IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. OF 2013
[Under Article 32 of the Constitution of India]

BETWEEN:

1. MouthShut.com (India) Private Ltd
Registered under companies Act
bearing Registration No. No.11-128914
7, Pali Village, Bandra,
Mumbai – 400 050, Maharashtra
Through its Chief Executive Officer
Mr. Faisal Farooqui

2. Faisal Farooqui,
7, Pali Village,Bandra,
Mumbai -400 050,
Maharashtra Petitioners

VERSUS

1. Union of India
Represented by the Secretary,
Ministry of Communications & Information Technology,
Electronics Niketan, 6, CGO Complex,
Lodhi Road, New Delhi 110003

2. Director General GC (Cyber Laws Group Formulation & Enforcement Division) Department of Electronics and Information Technology, Electronics Niketan, 6, CGO Complex, Lodhi Road, New Delhi – 110003

3. State of Maharashtra
Through its Chief Secretary,
Secretariat, Mumbai-23,
Maharashtra

4. State of Tamil Nadu
Through its Chief Secretary,
Secretariat, Madras,
Tamil Nadu

5. State of Andhra Pradesh
Through its Chief Secretary,
Secretariat Hyderabad,
Andhra Pradesh

Contesting Respondents

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS OTHER COMPANION JUDGES
OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF
PETITIONERS ABOVENAMED

MOST RESPECTFULLY SHOWETH:

1. That the instant Writ Petition is being filed under Article 32 of the Constitution of India before this Hon'ble Court, inter-alia for quashing the Information Technology (Intermediaries Guidelines) Rules, 2011 (hereinafter "the Impugned Rules") as they are violative of Articles 14, 19 and 21 of the Constitution of India. On 11th April, 2011, Respondent No. 1 & 2 notified the Information Technology (Intermediaries Guidelines) Rules, 2011, (herein after referred to as impugned Rules) prescribing guidelines for intermediaries, in exercise of the powers conferred by clause (zg) of sub- section (2) of section 87 read with sub-section (2) of section 79 of the Information Technology Act, 2000 (21 of 2000). The Impugned Rules, are liable to be set aside as they contain arbitrary provisions which place

unreasonable restrictions on the exercise of free speech and expression, as well as the freedom to practice any profession, or to carry on any occupation, trade or business as guaranteed by Article 19 (1) (a) and Article 19 (1) (g) of the Constitution of India. The Impugned Rules are also liable to be struck down because of their failure to conform to the Statute under which they are made and exceeding the limits of authority conferred by the enabling Act which is the Information Technology Act, 2000 (hereinafter "The Act").

That the Respondent No.1, Union of India has notified the Impugned Rules and Respondent No.2 is the Director General, GC (Cyber Laws Group Formulation & Enforcement Division), Department of Electronics and Information Technology. It is submitted that the Petitioners have received notices and phone calls from the cyber cells and police stations of different States in India as such the Petitioner has no efficacious remedy except to approach this Hon'ble Court under Article 32

of the Constitution of India. Hence the present Writ Petition.

1A. That the 1st Petitioner is a private limited company incorporated under the relevant provisions of the Companies Act, 1956 having registration No. 11-128914 of 2000 and being represented by its Chief Executive Officer Faisal Farooqui. The Petitioner No.2 is the Chief Executive Officer of the Petitioner No.1 and is filing the present Writ Petition in his individual capacity. The Petitioner No.1 has authorized the Principal Faisal Farooqui to swear the affidavit and execute the vakalatnama for the present Writ Petition. A true copy of the certificate of incorporation of the Petitioner No.1 dated 28-9-2000 and the copy of the Board resolution dated 20-12-2012 authorizing Mr Faisal Farooqui to represent the Petitioner No.1 are annexed as Annexure P-1 Colly. That the Petitioners state that they have not approached any other authority seeking similar relief as has been sought in the present Writ Petition.

2. That the facts leading to the filing of the present Writ Petition before this Hon'ble Court are as follows:

   a. It is submitted that the Petitioner No.1 is a company that operates MouthShut.com, a social networking, user review website. It was founded

in the year 2000 to provide a truly democratic platform for consumers to express their opinions on goods and services, thereby facilitating the free

b. flow of truthful information in the marketplace. It is estimated that at least 80 lakhs (eighty lakhs) users visit the website every month. The website acts as a meeting place for buyers to exchange ideas, opinions and feedback on products and services they have used or are considering buying. Each business or product listing result contains a 5-point rating, reviews from other site visitors, and details such as the business address, office hours, accessibility, and parking. Website visitors can become members and aid in keeping the business listings up to date, with moderator approval, and business owners can directly update their own listing information. Business owners can communicate with contributors who post reviews on their page via messages or public comments in order to address their grievances or present their explanations. Such a business model has emerged to be universally productive and successful in the current environment of consumer reach and interaction. The various

