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

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Judgment delivered on: 17.05.2018

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FAO 93/2018 & C.M.Nos.9352 & 9354/2018

YOUTUBE LLC & ANR.

..... Appellants

Through: Mr. Sajan Poovaya, Senior Advocate with
Mr. Pranav Narain, Ms. Shruttima Ehersa
and Mr. Priyadarshi Banerjee, Advocates.

Versus

GEETA SHROFF

..... Respondent

Through: Mr. Anil Sapra, Senior Advocate with
Mr. Ajay Kohli, Mr. S.S.Sobti, Ms. Pooja
Vohra and Mr. Sarthak Katyal, Advocates.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. Upon a query to the learned Senior Counsel for the appellant, the Court is informed that merely the offensive tagline has been removed but the offensive post itself, which damages the fair name of the respondent, has not been removed from the You Tube channels across the world, as was directed by the impugned order as well as the order dated 04.06.2015.

2. The Court would note that the case has been listed for nine times in the last 64 odd days. On each occasion, the time was sought by the appellant to comply with the directions of the Court. Today, the Court is informed that the directions cannot be complied with on account of technological reasons.

3. Accordingly, the Court deems it appropriate to traverse the facts of the case. The appellants impugn the order dated 18.01.2018 passed by the Ld. Additional District Judge, Saket Courts, New Delhi directing them to comply with the order dated 04.06.2015 which directed as under:

“... From the above discussion, the application under Order XXXIX Rule 1 & 2 CPC is allowed. The defendants are hereby directed to delete/ remove/ hide the said “Post” as well as the highlighted caption/ tagline that is “Indian Money Hungry Dr. Geeta Shroff Must Watch” from “YouTube channels”, immediately....”

4. The impugned order reasoned as under:

“..... I have given careful consideration to the rival contentions and find that plaintiff has arrayed two defendants namely YouTube, Inc, USA and Google Inc, USA. These two entities when arrayed as defendants do not subject itself to the jurisdiction of this court in respect of India operations only but these subjected to trial as a respective legal entities. The position would have been different if the orders were passed against the Indian subsidiaries of these two entities which could have pleaded that Indian subsidiaries have no control over the contents and the operational management of the World Wide entity. In the present case, the plaintiff has mounted proceedings against the above-mentioned entities of USA. The order dated 04.06.2015 has been passed directing these two USA –based entities to remove the contents from its website. It is not open for these two defendants to pick and choose the aforesaid order as to modify in its own wisdom to be operational only for Indian domain. The order against these two entities has been passed at an entry level so as to forbid the display of caption/tagline from their operations carried out by these two entities.

At this juncture, it would be useful to find out how the date gets uploaded on the websites of these World Wide companies. Most of these companies are operating through the Indian subsidiaries or claim to have no control over user date. It is also a fact that in India, there is no law passed which is known as "Data Localization" or the laws mandating that the date pertaining to Indian citizen be stored within the border of their country even for the company operating world wide. In India, there are no regulation which look at the movement of data across the border and the law does not mandate user consent to be taken before collecting information. Thus, without a consent and Data Localizing Law, those worldwide companies plead their inability in the legal suits to remove the data which has already travelled across the border. However, a very vital and important issue of data sharing or data localization is never explained by the companies operating worldwide. At times, this flow of data from local land to World Wide Web has serious dent on the rights of the plaintiff.

In the present suit, none of the defendants have placed on record as to from which location the above-mentioned caption/ tagline "Indian Money hungry Dr. Geeta Shroff, must watch" uploaded into the network of defendants. It is also a fact that these contents whenever loaded on the website/ network of the defendants carry the location/ IP address from where it was uploaded. It is not the case of the defendants that these particular contents has been uploaded from the place outside India. The defendants could have pleaded inability to block the contents from the World Wide Web only if it is shown that it was uploaded outside the jurisdiction/ India. In a case, these contents have been uploaded from India and subsequently these are ordered to be removed by an order dated 04.06.2015, it was incumbent upon the defendant to restore the position as it was prior to the uploading of the contents. In other words, it can be said that contents uploaded from India and even if

transpost/ flown outside the country, cannot be later-on said to be outside the jurisdiction because by following the same path which was used for uploading the contents, it can be blocked/ removed following the same path. It cannot be accepted that there are two paths, one for uploading of the contents which gets blocked and when the contents are to be removed because it has a different path. In both the cases, legal consequences are the same, therefore, the defendants have to comply with the order dated 04.06.2015 in letter and spirit which is clear that the contents of above-mentioned caption/ tagline need to be removed. The application filed by the plaintiff is allowed accordingly and defendants are directed to make compliance of order dated 04.06.2015.

