Kattamkandi Puthiya* (2002) 5 SCC 548; *Sunil Bharti vs. CBI* (2015) 1 SCALE 140; *Sanjay Dutt vs. State (II)* (1994) 5 SCC 410; *Jacob Mathew vs. State of Punjab And Anr.* (2005) 6 SCC 1; *Queen vs.*

Anthony Udayan (1883) ILR 6 MAD 280; *Aveek Sarkar vs.State of West Bengal* (2014) 4 SCC 457; *U.J.S.Chopra vs.State* AIR 1955 SC 633; *Anvar P.V. vs.P.K.Basheer* (2014) 10 SCC 473; *State (NCT Sandhu of Delhi) vs.Navjot* (2005) 11 SCC 600; *Dilawar Babu Kurane vs.State of Maharashtra* (2002) 2 SCC 135; *Sajjan Kumar vs.CBI* (2010) 9 SCC 368; *Niranjan Singh Karam Singh Punjabi vs.Jitender Bhimraj Bijaya* (1990) 4 SCC 76; *S.K.Alagh vs.State of U.P. case* (2008) 5 SCC 662; *Jethsur Surangbhai vs.State of Gujarat* (1984) Supp.SCC 207; *Maksud Saiyed vs.State of Gujarat* (2008) 5 SCC 668; *R.Kalyani vs.Janak C.Mehta* (2009) 1 SCC 516; *Keki Hormusji Gharda vs.Mehervan Rustom Irani* (2009) 6 SCC 475; *Basharat vs. Emperor* AIR 1934 Lahore 813; *Ambika Prasad vs.Emperor* AIR 1932 All 506; *P.B.Desai vs.State of Maharashtra* (2013) 15 SCC 481; *O.P.Lamba vs. Tarun Mehta* (1988) Cri LJ 610; *Rajiv Thapar vs.Madan Lal Kapoor* JT 2013 (2) SC 209; *Sanchayani Savings Investment (I) Ltd.&Ors. vs.State of West Bengal & Ors.* in Civil Appeal No.5168/2000; *Krishan Nambissan vs.State of Kerela* (1966) 3 SCR 373; and *Shreya Singhal vs.Union of India; being Writ Petition (Crl.) No.167/2012.*

11. Indisputably, in Avnish Bajaj's case (supra), it was clarified that Trial Court will proceed to the next stage of passing an order on

charge uninfluenced by the ‘observations’ in regard to the offences in respect of which it has been held that a prima facie case has been made out against the petitioner therein i.e. Avnish Bajaj. Nevertheless the Trial Court was not debarred from adhering or adopting the ‘observations’ made therein. It is pertinent to note that Hon’ble Supreme Court in appeal quashed the proceedings against Avnish Bajaj solely on the ground that he being Director could not have been prosecuted for the offence under Section 67 read with Section 85 of IT Act in the absence of company being implicated as an accused in the proceedings. Para 59 reads :

“In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative.....”

12. In para No.64, Supreme Court held :

“Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the Director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, Criminal Appeal No.1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the Company is concerned, it was not arraigned as an accused. Ergo, the proceedings as initiated in the existing

incarnation is not maintainable either against the company or against the Director. As a logical sequitur, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the Company in the present form are quashed.”

13. The petitioner’s case stands on altogether different footing. Admittedly, he was working as Senior Manager, Trust and Safety, BIPL on the day of incident. In his letter dated 14.12.2004, to the police describing his role and responsibility he stated that: *“I am currently working as Senior Manager, Trust and Safety in Baazee.com India Pvt. Ltd. at Mumbai. I am heading the Trust and Safety Cell of Baazee.com which is primarily responsible for safety of the portal, taking action on suspect lists when reported by our users, and block the user or close items listed accordingly.”*

14. In the charge-sheet, there are specific allegations attributed to him. The relevant portion in the charge-sheet reads :

“Further, subsequent to the registration and arrest in this case, the domain and the network contact information for the website Baazee.com had been changed from Baazee.com to ebay.com, the principal company, who now own the domain name Baazee.com, primarily to insulate the other Directors of the Company from criminal responsibilities. The domain servers were also

relocated by the company to xxx. EBAYDNS.COM, USA.

Sharat Digumarti was the Senior Manager, Trust and Safety who was responsible for maintaining the subject and banned key word list and ensuring that no lascivious item is listed for sale on the website. Sharat Digumarti was responsible for ensuring that no banned and illegal items are traded on the website. However, he did not take appropriate measures to ensure that the list of the banned and suspect words are updated keeping in mind the social and moral norms. Although the website runs a 24 x 7 operations, no person had been deputed by him from his unit to review the listings and to respond to alerts generated by the system. This allowed the item to remain listed for 38 hours after an alert was raised by the Community Watch program. The filters that have been claimed by the accused as a measure to block objectionable materials were found to be grossly inadequate during the investigations. Sharat Digumarti has been charge-sheeted on recognizance without arrest.

The investigation conducted till date have gathered enough evidences against accused persons Avnish Bajaj, Ravi Raj and Sharat Digumarti Col.No.4. It has been clearly established that all the said three accused persons knowing fully well and having reasons to believe, have sold / transmitted a pornographic / obscene MMS clip causing lascivious impact on citizens by appealing to their prurient interest for their undue pecuniary gains. Hence the present charge sheet has been prepared u/s 292/294 IPC r/w 67 IT Act. It is therefore respectfully prayed that accused Accused Avnish Bajaj and Ravi Raj col.No.4 on bail and Sharat Digumarti on recognizance, may kindly be called through notices and witness through summons for holding their trial in accordance with law. The list

of witnesses, documents and materials exhibits have also been enclosed. ”

15. The averments made in the charge-sheet describe precise role of the petitioner, as Senior Manager, Trust and Safety, BIPL. Liability sought to be attached to the petitioner is in his individual capacity. The charge-sheet discloses that at various stages, in an automated system, roles were assigned to individual employees of BIPL. There was a separate Manager for Trust and Safety. When the Community Watch group alerted the website, the matter was first marked to an employee Namrata, then to another employee Swapna Sawant. The charge-sheet when read as a whole makes out a prima-facie case against the petitioner in his individual capacity for the offence under Section 292 IPC. The petitioner had a direct active role in the matter.