categories of products and services, the reviews of which are available on the website, are appliances, automotives, books, computers, mobile/Internet, personal finance, travel, education, household goods, electronics, music, small businesses, malls, stores, employers, sports, health and beauty etc. It is submitted that MouthShut.com has emerged as a market leader in its niche in India and was the first in this field to gain such traction and momentum. It may be pointed out that other successful businesses in this area started much later are celebrated world over. One such website is the San Francisco based Yelp.com that was started in 2004. It is submitted that MouthShut.com is led by an able team, committed to improve consumer experience, headed by Mr Faisal Farooqui who gave up a lucrative career in the United States to bootstrap peer review based online business in India. True copies of the Certificate of Incorporation of the Petitioner No.1 dated 28.09.2000 and the copy of the extracts of the Minutes of the meeting of the Board of Directors of Petitioner No.1 dated 20.12.2012 are annexed

hereto and marked as **ANNEXURE P-1 COLLY (Pages 50-52)**

c. It is submitted that the Terms of Use policy of MouthShut.com states clearly that “Any opinions expressed by a member are those of a member alone, and are not to be attributed to MouthShut.com. MouthShut.com cannot and does not assume responsibility for the accuracy, completeness, safety, timeliness, legality or applicability of anything said or written by any member”.

d. It is submitted that although the website provides a means to connect businesses with aggrieved customers or reviewers to address their complaints about the product or service in question, the 1st Petitioner receives numerous requests for taking down negative reviews from a variety of business owners including reputed banks, consumer electronics companies, real estate dealers and builders etc. in the regular course of business. However, the 1st Petitioner does not exercise any influence on the content of the reviews. Reflecting the consumer protection ethos on which the 1st Petitioner's business is based, the 1st Petitioner does not screen any

review before it is posted online, in order to avoid creating an indirect prior restraint on speech which will inevitably lead to lesser user generated reviews overall. There is an automated algorithm which checks the content for “expletives” but its accuracy and completeness cannot be trusted.

e. It is submitted that the 1st Petitioner's official policy is to only remove content if ordered by a court of competent jurisdiction or on a written request signed by a competent authority of the Government in view of any “unlawful” content.

f. It is submitted that the Information Technology Act, 2000 was enacted to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternative to paper-based methods of communication and storage of information to facilitate electronic filing of documents with the Government agencies.

g. In 2004, Avnish Bajaj, the CEO of Baazee.com, an auction portal, was arrested for an obscene MMS clip that was put up for sale on the site by a user. The Baazee case showed the legal risks that

corporates operating an online business that provide a platform for users to host their content, could be exposed to in spite of the fact that they are not the authors of the content. The Baazee.com case resulted in an appeal by the industry to amend the Information Technology Act, 2000 by providing protection to intermediaries from liabilities arising out of user-generated content. The Information Technology (Amendment) Act, 2008 amended Section 79 of the IT Act, 2000 to provide for a safe – harbour protection to intermediaries. The Legislature intended to reduce legal uncertainty for Intermediaries and make the creator of the content responsible for it and not the host of the content as it would be both unjust and impractical to hold companies responsible for words someone else posted or videos, a third party created. Further, it is technologically infeasible for intermediaries to pre-screen each and every bit of content being uploaded onto their platforms, especially as the amount of information coming online is increasing exponential. As per data provided by Google, Inc., over 4 billion hours of video are watched each month and

approximately 72 hrs (Seventy Two) of video are uploaded every minute to its service, Youtube.com. The Legislature acknowledged that imposition of such a burdensome standard would crush innovation, throttle Indian competitiveness, and prevent entrepreneurs from deploying new services in the first place, a truly unfortunate outcome for the growth of the Internet in India.

h. The Information Technology (Amendment) Act, 2008, received the assent of the President on 05-02-2009 and came into force on 27-10-2009 as per Notification No. S.O.2689(E) dated 27-10-2009. This Amendment Act made substantial amendments to various provisions in the Principal Act.