Put up for further proceedings on 27.02.2018....”

5. On 12.03.2018, this Court had recorded as under:

“..... It is the appellants’ case that the impugned order directing proceedings under Order XXXIX Rule 2-A CPC is erroneous insofar as the direction dated 04.06.2015 has been complied with for the territory of India i.e. the “post” mentioned in para 10 of the said order has been disabled from the appellants website, and cannot be accessed by any person having access to the internet from the territory of India.

The learned counsel for the appellants submits that the aforesaid Court direction, like statutes of India, would be operative only up to the territorial limits of India; that in international law jurisprudence, the “territory” of a country is limited to its geographical extent unless the applicability of law is otherwise extended by way of international treaty; that the respondents themselves have relied upon the provisions of Indian statutes such as section 499 of the Indian Penal Code, Articles 19 & 21 of the Constitution of India and now repealed section 66-A of the I.T. Act and according to the appellants all these statutes would be limited to the events occurring within the territory of India.

It is argued that the availability of the aforementioned allegedly offending “post”, in other national jurisdictions would be governed by the laws governing defamation in those other countries. Therefore, the order of 04.06.2015 was bonafidely complied with by blocking/disabling access to the said “post” from the territory of India and a compliance report has been filed. The appellant submits that there could not be, nor is there any willful disobedience of the Court direction.

Issue notice through ordinary process, Speed Post, approved courier, dasti, through counsel as well, returnable on 19.03.2018.

A copy of this order be given dasti to the learned counsel for the appellants, under the signature of the Court Master...”

6. Subsequently on the next date of hearing i.e. 19.03.2018, the Court had further noted as under:

“.... Mr. Anil Sapra, the learned Senior Counsel states upon instructions that the offensive post is still accessible from India, therefore, the appellants are in breach of the interim order dated 04.06.2015 passed by the learned Additional District Judge-03, Saket Courts, New Delhi and they are liable for prosecution under Order XXXIX Rule 2 CPC. However, upon a closer examination of the mode of access, it is noticed that although the respondent has an Airtel connection, the access to the site is through a Virtual Private Network (VPN), a subscribed private mode of access located outside India for researching the appellant’s Internet platform.

The learned Senior Counsel further submits that the vilification campaigns by the ‘offensive post’ are still available on the website of the appellant outside the country, which is a constant source of embarrassment and

harassment to the respondent. It incites and maliciously lends to loss of her goodwill built-up through years of extensive competent professional medical practices, constant research and designing and adoption of innovative methods of treatments, a reputation built up by reference from happy and/or satisfied clients and their references, etc. He further submits that at the end of the day, it is the desire of the respondent that the said offensive post be removed/blocked from being accessed anywhere in the world, for the simple reason that professionals like her cannot go about trying to justify her position or to protect herself from such malicious vilification campaigning against her. Furthermore, he submits that there will be no adverse impact to the business of the appellant if such a post is removed/blocked worldwide from their site. He submits that since the respondent would like to initiate appropriate action against the person who has uploaded the offensive post in the first instance, the appellant may be directed to disclose the identity of the person who has uploaded the same.

The Court would note that it would be in the interest of justice and without prejudice to the appellant's rights to remove the offensive post from being available on their sites internationally. Mr. Sajan Poovayya, the learned Senior Advocate for the appellant submits that he will seek instructions in this respect.

Presently, there is no application for disclosure of the identity of the person who had first uploaded the said offensive post. Mr. Sapra seeks time to obtain instructions and initiate motion in this regard.

At his request, re-notify on 09.04.2018....”

