

255 **IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR No.4759 of 2018 (O&M)
Date of Decision: 31.10.2019

Facebook India Ltd.

.....Petitioner

Versus

Rajesh Duseja and others

.....Respondents

CORAM: HON'BLE MS. JUSTICE NIRMALJIT KAUR

Present: Mr. Parag Tripathi, Senior Advocate, with
 Mr. Rohit Khanna, Advocate;
 Ms. Richa Srivastava, Advocate;
 Ms. Mishika Bajpai, Advocate; and
 Ms. Nayantara Narayan, Advocate, for the petitioner.

Mr. Pradip Rajput, Advocate, for respondent No.1.

NIRMALJIT KAUR, J. (ORAL)

The present revision petition is filed against the impugned order dated 24.05.2018 passed by the Additional District Judge, Amritsar, dismissing the application filed by the petitioner under Order 1 Rule 10 CPC seeking deletion of his name from the array of parties in suit No.16 of 2016 as defendant No.4.

Respondent No.1 initiated the suit against the petitioner and other defendants seeking relief of permanent injunction, damages and rendition of the defendants' accounts for infringement of his copyright over his literary works. Respondent No.1 further claimed that his literary work was being made available for sale on various websites, including the website www.facebook.com and applications for mobile devices and tablets ("Facebook Service"), in an authorized manner.

An application was filed by the petitioner for deletion of his name from the array of parties on the ground that the petitioner, namely,

“Facebook India Ltd.” was not responsible for hosting the content, that appeared on the Facebook service or any website, and does not operate or control the Facebook service. It has no authority to comply with any order passed by the trial Court in relation to the suit. However, the application was dismissed on the ground that the petitioner - Facebook India Ltd. was an Indian arm of defendant No.3 to the suit that Facebook INC which is a company incorporated in the United States of America. Secondly, the respondent had been duly served with a notice, but still he continued to violate the copyright. Since, the prayer was for rendition of accounts regarding sale of the respondent's book, the respondent's name cannot be deleted simply on the ground that it had no control or was not in a position to operate the Facebook service.

While praying for setting aside the impugned order, learned counsel for the petitioner submits that it does not own or operate any server that hosts any content appearing on the facebook service and even if, the petitioner is considered to be the Operator and Controller of Facebook service, which it was not, it is only an intermediary under the Information Technology Act, 2000 (for short, 'IT Act') and, therefore, was liable to be exempted from any liability as provided by Section 79 (1) of the IT Act, as it has no role in initiating transmission or selecting the receiver.

Reliance was placed on the judgments of the Delhi High Court rendered in **Kamdhenu Limited v. Jindal Steel & Power Limited and others** [CS (Comm) No.1229 of 2018] decided on 19.07.2019; **Facebook India Online Services Pvt. Ltd. v. Mufty Aijas Arshad Qasmi** [C.R.P. No.78/2012] decided on 26.08.2013; **Bhaichung Bhutia v. Soumik Dutta**

Amira Pure Foods Pvt. Ltd. v. Goyal Trading Company and others [CS (OS) No.2853 of 2015] decided on 14.07.2016, to support the argument that in similar facts, it was duly held that Facebook India Ltd. was not a proper party. Further, even if, it is assumed that it was a necessary party, still no suit can be filed till the procedure laid down under Section 52 (C) of the Copyright Act, 1957, is followed and that in the present case, the said procedure was not followed. No notice was issued to the petitioner before the filing of the suit, which is mandatory, nor was there any compliance of Rule 75(1)(f) of the Copyright Rules, 2013, requiring an undertaking to be given in the said notice that complainant shall produce a copy of the orders of competent Court within 21 days giving direction refrain from facilitating any access. It was further submitted that, the petitioner was in any case exempted from liability under Section 79 of the IT Act as there was no allegation of conspiracy or abatement against it and it also fulfilled the condition laid down in Section 79(2) of the Act. In order to support his contention, reliance was placed on the judgment of the Hon'ble Apex Court in **Shreya Singhal v. Union of India**, 2015(5) SCC 1.

Learned counsel for respondent No.1 on the other hand while vehemently opposing the revision petition relied upon a judgment of learned Single Bench of this Court in **Google India Private Ltd. v. M/s Shree Krishna International and others** (CR No.7034 of 2012), decided on 26.11.2012, to contend that defendant cannot be permitted to walk off from the proceedings simply on the ground that it has no role to play and was neither server nor has any business connection with Facebook INC. Further, the judgment rendered in the case of **Google India Private Ltd.**

(supra) was upheld by the Hon'ble Apex Court vide order dated 16.08.2016.