i. Section 79 of the Information Technology Act, 2000 as amended provides protection for intermediaries from liability arising out of user generated content. As per clause (w) of sub-section (1) of Section 2 of the Principal Act as amended, an intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom

service providers, network service providers, internet service providers, web-hosting service providers, search engines, on-line payment sites, on-line auction sites, on-line market places and cyber cafes. Thus, Intermediaries are entities that provide services that enable any content that is created on the internet to be delivered to the user. This includes social media websites like Facebook and Twitter that act as platforms to store and retrieve content, websites such as that of the 1st Petitioner which provide a platform to the public to review various products and services, blogging platforms like Blogspot and Wordpress, search engines like Google and Yahoo, web hosting providers like GoDaddy, auction sites like eBay, payment gateways like PayPal and ISPs like Airtel and MTNL amongst others.

j. That the 2nd respondent released a set of draft rules called the Information Technology (Due diligence observed by intermediaries guidelines) Rules, 2011 (Hereinafter the "draft rules") and invited comments on these rules. However these rules were finalised without taking into account feedback submitted by many organisations and individuals. A true copy of the Information

Technology (Due diligence observed by intermediaries guidelines) Rules, 2011 is annexed herewith and marked as **ANNEXURE P-2 (Pages 53-60)**

k. That on 11th April, 2011, the 1st Respondent notified the Information Technology (Intermediaries Guidelines) Rules, 2011, prescribing guidelines for intermediaries, in exercise of the powers conferred by clause (zg) of sub- section (2) of section 87 read with sub-section (2) of section 79 of the Information Technology Act, 2000 (21 of 2000). A true copy of the Technology (Intermediaries Guidelines) Rules, 2011, notified on 11th April, 2011 is annexed hereto and marked as **ANNEXURE P-3 (Pages 61-68)**

l. That Rule 3 of the impugned rules prescribes due diligence to be observed by the intermediary. Sub-rule (1) of rule 3 mandates intermediaries to publish rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource. Sub-rule (2) of rule 3 mandates the intermediary to inform users the kind of information that cannot be hosted, uploaded, modified, published, transmitted,

updated or shared. Sub-rule (4) of rule 3 requires the intermediary to take action within 36 hours for disabling information that is in contravention of sub-rule (2) within 36 hours, upon obtaining knowledge by itself or on being brought to actual knowledge by an affected person.

m. That after the notification of the impugned Rules, the 1st Petitioner's website has received requests for removing content from persons and organisations from various parts of the country. Private parties have started writing to the 1st Petitioner to remove genuine reviews in case they bring to light certain negative aspects of a product or service, often categorizing them as defamatory or harassing. Further, on a refusal to comply with such requests, the 1st Petitioner is being flooded with legal notices instructing the 1st Petitioner to remove any negative reviews or else face defamation charges claiming damages to the tune of Rs. 2000 (Rupees two thousand) crores and criminal proceedings. Although, even prior to the notification of these impugned rules, the 1st Petitioner was receiving such requests, the number of requests have increased after the

notification. A true copy of the notice sent to the Petitioner by a builder M/s Kumar Builders Consortium dated 27-11-2010 is annexed hereto and marked as **ANNEXURE P-4 (Pages 69-71)**

n. It is submitted that the 1st Petitioner and its employees have also started receiving threatening calls from various police officials of various states in India asking them to remove adverse reviews or comments from their website and to provide the details of the member who has authored adverse reviews. Expressing inability to take such an action in absence of a written request signed by the relevant authority or a court order, the 1st Petitioner has so far refused to comply with such requests and threats. However, the threats have continued and the police officers have threatened to arrest the Petitioner No.2 under Section 66A of the Information Technology Act, 2000. It is submitted that user authentication on the Internet is difficult and the 1st Petitioner cannot confirm and does not confirm user identity with certainty. Further, even if it were theoretically possible, it is this aspect of the Internet that makes it possible for users to express themselves

freely without the fears that normally plague individuals in the offline world.

o. It is submitted that in one instance MouthShut.com lost a key member of its operation team who resigned owing to the pressure exercised by local police officers threatening to use Information Technology Act, 2000 to "jail" him on his refusal to remove "unwanted content." True copies of the letters sent to the Petitioner by Cyber Crime Cell, Tamil Nadu dated 16.03.2012 and by Cyber Crime Police Station Hyderabad City dated 17.03.2012 are annexed herewith and marked as **ANNEXURE P-5 (COLLY) (Pages 72-75)**

p. It is submitted that employees of the 1st Petitioner are increasingly receiving threatening phone calls, often at the middle of the night asking them to take down content. This scenario has had a negative effect on employee morale and has made running the operations difficult for the 1st Petitioner.