7. On a subsequent date i.e. 03.04.2018, on an application filed by the respondent, this Court had recorded as under:

“..... C.M.No.11913/2018

.....

The applicant seeks the disclosure of the identity of the person who had first uploaded the offensive post against her. As recorded in the previous order dated 19.03.2018, the appellants have already blocked the offensive post from being accessed from India. However, since it is still available in other national jurisdictions, and is a constant cause for detriment to the goodwill and fair name of the applicant, it would be in the interest of justice that the originator and the perpetrator of the said offensive post be identified so that the applicant may initiate such action, as may be advised, against the said person. The applicant cannot be remediless from initiating action against acts which are perceived by her as offensive, defamatory and vexatious.

In the circumstances, the appellants are directed to disclose to the applicant information about the person/entity, who uploaded the offensive post vide URL: www.youtube.com/watch?v=EhoYby-V4aE and all such data which is in its possession so long as the Internet Protocol (IP) Address resolves to India.....”

8. The learned Senior Advocate for the appellants contends that the impugned order would be applicable only to the geographical territory of India and/or to any such extent with activities carried out from the Indian soil. He submits that the appellants, who otherwise submit to the jurisdiction of this Court, are constrained from complying with the impugned directions because of the SPEECH Act viz. the statute of the United States of America titled, “Securing the Protection of Our Enduring and Established Constitutional Heritage Act”. He refers to section 2 thereof, which reads as under:

SEC. 2. FINDINGS.

Congress finds the following:

(1) The freedom of speech and the press is enshrined in the first amendment to the Constitution, and is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy.

(2) Some persons are obstructing the free expression rights of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publisher in that foreign jurisdiction.

(3) These foreign defamation lawsuits not only suppress the free speech rights of the defendants to the suit, but inhibit other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit.

(4) The threat of the libel laws of some foreign countries is so dramatic that the United Nations Human Rights Committee examined the issue and indicated that in some instances the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work. The advent of the internet and the international distribution of foreign media also create the danger that one country's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.

(5) Governments and courts of foreign countries scattered around the world have failed to curtail this practice of permitting libel lawsuits against United States persons within their courts, and foreign libel judgments inconsistent

with United States first amendment protections are increasingly common...”

9. Section 3 of the said Act which deals with Recognition of Foreign Defamation Judgments, in particular 4102 clause (c) reads as under:

“...(c) JUDGMENT AGAINST PROVIDER OF INTERACTIVE COMPUTER SERVICE.—

“(1) IN GENERAL.—Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230) unless the domestic court determines that the judgment would be consistent with section 230 if the information that is the subject of such judgment had been provided in the United States.

“(2) BURDEN OF ESTABLISHING CONSISTENCY OF JUDGMENT.—The party seeking recognition or enforcement of the foreign judgment shall bear the burden of establishing that the judgment is consistent with section 230.

“(d) APPEARANCES NOT A BAR.—An appearance by a party in a foreign court rendering a foreign judgment to which this section applies shall not deprive such party of the right to oppose the recognition or enforcement of the judgment under this section, or represent a waiver of any jurisdictional claims.....”

10. It is argued that the freedom of speech in the United States of America (in short ‘USA’) is absolute unless it is enjoined in that country by a Court of competent jurisdiction. The email communication from the appellants to their counsel seems to suggest that a John Doe injunction order could well be taken from the American Courts to seek the identity of the Google LLC subscriber, who had uploaded the offending post or otherwise

seek diplomatic procedures such as the Hague Evidence Convention. The appellants have, in effect, expressed the inability to provide any information with respect to the person who uploaded the offending post, unless they are so directed to do by an American Court. With reference to an affidavit dated 26.04.2018 of Ms. Asya Strickland, Custodian of Records, working at Google LLC, the appellants state that the offending post was not uploaded from India but it resolves with USA.

11. The learned counsel for the appellant states that the Directive Principle of State policy, as embodied in the Constitution of India, in particular Article 51 thereof, the Indian Public Policy would be to endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another; it is in this spirit and for the international comity of Courts that the laws of USA should be respected and given effect to. He refers to the judgment of Court of Justice Sao Paulo in ***Twitter Brasil Rede d Informacao Ltda vs Tim Celular S/A*** dated 26th July, 2016 which in a similar case held:

“... In this regard, article 11 of the Internet Civil Framework provides that, in any operation for collection, storage and treatment of records of personal data, the Brazilian law and the rights to privacy, protection of personal data and confidentiality of private communications and records must be complied with, provided that at least one of the terminals is located in Brazil.

