

\$~55

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

+ **BAIL APPLN. 2751/2019**

MANISH SHARMA

..... Petitioner

Through

Mr. Mayank Sharma and Mr. Aman
Singh Brar, Proxy Advs.

versus

STATE

..... Respondent

Through

Mr. Hirein Sharma, APP for State
Mr. Arun Verma, EOW

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

ORDER

%

04.11.2019

Vide the present petition, the petitioner seeks direction thereby to be released on bail in connection with the FIR No.200/2016 registered at Police Station EOW/Cyber Cell for the offences punishable u/s 420/467/468/471/120B/34 of Indian Penal Code, 1860 and 66C/66D of IT Act.

The case of the petitioner is that a complaint was made to the EOW by one Ms. Vineeta Lamba, AR of the Microsoft Corporation India Pvt Ltd alleging that during the period of 2014 till date, various customers of the complainant company based out of USA made several complaints to Microsoft and stated that Microsoft's alleged business partner had cheated them of money on the false pretext of providing technical services.

The case of the prosecution is that upon perusal of the said complaints, it came to the light, by checking their internal records, that company mentioned therein were neither business partner nor authorized by

Microsoft for any purpose. Microsoft does not carry out any such process/ call or transmit Pop-ups messages to its customers. One Company by the name of Webonflex Marketing Pvt. Ltd runs a call centre / BPO at Kohat Enclave and Manish Sharma (director) i.e. petitioner herein, Mohit Sharma (CEO) and Ms. Chandani Chadha (HR) are responsible for overall management and day to day functioning of the company.

Such false popups are reflected / transmitted on the computers of USA and various other English speaking individual customers with the dishonest intent to dupe and cheat them. The Popup messages falsely state that victim computer is infected with viruses and other security related risks and if not rectified immediately, the victims computer would be at serious risk of getting damaged or the victims banking and other personal detail might get hacked and thereafter, rectify the same by charging money from the victim. On the basis of the above complaint, an FIR No. 200/16 was registered at Police Station, EOW, New Delhi on 26.12.2016.

Learned proxy counsel appearing on behalf of petitioner submits that after the lapse of approx. 32 months from the date of registration of FIR, police officials on 21.09.2019 arrested the petitioner. The allegations in the present FIR only attracts offence under section 66 of IT Act which is bailable but the Prosecution in most arbitrary manner have added Section 420/467/468/471/120-B/34 IPC which is otherwise impermissible under statutory provisions of law.

To strengthen his arguments, learned counsel for petitioner has relied upon the judgment delivered by the High Court of Bombay in the case of *Gagan Harsh Sharma And Another Vs. State of Maharashtra*:

2019 Cri LJ 398 whereby while referring the judgment delivered by the Hon'ble Supreme Court in the case of **Sharat Babu Digumarti Vs. Government (NCT Of Delhi): AIR 2017 SC 150**, the Court opined that:-

“15. The Hon'ble Apex Court in case of Sharat Babu Digumarti (Supra) had in great detail dealt with the offences punishable under the Information Technology Act and at the same time punishable under the relevant provisions of the Indian Penal Code. In the said case, an FIR was filed against the appellant and on investigation, chargesheet came to be filed before the Magistrate who took cognizance of the offences punishable under Section 292 and 294 of the Indian Penal Code and also Section 67 of the Information Technology Act. In a petition before the High Court seeking quashment, he was discharged of the offences under Section 292 and 294 but the prosecution under Section 67 of the Information Technology Act continued. The appellant approached the Apex Court and on the ground that the company was not arraigned as a party and the Director could not have been liable of the offences punishable under Section 85 of the Information Technology Act and the proceeding came to be quashed. Subsequently an application came to be filed before the Trial Court to drop the proceedings and the Trial Court refused to drop the proceedings under Section 292 of Indian Penal Code and framed the charge. With this issue he approached the Apex Court and the question for consideration before the Hon'ble Apex Court was whether the appellant who has been discharged under Section 67 of the Information Technology Act could be proceeded under Section 292 of the Indian Penal Code. The Hon'ble Apex Court also examined whether an activity emanating from electronic form which may be obscene would be punishable under Section 292 of the Indian Penal Code or 67 of the Information Technology Act or both or any other provision of the Information Technology Act. In the backdrop of the said facts the Hon'ble Apex Court observed thus

30. In this regard, we may reproduce Section 81 of the IT Act, which is as follows:-

"81. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act 1957 or the Patents Act 1970."

The proviso has been inserted by Act 10 of 2009 w.e.f.27.10.2009.

31. Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Section 67-A and 67-B is a complete code relating to the offences that are covered under the IT Act. Section 79, as has been interpreted, is an exemption provision conferring protection to the individuals. However, the said protection has been expanded in the dictum of Sherya Singhal and we concur with the same.

32. Section 81 of the IT Act also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply.

37. The aforesaid passage clearly shows that if legislative intent is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC.

39. In view of the aforesaid analysis and the authorities referred to hereinabove, we are of the considered opinion that the High Court has fallen into error that though charge has not been made out under Section 67 of the IT Act, yet the appellant could be proceeded under Section 292 IPC.

36. Applying the aforesaid principles to the facts involved in the case, perusal of the complaint would reveal that the allegations relate to the use of the data code by the employees of the complainant company by accessing the Code and stealing the said N.S. Kamble page 42 of 45 jud-917-wp-4361-2018 data by using the computer source code. The Act of accessing or securing access to computer/computer system or computer network or computer resources by any person without permission of the owner or any person who is in charge of the computer, computer system, computer network or downloading of any such data or information from computer in a similar manner falls within the purview of Section 43 of the Information Technology Act, 2000. When such Act is done dishonestly and fraudulently it would attract the punishment under Section 66 of the

Information Technology Act, such Act being held to be an offence. The ingredients of dishonesty and fraudulently are the same which are present if the person is charged with Section 420 of the Indian Penal Code. The offence of Section 379 in terms of technology is also covered under Section 43. Further, as far as Section 408 is concerned which relates to criminal breach of trust, by a clerk or servant who is entrusted in such capacity with the property or with any dominion over property, would also fall within the purview of Section 43 would intents to cover any act of accessing a computer by a person without permission of the owner or a person in charge of computer and/or stealing of any data, computer data base or any information from such computer or a computer system including information or data held or stored in any removable storage medium and if it is N.S. Kamble page 43 of 45 jud-917-wp-4361-2018 done with fraudulent and dishonest intention then it amounts to an offence. The ingredients of an offences under which are attracted by invoking and applying the Section 420, 408, 379 of the Indian Penal Code are covered by Section 66 of the Information Technology Act, 2000 and prosecuting the petitioners under the both Indian Penal Code and Information Technology Act would be a brazen violation of protection against double jeopardy.

38. In such circumstances we are inclined to allow the Writ Petition in terms of prayer clause (a) and quash and set aside the subject FIR insofar as the investigation into the offences punishable under the Indian Penal Code.”

Learned APP appearing on behalf of State does not dispute the opinion given by the Hon'ble Supreme Court which has been referred by Bombay High Court in the case cited above.

At this stage, without commenting upon the merits of the case, I am of the opinion that the petitioner has made his case fit for bail.

Accordingly, he shall be released on bail on his furnishing personal

bond in the sum of ₹50,000/- with two sureties of the like amount to the satisfaction of the Trial Court.

Application stands allowed and disposed of.

Copy of this order be transmitted to the Jail Superintendent and the Trial Court concerned for compliance.

Order *dasti* under the signatures of the Court Master.

SURESH KUMAR KAIT, J

NOVEMBER 04, 2019

ms