q. It is submitted that the impugned Rules impose a significant burden on the 1st Petitioner forcing it to screen content and exercise online censorship which in turn impacts the Freedom of speech and

expression of its customers thereby risking a loss of its large consumer base or incurring legal costs and facing criminal action for third party, user generated content. It is submitted that while a private party may allege that certain content is defamatory or infringes copyright, such determinations are usually made by judges and can involve factual inquiry and careful balancing of competing interests and factors, the 1st Petitioner is not well-positioned to make these types of determinations but is being forced to adopt an adjudicative role in making such determinations. It is submitted that as per the impugned rules the 1st Petitioner is required to take an action within thirty six (36) hours of receiving a request by an aggrieved person. However, the 1st Petitioner is incapable of making legal determinations.

r. It is submitted that impugned rules while providing for an affected party to complain about the posted content does not afford a right of hearing to the user who posted the content which is removed by the Intermediary. There is no "putting back" provision for the content to re-appear if the complaint was frivolous. This allows

people to file multiple frivolous complaints against any kind of material, even falsely (since there is no penalty for false complaints), and keep some material permanently censored.

s. It is submitted that the impugned rules in the garb of regulating intermediaries impose unreasonable restriction on the freedom of expression of the users of these websites and such restrictions make it unviable to operate the websites. Hence the present Writ Petition.

3. That the Petitioner has got no other alternative remedy except to file the present Writ Petition before this Hon`ble Court. The Petitioner is filing the present Writ Petition on the following amongst other Grounds.

4. **GROUNDS**

i) Because the Constitutional bench of this Hon'ble Court in Kavalappara Kottarathil and Kochunni alias Moopil Nayar Vs. States of Madras and Kerala and Ors. reported in [1963] 3 S.C.R. 887 held that Article 32 prescribes guaranteed remedy for the enforcement of those rights and makes the remedial right itself a fundamental right. Article 13(1) declares that "All laws in force in the territory of India immediately before the commencement of this

Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void"; and Article 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by Part III of the Constitution and declares that any law made in contravention of that clause shall, to the extent of the contravention, be void.

ii) Because Sub rules (2) and (4) of Rule 3 of the impugned rules violate the fundamental right to freedom of speech and expression guaranteed to citizens by Article 19(1)(a) of the Constitution of India and are thus void and unconstitutional in view of Article 13 of the Constitution of India.

iii) That Sub-rule (2) of Rule 3 mandates intermediaries to place restrictions on the kind of content that a user can post by listing a broad list of information. Sub-rule (2) of Rule 3 mandates users not to host information included in a broad list that includes information that is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libelous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering

or gambling, or otherwise unlawful in any manner whatever.

iv) That Sub-rule (4) of rule 3 of the impugned rules mandates that the intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours to disable such information that is in contravention of sub-rule (2).

v) That the subject matter of information listed in sub-rule (2) of rule 3 is highly subjective and could result in wide interpretation. Sub-rule (2) of rule 3 has provisions that are beyond reasonable restrictions that can be laid down as per Article 19(2) of the Constitution of India. Clause (2) of Article 19 permits the state to make laws mandating reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense. Thus, any restrictions that

can be made on the right of citizens to freedom of speech and expression can only be within the ambit of clause (2) of Article 19. The list of unacceptable information listed under Sub-rule(2) of Rule 3 that includes information considered as grossly harmful, harassing, blasphemous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner is beyond any reasonable restrictions that can be imposed under Article 19 (2) of the Constitution of India. Any unreasonable restrictions on fundamental rights, that are imposed by a statute or executive orders are liable to be struck down as unconstitutional by a competent court. This Hon'ble Court has held in *Express Newspapers (Private) Ltd. and Anr. Vs. The Union of India (UOI) and Ors., AIR 1958 SC 578* that if any limitation on the exercise of the fundamental right under Art. 19(1)(a) does not fall within the four corners of Art. 19(2) it cannot be upheld. The Hon'ble Court further held that there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas.

vi) That “Freedom of speech and expression” guaranteed under Article 19(1)(a) has been held to include the right

to acquire and disseminate information. It includes the right to communicate it through any available media whether print or electronic. The Hon'ble Supreme Court has given a broad dimension to Article 19(1)(a) by laying down that freedom of speech under Article 19(1)(a) not only guarantees freedom of speech and expression, it also ensures the right of the citizen to know and the right to receive information regarding matters of public concern. In light of the above observation, it is submitted that the the impugned rules impose restrictions on the right of freedom of speech and expression which have no sufficient nexus with the grounds laid down for restriction of freedom of speech and expression.

vii) This Hon'ble Court has laid down in a catena of decisions that in interpreting a constitutional provision, the court should keep in mind the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation. The websites like that of the 1st Petitioner and other sites which provide citizens a platform to voice their opinions and to view the opinions expressed by others have a great role to play in the current environment in fostering public discourses and

debates. Any unreasonable restrictions on users in expressing their views online will be a violation of their right to freedom of speech and expression.