Therefore, considering that the appellant has removed all allegedly illegal contents in accesses made from the Brazilian territory, the respondent's allegation that the former had not complied with the court order is inapplicable in case the access occurs outside the country.....”

12. Likewise, the Sao Paulo State Court of Appeal in the case of **Google Brasil Internet Ltda vs Luiz Eduardo Auricchio Bottura et. alius** by its decision dated 05.04.2017 seeking removal of an offending video about a service offered by the defendant and published by the co-defendant with the title ‘*O golpista do ano*’ (the scam artist of the year), as well as the receipt of compensation for pain and suffering, held:

“..... Evidently, the judicial command is limited to the national territory, in light of the provisions of article 16 of the New Code of Civil Procedure (old 1 of the Code of Civil Procedure of 1973), such that the appellant, GOOGLE BRASIL, cannot be compelled to promote the removal of this same video in other countries, also because the respectable court decision granting the interim relief (and, as such, the respectable decision appealed), a command only has effects in Brazil when, evidently, it also applies in conflicts involving the internet. To admit the contrary would be to violate the principle of sovereignty of the States and, as such, the provisions of article 4, III and V of the Federal Constitution.....

....

..... Interlocutory appeal. Positive covenant combined with pain and suffering. Fulfillment of the decision. Decision that, due to the scenarios presented by the appellee, ordered the appellant to comply with the determinations of the respectable decision, under penalty of the crime of disobedience, with the increase of the daily fine. Reversal.

Decision that seeks to hold the appellant liable for accesses to the content with the aid of tools that allow the perpetration of unlawful acts and that the court decision reaches any existing relationship between Google and web users anywhere in the world. Inadmissibility.

The rule is that the removal of the content shall be local, not global. Territorial limit of the judicial commands, which also applies in cases involving the internet, article 1 of the Code of Civil Procedure. Appeal accepted.

Moreover, as we know, GOOGLE BRASIL is a search site that only offers users access to the immense range of electronic addresses available in the web upon the insertion of the name of keywords in its application. Evidently, their content cannot be attributed to its and, for this motive, it shall not be held jointly and severally liable for offenses directed against the plaintiff and appellee hereunder.

This means to say that the offenses that motivated the filing of the present claim are not under the responsibility of the appellant (but only of the co-defendant), author of the video), which only allows access to these addresses with the search tool that it offers to users, note again, in the national territory....”

13. In the same vein, he refers to an order of the Northern District of California, San Jose Division dated 02.11.2017 in **Google LLC vs Equustek Solutions Inc.**, which stayed the direction of the Supreme Court of Canada to Google to de-index the websites of a party which carried out business from unknown locations using the plaintiff’s intellectual property. In part compliance of the Canadian order, Google had de-indexed only specific web pages associated with the enjoined party, thus rendering the order ineffective because the enjoined party simply moved its objectionable content to new pages within its website thereby circumventing the Canadian Court’s order. The issue before the Court was whether the interlocutory injunction against Google could be upheld. The Canadian Court reasoned as under:

“.....44. Google’s argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical. As Fenlon J. noted. “Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong”.

45. And while it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case. As Groberman J.A. concluded:

‘In the case before us, there is no realistic assertion that the Judge’s order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs’ core rights are respected.

... the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.....’

46. If Google has evidence that complying with such an injunction would require it to violate laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application.

47. In the absence of any evidentiary foundation, and given Google's right to seek a rectifying order, it hardly seems equitable to deny Equustek the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible. We are dealing with the internet after all, and the balance of convenience test has to take full account of its inevitable extraterritorial reach when injunctive relief is being sought against an entity like Google.

48. This is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders. We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods..."