16. Avnish Bajaj was discharged under Section 292 IPC as Indian Penal Code did not recognise the concept of an automatic criminal liability attaching to a ‘director’ being implicated in his designation as MD of BIPL and not in his individual capacity. This Court specifically observed that “This will, however, not affect the case against the other accused.” Since there are specific allegations against the present petitioner

in his individual capacity which were lacking in the said case, he cannot claim parity with Anvinsh Bajaj.

17. Most of the submissions raised by the learned Senior Counsel have been answered by this Court in Avnish Bajaj's case (supra). This Court finds no valid and sound reasons to take a different view. No useful purpose will be served to reargue the issues.

18. It was specifically contended that the video clip itself was not made available on baazee.com and was transferred directly between the seller and the buyer without the intervention of the website. BIPL was concerned only with the listing placed on the website which by itself was not obscene and did not attract the offences under Sections 292/294 IPC or Section 67 IT Act. After detail discussion in para Nos.6.4, 6.5, 6.6, this Court declined to agree with the submissions that the listing itself was not even prima facie an obscene material or text. In para No.6.8, it was held that in relation to the video clip, the wording of Section 292 (2)(d) IPC was wide enough to include an attempt at making known "by any means whatsoever" that "such obscene object can be procured." The placing of an advertisement on the website informing the viewer that an obscene material or object is available for sale, one click away, was enough to attract the offence under Section 292(2)(d). The advertisement might itself

have been inserted by the seller but the website facilitated the sale by carrying the listing which informed the potential buyer that such a video clip that is pornographic can be procured for a price. Observations in para 6.11 are relevant to note :

“6.11 Turning to the case on hand, the listing here was carried by the website baazee.com. The text of the listing leaves no doubt that the object being offered for sale was obscene. 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.....”

19. By a letter dated 29.11.2004 Amit Vohra was thanked for spotting and reporting it at Community Watch that the Item ID : 27877408 was pornographic in nature.

20. Allegations against the petitioner are specific as he was responsible for ensuring that no banned and illegal items were traded on the website. However, he allegedly did not take appropriate measures in time promptly. Needless to say, duty to exercise reasonable and proper care and precaution of a very high degree to guard against injury to the individuals was greater particularly when the language of the advertisement was quite explicit and the victims in the video clip were

two school-going minor children. Before the video clip could be deactivated on 29.11.2004, the damage had already been done and eight transactions had taken place. 'Today' (afternoon newspaper) of 9/12/2004 carried a news item with the video clip and informed that 'To the society's shock, the videos surfaced in seedy VCD outlets in the city, the den of vice videos.' It is a matter of trial to ascertain if the petitioner took prompt, reasonable, corrective measures / precautions and was vigilant in removing the obscene material in time from the website.

21. Learned Trial Court has dealt with reasons all the relevant aspects / contentions raised before this Court in the impugned order and no interference is called for. The allegations against the petitioner in the charge-sheet cannot be brushed aside. It cannot be accepted that the entire case of the prosecution is based solely on electronic evidence and deserves outright rejection for want of certificate under Section 65 (B) Evidence Act as claimed.

22. In '*Amit Kapoor vs. Ramesh Chander and Another* ', 2012 (9) SCC 460, Hon'ble Supreme Court discussed the ambit and scope of power with the Courts including the High Court under Section 397 and Section 482 of the Code.

“12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law.....

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforesaid. Even framing of charge is a much advanced stage in the proceedings under the Code of Criminal Procedure.....

16. The above-stated principles clearly show that inherent as well as revisional jurisdiction should be exercised cautiously. If the jurisdiction under Section 482 of the Code in relation to quashing of an FIR is circumscribed by the factum and caution afore-noticed, in that event, the revisional jurisdiction, particularly while dealing with framing of a charge, has to be even more limited.

17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under

both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage.....”

23. In ‘P.Vijayan vs. State of Kerala and another’, 2010 (2) SCC

398, Supreme Court held :

“11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

12. The scope of Section 227 of the Code was considered by this Court in the case of State of Bihar v. Ramesh Singh : (1977) 4 SCC 39 wherein this Court observed as follows:

“4....Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial....”

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the Trial Judge in order to frame a charge against the accused."

24. If on the basis of the materials on record, a Court could come to the conclusion that commission of the offence is a probable consequence; a case of framing of charge exists. For the purpose of framing charge under Section 228 Cr.P.C., the Court is to consider judicially whether on consideration of the materials on record, it can be said that the accused has been reasonably connected with the offence alleged to have been committed and that on the basis of the said material there is a reasonable probability or chance of the accused being found guilty of the offence alleged. If the answer is in the affirmative, the Court will be at liberty to presume "that the accused has committed an offence" as mentioned in Section 228 of the Code for the purpose of framing charge.

25. Prima facie there is sufficient material showing petitioner's involvement to proceed against him for the commission of offence punishable under Section 292 IPC.

26. I find no illegality or material irregularity in the impugned order to intervene. The revision petition stands dismissed. Pending application also stands disposed of.

27. Observations in the order shall have no impact on merits of the case.

28. Trial Court record (if any) be sent back forthwith with the copy of the order.

(S.P.GARG)
JUDGE

AUGUST 31, 2015 / *tr*