viii) It is submitted that in judging whether a statute is constitutional the effect that the statute will have on the fundamental rights of citizens has to be examined. The effect of impugned rules will be strict censorship by intermediaries of content posted by users. Such an action by the intermediaries will affect the fundamental right of freedom of speech and expression guaranteed by Article 19(1) of the Constitution of India. A five-judge bench of the Hon'ble Supreme Court held in Bennett Coleman & Co. Vs. Union of India (UOI), AIR1973 SC 106, (1972) 2 SCC 788 has held that:

> "*The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgment of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject matter of the impeached law or action.*"

As the direct effect of the impugned rules will be curtailment of the freedom of expression of users of websites like that of the 1st Petitioner and other

websites the impugned rules are liable to be struck down.

ix) That this Hon'ble Court considered the issue of restrictions on freedom of speech in detail in Sakal Papers (P) Ltd. Vs. The Union of India, AIR 1962 SC 305. The Hon'ble Court held in para 31 of the judgment that :

> *"the right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under clause (2) of Article 19."*

This Hon'ble Court further held that

> " *The correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely what manner and method has been adopted by the State in placing the restriction*".

x) This Hon'ble Court has held in *S.Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574* that "*the commitment to freedom demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The*

anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably like the equivalent of a 'spark in a power keg'." The impugned rules result in censorship of a broad spectrum of information without looking at the effect such speech would have on the public interest.

xi) The impugned rules result in removal of any content that is disliked by any person or is not in his interest. This Hon'ble Court has held in Naraindas v. State of Madhya Pradesh [1974] 3 SCR 624 that:

> "It is our firm belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom not only for the thought that we cherish, but also for the thought that we hate. As pointed out by Mr. Justice Holmes in Abramson v. United States, 250 U.S. 616: "The ultimate good desired is better reached by free trade in ideas--the best test of truth is the power of the thought to get itself accepted in the competition of the market." There must be freedom of thought and the mind must

be ready to receive new ideas, to critically analyse and examine them and to accept those which are found to stand the test of scrutiny and to reject the rest.". This Hon'ble Court has held in *Ajay Goswami v. Union of India, AIR 2007 SC 493* that "We observe that, as decided by the American Supreme Court in United States v. Playboy Entertainment Group, Inc, 146 L ed 2d 865, that, "in order for the State to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

The impugned rules curtail the right to freedom of expression of users of the 1st Petitioner's website by mandating removal of content just because a person or an organisation finds it not to his liking. Thus the impugned rules go beyond the permissive limits to freedom of speech and expression that can be imposed by a statute. It is submitted that Sub-rules (2) and (4) of Rule 3 of impugned Rules, 2011 are violative of the fundamental right to freedom of speech and expression guaranteed under Article 19(1) of the Constitution of India and are liable to be struck down.

xii) Because the impugned rules impose unreasonable restrictions on the 1st Petitioner's right to practice any profession, or to carry on any occupation, trade or business as guaranteed by Article 19 (1) (g) of the Constitution of India by forcing upon it to acquire an adjudicative role which leads to censorship or suffer litigation or criminal liability or both at the hands of the Respondent and private parties.

xiii) Because the impugned Rules impose a significant burden on the 1st Petitioner forcing it to screen content and exercise online censorship which in turn impacts the Freedom of speech and expression of its customers thereby risking a loss of its large consumer base or incurring legal costs and facing criminal action for third party, user generated content. It is submitted that the 1st Petitioner is made to choose between the option of taking down content which could in turn result in losing the confidence of its users or the option of taking a legal risk of criminal prosecution by letting the content stay online for numerous posts every day. Thus, the impugned rules make it difficult for the Petitioners to run their business. It is submitted that while a private party may allege that certain content is defamatory or infringes copyright, such determinations are usually made by judges and can involve factual

inquiry and careful balancing of competing interests and factors. The 1st Petitioner is not well-positioned to make these types of determinations but is being forced to adopt an adjudicative role in making such determinations. It is submitted that as per the impugned rules the 1st Petitioner is required to take an action within thirty six (36) hours of receiving a request by an aggrieved person, however 1st Petitioner is incapable of making legal determinations.

xiv) In *Sakal Papers (P) Ltd. Vs The Union Of India 1962 AIR 305: 1962 SCR (3) 842* it was held that:

> "It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State,

public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public". The impugned rules in the garb of regulating intermediaries end up controlling the freedom of expression of citizens.