It was further argued that the counsel for the Facebook INC, who was defendant No.3 in the suit had made a statement before the trial Court that Facebook INC is willing to take action URLs on the Facebook service as will be directed by the Court, which shows that the petitioner had a specific role to play. Reliance was also placed on the judgment of the learned Single Bench of this Court in **Microsoft Corporation Pvt. Ltd. v. Rajesh Duseja and others** (CR No.7783 of 2018), decided on 15.01.2019, vide which the revision against the order dismissing the application for deletion of name was dismissed. Further, since one clicks on sharing link icons on defendants sign/adwords in advertisements by defendant the page is redirected to the facebook community of online channels selling the literary works of the plaintiff, carry loss to the petitioner, the petitioner cannot escape from its liability

Heard.

The judgment rendered in the case of **Google India Private Ltd.** (supra), relied upon by the learned counsel for respondent No.1-plaintiff, will not help in the present case. In the said case, the application for deleting the name of defendant was dismissed as there was a specific allegation of connivance by the defendant with the other defendants for the infringement of the Copyright. It was in view of the same, the Hon'ble Apex Court refused to interfere and dismissed the appeal filed against the order dated 26.11.2012 passed in **Google India Private Ltd.** (supra). Similarly, the judgment rendered in the case of **Microsoft Corporation Pvt. Ltd.** (supra), referred by respondent No.1-plaintiff, was passed in view of the allegation alleged in the plaint. In any case, on remand by the Apex Court,

the learned Single Bench in the second round in the case of **Blueberry**

Books and others vs. Google India Pvt. Ltd. and others, [CS(Comm) 116/2017] dismissed the suit against Google India Private Ltd. in view of Section 79 of IT Act granting exemption from liability to the intermediaries. Against the order dated 30.1.2018 passed by the learned Single Bench dismissing the suit, the Blueberry Books filed LPA before the Division Bench. The Division Bench dismissed the appeal by holding that no notice as required under the IT Act and Rules was ever issued. In the present case too, the said notice was never issued to the petitioner. Notice issued to other defendant i.e. Facebook INC is not a notice to Facebook India Private Ltd.

After having heard learned counsel for the parties as also going through the various judgments relied upon by the parties, this Court finds the judgments rendered in **Facebook India Online Services Pvt. Ltd. and Bhaichung Bhutia** (supra) are squarely applicable in the given facts. In the case of **Bhaichung Bhutia** (supra) the name of Facebook India Pvt. Ltd. was deleted while allowing the application under Order 1 Rule 10 CPC, by way of the following order:-

“The abovementioned application has been filed by defendant No.5 Facebook India Pvt. Ltd. under Order 1 Rule 10 CPC for deletion of its name. Learned Senior counsel appearing on behalf of the applicant/defendant No.5 is pressing for disposal of this application. He submits that defendant No.5 is not the necessary or proper party for the purpose of adjudication of the present suit. He further submits that the facebook service in question is being controlled by defendants No.3 & 4 and defendant No.5 does not own or control the servers that host content on the facebook service. Thus, there is no role of defendant No.5 to comply with the orders, nor the said defendant is responsible for hosting the contents.

In view of the averments made in the application as well

as for the reason that defendant No.5 does not own or operate any server and it is not responsible for hosting the contents that may appear on any website, the prayer made therein is allowed. Accordingly, the name of defendant No.5 is deleted from the array of parties. Let the amended memo of parties be filed within two weeks.”

Similarly in the case of M/s Amira Pure Foods Pvt. Ltd. (supra), application under Order 1 Rule 10 CPC filed by the Facebook India Online Services Pvt. Ltd. for deletion of its name from the array of parties as defendant, was allowed by observing as under:

“Plaintiff has filed the suit for damages and recovery of money on account of defamation with a consequential relief of perpetual injunction against eleven defendants. Relief against defendant no.10 has also been specifically claimed in para (c) of the prayer clause in plaint. Except the general bald allegations against defendant No.10 that defamatory videos and remarks/comments were uploaded on its social media/networking platform, no specific role has been attributed to defendant no.10 as to how it has any control over the server or the Facefook services.”