14. Google's appeal against the said order was dismissed. In effect it was required to comply with the worldwide injunction. The case was taken up by the Northern District of California where Google had argued that the Canadian order was not enforceable in USA because it conflicted directly with the First Amendment, disregards the Communication Decency Act's immunity for interactive service providers, and violates the principles of international comity. With reference to the SPEECH Act, the American Court held:

"the Canadian order treats Google as a publisher because the order would impose liability for failing to remove third-party content from its search results. Google meets the requirements for Section 230 immunity. As such, the Court finds that Google is likely to prevail on the merits of its Section 230 argument¹

¹ Since Google is likely to prevail on the merits of its Section 230 claim, it is unnecessary to address Google's arguments based on the First Amendment and international comity.

..... The Canadian order would eliminate Section 230 immunity for service providers that link to third-party websites. By forcing intermediaries to remove links to third-party material, the Canadian order undermines the policy goals of Section 230 and threatens free speech on the global internet.....”

15. In view of the aforesaid, the learned counsel for the appellant submits that the orders of the Indian Court cannot be given effect to because the video linked on Youtube was not uploaded from India and the SPEECH Act constrains the appellant from disclosing such information.

16. Mr. Sapra, the learned Senior Advocate for the respondent submits that the appellants now seek to wriggle out of a difficult situation. He contends that the affidavit of Ms. Asya Strickland is an endeavour to defeat the process of justice. The interim order dated 04.06.2015 records, in effect, that the appellant had not specifically disputed that the offending post was posted from India. The said order has not been challenged and has, therefore, attained finality. Hence, the appellants are required to comply with it.

17. The Court would note that it was never the case of Google that the contents of the offending post had been uploaded from a place outside India. It held that the contents have been uploaded from India, hence they were ordered to be removed from the internet so as to restore the position as it was prior to the uploading of the contents. The impugned order went on to hold that the contents which were uploaded from India, if transposed outside the jurisdiction of the country, cannot be said to be beyond the jurisdiction of India, and it could well be blocked or removed following the path by which it was uploaded. The Court is of the view that in the first

instance, the injunction order dated 04.06.2015, which has not been challenged, has attained finality. It holds that on the basis of the pleadings and/or lack of denial from Google that the offending post had been uploaded from India, Google was required to remove it so as to restore *status quo ante*.

18. The affidavit of Ms. Asya Strickland is of no evidentiary value since it is not apostilled before an Indian Consular Office in the USA. However, for the sake of argument if it were to be examined, it does not bring in any evidentiary value or legal reasoning to reverse a finding that already exists in terms of the impugned order, for almost three years. If it was the appellants' case that the offending post was uploaded from outside India, it should have so stated before the trial court. In the circumstances, the affidavit now relied upon by the appellants is a clear attempt to over-reach the orders of this Court. Such endeavour cannot be permitted.

19. There is no merit in the appeal and accordingly it is to be dismissed. However, at this stage, Mr. Poovaya, the learned Senior Counsel for the appellant seeks to withdraw the appeal to pursue his remedies as may be available in law on the basis of supervening, technological and technical reasons in removing the offensive post.

20. The Court, however, is unable to see as to how the contents being posted on the platform of the appellant can govern or steer the functioning of the platform itself. Contents can never be the master of the vehicle or platform on which they are posted. The owner of the platform can always remove such material from its portal, if it so wishes. Mr. Sapra, the learned

Senior Counsel for the respondent, submits that there is no technological or technical constraint in removing the offensive post from You Tube channels.

21. However, since at this stage, the learned counsel for the appellant seeks to withdraw the appeal, subject to such terms as this Court may impose. The Court would note, as mentioned above, the case has been listed nine times in a short period of 64 days; each time the case was adjourned at Google's request. The judicial time consumed is being sought to be set at naught, simultaneously the respondent must have expended monies on the litigation. The request is allowed on the condition that the appellant will not raise any of the arguments already addressed in this order and subject to payment of cost of Rs. 50,000/- per hearing; of which Rs. 1 lakh shall be paid to the Delhi High Court Mediation and Conciliation Centre. The remaining amount shall be paid to the respondent.

22. The appeal, alongwith pending applications, is dismissed as withdrawn in the above terms.

MAY 17, 2018

kk/sb

NAJMI WAZIRI, J.