It was held in Bennett Coleman & Co. & Ors vs Union Of India 1973 AIR 106, 1973 SCR (2) 757 that

> "Publication means dissemination and circulation. The press has to carry on its activity by keeping in view the class of readers, the,conditions of labour, price of material, availability of advertisements, size of paper and the different kinds of news comments and views and advertisements which are to be published and circulated. The law which lays excessive and prohibitive burden which, would restrict the circulation of a newspaper will not be saved by Article 19 (2). If the area of advertisement is restricted, price of paper goes up. If the price goes up circulation will go down. This was held in Sakal Papers case (supra) to be the

direct consequence of curtailment of advertisement. The freedom of a newspaper to publish any number of pages or to circulate it to any number of persons has been held by this Court to be an integral part of the freedom of speech and expression. This freedom is violated by placing restraints upon it or by placing restraints upon something which is an essential part of that freedom. A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would affect the fundamental rights under Article 19 (1)(a) on the aspects of propagation, publication and circulation."

xv) It is most humbly submitted that in this digital age intermediaries like the 1st Petitioner by providing a platform enabling free expression of ideas provides users a medium that makes it easier for users to express their opinion and views. The 1st Petitioner thus offers greater options for users to express their views and opinions when compared to a newspaper. The 1st Petitioner has the same kind of rights as upheld by this Hon'ble Court in Sakal Papers case and Bennet Coleman case. The impugned rules make it

impossible for the 1st Petitioner and other intermediaries to run their business as it imposes unreasonable restrictions on the freedom of expression of users and by forcing the intermediaries to indulge in censorship.

xvi) The petitioners are receiving notices and phone calls from cyber cells and police stations in various states asking them to delete content and also asking them to provide information of users. These frequent notices and threats from police officers on the employees of the 1st petitioner make it difficult for the petitioners to run their business.

xvii) Because Subrules (2) and (4) of Rule 3 of the impugned rules are unreasonable and arbitrary and thus are liable to be struck down.

xviii) It is most humbly submitted that Sub-rule (2) of Rule 3 mandates intermediaries to place restrictions on the kind of content that a user can post by listing a broad list of information. Sub-rule (2) of Rule 3 mandates users not to host information included in a broad list that includes information that is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libelous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging

money laundering or gambling, or otherwise unlawful in any manner whatever. The subject matter of information listed in sub-rule (2) of rule 3 including words like blasphemous, grossly harmful, harassing, invasive of another's privacy, racially, ethnically objectionable and disparaging is highly subjective and is not defined either in the rules or in the Act, or in any statute for that matter. Thus the intermediaries applying these rules are left in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom from them as well as the users they are forced to censor. The action of the respondent in notifying impugned rules is highly unreasonable and arbitrary.

xix) The usage of words which are not defined makes the impugned rules ambiguous and subject to misuse. When the provision is ambiguous, the restrictions on freedom of expression will transcend beyond the reasonable restrictions that can be imposed under Art.19 (2) of the Constitution.

In the U.S, the doctrine “vague as void” was applied in the case of *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) and it was held that:

> “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for

resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

This Hon'ble Court has stressed on the need to avoid vague expressions in statutes in A.K. *Roy v. Union of India, (1982) 1 SCC 271.* The impugned rules with the vague provisions is unreasonable and arbitrary and is ultra vires of Article 14 of the Constitution of India. It was held in *K. A. Abbas vs Union Of India 1971 AIR 481: 1971 SCR (2) 446* that:

> "Where however the law admits of such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution, This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual"

xx) The Lok Sabha Committee on Subordinate legislation which reviewed the impugned rules noted that terms used in the Rules are not defined either in the Act or in the Rules and recommended in its 35th report

submitted before the Lok Sabha on on 21st March 2013 that:

> *"The Committee have desired the Ministry of Communications & Information Technology to have a fresh look at the Information Technology (Intermediary Guidelines) Rules, 2011, and make such amendments as necessary to ensure that there is no ambiguity in any of the provisions of the said rules."*

xxi) That Sub-rule (4) of rule 3 that mandates that the intermediary, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours to disable such information that is in contravention of sub-rule (2), does not provide for an opportunity to the user who has posted the content to reply to the complaint and to justify his case. The rule that mandates the intermediary to disable the content without providing an opportunity of hearing to the user who posted the content is violative of the principles of natural justice and is thus highly arbitrary. This Hon'ble Court in *Bidhannagar (Saltlake) Welfare Assn. Vs. Central Valuation Board & Ors, 2007(6) SCC 668*

stressed the importance of providing an opportunity for hearing when a right is taken away.