In the case in hand too, petitioner-Facebook India Limited is intermediary of the Facebook INC. It has no control over the server and nor operates the server and nor plays host to the contents on the website. These facts are not disputed by the respondent-company. The revision deserves to be allowed on this ground above.

In any case, as admitted by respondent No.1/plaintiff himself, learned counsel for defendant No.3 in the suit has already made a statement that Facebook INC is willing to take action URLs on the facebook service as will be directed by the Court.

Although, the above facts in themselves as stated above are sufficient to allow the revision but there is another way to look at the entire matter. The plaint has admittedly been filed under the Copyright Act, 1957, including Section 52 of the same. Section 52(1)(c) of the Copyright Act, 1957 reads as under:

“Section 52(1)(c):- transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.”

A perusal of the above proviso shows that no suit could have been filed till the complaint or notice is sent to the person responsible for the storage or violation of copyright and thereafter the said person shall refrain from facilitating any access, that too for a period of 21 days. After 21 days, the person giving notice is required to show a copy of the order restraining from granting access. In the present case, no notice was issued to the present petitioner. The alleged notice has admittedly been issued to

in control of the server, rather it is allegedly one of the intermediaries having no control on the server.

Further, Rule 75 of the Copyright Rules, 2013 makes it mandatory to give an undertaking in the said notice that the complainant shall produce the order of the competent Court within 21 days of the receipt of the said notice. Rules 75(1), (2)(f), (5) & (6) of the Copyright Rules, 2013 read as under:-

“75. (1) Any owner of copyright may give a complaint in writing under clause (c) of sub-section (1) of section 52, to a person who has facilitated transient or incidental storage of work for providing electronic links, access or integration to restrain from such storage of work.

(2)(f) Undertaking that the complainant shall file an infringement suit in the competent court against the person responsible for uploading the infringing copy and produce the orders of the competent court having jurisdiction, within a period of twenty-one days from the receipt of the notice.

(5) The person responsible for storage may restore the storage of the work in case the complainant failed to produce the orders of the competent court having jurisdiction, restraining him from facilitating access.

(6) In case the complainant fails to produce the orders of the competent court having jurisdiction within the stipulated period, the person responsible for storage shall not be obliged to respond to any further notice sent by the same complainant on the same work in the same location.”

Admittedly, no such notice was given, let alone giving undertaking in the said notice. Thus, the suit would not be in any case maintainable against the present petitioner.

Section 79 of the IT Act provides exemption from liability of

intermediary in certain cases. Section 79(2) of the IT Act requires certain conditions to be fulfilled for taking the benefit of Section 79(1) of IT Act. Similarly, application Section 79(1) is subject to sub Section 3 of Section 79 of the IT Act. It would be relevant to reproduce Section 79(1) (2) (3) which read as under:-

“79. 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,

(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.”

It is not disputed that the present petitioner is one of the intermediaries of facebook INC. There is nothing in the plaint to say that the present petitioner initiates the transmission or is in position to select the server or modify the information in the transmission. There is not a word of allegation qua the conspiracy or adding or inducing or power to control the server. Hence, the petitioner satisfies all the conditions for seeking exemption under Section 79 of the IT Act. In these circumstances, the petitioner is otherwise also entitled to the exemption from liability. As such, under no circumstances, a necessary party. The observations in the case of **Shreya Singhal' (supra)** clarifies the object behind Section 79(3)(b) of the IT Act, which is “for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not”.

In the present case, the petitioner was not even given a notice as envisaged under Section 79 of the IT Act to enable him to act upon any information, leave alone a Court order.

In view of the above, the present revision petition is allowed taking into account that the petitioner is neither the server and nor can

control the server. No mandatory notice as required under Rule 75 of the Copyright Rules 2013 as well as Section 52(1)(c) of the Copyright Act, 1957 as also in view of Section 79 of the IT Act was ever issued. Further, in the absence of any allegation of malafide or connivance against the present petitioner in the plaint, the impugned order dated 24.5.2018 is set aside and the name of the petitioner as defendant No.4 is accordingly deleted from the array of the parties. The respondents may place on record the amended memo of parties.

(NIRMALJIT KAUR)
JUDGE

31.10.2019

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Whether Speaking/Reasoned	:	Yes/No
Whether Reportable	:	Yes/No