xxii) The draft rules provided for the intermediary to take down content on being informed by an authority mandated under the law for the time being in force. This provision was changed in the impugned rules by mandating the intermediary to take down content on being informed by an affected person. This provision that results in taking down of content without any involvement of a government authority or a competent court will result in a private censorship mechanism without any checks and safeguards. Such a provision is highly unreasonable and arbitrary. In Om Kumar v. Union of India (2001) 2 SCC 386, 408 this Hon'ble court held that in case where a legislation imposes reasonable restrictions, yet if the statute permits the administrative authorities to exercise power or discretion while imposing restriction, the administrative action needs to be tested on the principle of proportionality. The impugned rules result in leaving the power to impose restrictions on private intermediaries with no safeguards available to the citizen. Such an action is highly unreasonable and arbitrary.

xxiii) That Sub-rule (4) of rule 3 results in endowing an adjudicating role to the intermediary in deciding questions of fact and law, which can only be done by a competent court. Such a provision of the rules is liable to be misused and is highly unreasonable and arbitrary.

xxiv) The Hon'ble Supreme Court in Bidhannagar (Salt Lake) Welfare Association Vs. Central Valuation Board and Ors., AIR 2007 SC 227:(2007)6 SCC 668 held that "When a substantive unreasonableness is to be found in a statute, it may have to be declared unconstitutional." The Hon'ble Supreme Court has held in Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, AIR 1986 SC 515 that:

> *"On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19 (1) (a) of the Constitution".*

xxv) The Copyright Act, 1957 as amended by the Copyright (Amendment) Act, 2012 provides for an Intermediary to put back content if the holder of the copyright who has complained about the infringing content does not produce an order from a competent court within 21 days. The impugned rules do not have a provision that mandates the complainant to produce an order from a competent court for the intermediary to continue blocking access to any content.

xxvi) The Digital Millennium Copyright Act (DMCA) in the US provides for a notice and counter-notice mechanism by which a person who posts content online is given an opportunity to reply to a take-down notice. The intermediary or the service-provider on receiving a counter-notice has to put back the content that was taken down earlier on the basis of a complaint received from a rights-holder. The impugned rules do not have a counter-notice and put-back provision by which a person who has posted content gets an opportunity to reply to the complaint and to ensure that access to the content that is taken down is restored.

xxvii) Because the impugned rules, in particular Sub rules (2) and (4) of Rule 3 which have been notified by the Respondent by way of sub-ordinate legislation are ultra vires the parent Act and are not reasonable and are not

in consonance with the legislative policy which can give effect to the object of the Parent act

xxviii) It is a well-settled principle of interpretation of statutes that the conferment of rule-making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto. The Central Government obtains the source of power to issue the impugned rules from the provisions of the Information Technology Act, 2000. The rule making power has to be strictly confined to the boundaries specified as per the Act and cannot result in expanding the scope of the Act. Chapter XII of the Information Technology Act, 2000 (as amended) provides exemption from liability of intermediaries in certain cases. Section 79 of the Act provides for a “safe harbor” or exemption from liability of an intermediary. The rationale being that owing to the technical, economic and legal impracticalities, intermediaries cannot be expected to regulate or monitor third party or user generated content which they host on their servers or enable access to. The legislative and judicial history related to intermediaries' liability and reasons behind this amendment evince that Legislature intended to “facilitate the robust development and

world -wide expansion of electronic commerce, communications, research, development, and education . In order to accomplish these goals, Legislature created a set of “safe harbors” designed to “provide ‘greater certainty to intermediaries concerning their legal exposure for infringements that may occur in the course of their activities.

xxix) Section 79 of the IT Act provides the intermediaries protection from liability arising out of user generated content. This is in line with the position followed in countries like the United States of America (US) and members of the European Union (EU). The Digital Millennium Copyright Act in the US and the Directive on Electronic Commerce in the EU provides protection to intermediaries from liability arising out of content posted by users of services provided by intermediaries. S. 79 of the Act mandates the intermediaries to observe due diligence while discharging their duties under the Act and to observe such other guidelines as prescribed by the Central government in this behalf. The Central Government is thus provided powers to prescribe guidelines relating to duties to be discharged by the intermediaries. However, instead of providing a safe harbour to the intermediaries as intended by the Legislature, the impugned rules delegate the task of

policing content to the private intermediaries. Rules whether made under a Statute, must be intra vires the parent law under which power has been delegated. They must also be in harmony with the provisions of the Constitution and other laws. If they do not tend in some degree to the accomplishment of the objects for which power has been delegated to the authority, they are bound to be unreasonable and therefore void. Further, private parties such as the intermediaries are forced to adopt an adjudicative role wherein they are compelled to scrutinize and limit user content while performing functions traditionally performed by courts such as defamation, intellectual property rights infringement etc. Thus, the impugned rules are not reasonably related to the purposes of the enabling legislation for which the Parliament never intended to give authority to make such rules; and thus they are they are unreasonable and ultra vires the Parent Act.

xxx) The Respondent who has been authorized to make subsidiary Rules and Regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder. It cannot, in the garb of making Rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of

the Act. Impugned rules are in excess of the provisions contained in Section 79 of the Act as amended. Various provisions contained in impugned Rules have, in fact, made additions to the provisions in Section 79 of the Act. Rules have thus added and amended the provisions in the Act.

xxxi) The Respondent obtains the source of power to issue these rules from two provisions of the Act :

S.79 (2) (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.

S.87 (2) (zg) – the guidelines to be observed by the intermediaries under sub-section (2) of section 79

Thus the rule making power of the Central Government is limited to prescribing other guidelines in this behalf**.** These guidelines can only be related to "due diligence" to be observed by the intermediary while discharging its duties under the Act

xxxii) The duties of the 1st Petitioner, an intermediary under the Act are restricted to the following:

Under S. 67C of the Act Intermediary shall preserve and retain such information as may be specified for such duration and in such manner

and format as the Central Government may prescribed

Section 69 of the Act relates to Power to issue directions for interception or monitoring or decryption of any information through any computer resource the subscriber or intermediary or any person in-charge of the computer resource shall, when called upon by any agency referred to in sub-section (1) extend all facilities and technical assistance to—

(*a*) provide access to or secure access to the computer resource generating transmitting, receiving or storing such information; or

(*b*) intercept, monitor, or decrypt the information, as the case may be; or

(*c*) provide information stored in computer resource.

Section 69A of the Act relates to blocking public access of any information through any computer resource the intermediary has to comply with the direction issued by the government in this regard.

Section 69B of the Act relating to monitoring and collecting traffic data or information through any computer resource for cyber security the intermediary or any person in-charge or the computer resource

shall, when called upon by the agency authorized, provide technical assistance and extend all facilities to such agency to enable online access or to secure and provide online access to the computer resource generating, transmitting, receiving or storing such traffic data or information.

xxxiii) The government can prescribe guidelines only on behalf of the above duties of the intermediaries. But impugned rules have widened the scope of the Act by legislating on information that can be posted by a user and listing a broad list of of information that can be considered as unlawful and this is not in any way connected to the duties to be discharged by the intermediaries under the Act.

xxxiv) Thus, the impugned rules are not reasonably related to the purposes of the enabling legislation for which the Parliament never intended to give authority to make such rules; and thus they are unreasonable and ultra vires the Parent Act.

xxxv) Because Sub-rule (7) of Rule 3 of the impugned rules violate the right to privacy as provided by Article 21 of the Constitution of India and established by a plethora of judicial decisions of this Hon'ble court and is thus unconstitutional.

Sub-rule (7) of rule 3 mandates the intermediary, when required by lawful order, to provide information or any such assistance to Government Agencies who are lawfully authorized for investigative, protective, cyber security activity. The requirement for lawful order is modified while mandating that the information or any such assistance shall be provided for the purpose of verification of identity, or for prevention, detection, investigation, prosecution, cyber security incidents and punishment of offenses under any law for the time being in force, on a request in writing stating clearly the purpose of seeking such information or any such assistance. The requirement of giving information about users by the intermediary on a mere written request from an agency could have serious implications on the right to privacy of citizens. Sub-rule (7) of Rule 3 of the impugned rules are violative of the right to privacy which is an integral part of the fundamental right of right to life and personal liberty guaranteed to all and is liable to be struck down as unconstitutional.

xxxvi) Because the impugned rules in their entirety are unconstitutional and are liable to be struck down.

xxxvii) The provisions of the impugned rules operate by asking the intermediary to restrict the freedom of users to post or upload content. Such a restriction on the users are

a violation of the fundamental right to freedom of speech and expression guaranteed by the Constitution of India. Sub-rules (2), (4), (5) and (7) of Rule 3 are the most important provisions of the rules and these rules are unconstitutional and ultra vires of the parent act. As the rules have provisions that are beyond the reasonable restrictions that can be imposed as per Article 19(2) of the Constitution, these provisions are not severable from the rest of the legislation and the rules as a whole is liable to be struck down as unconstitutional and ultra vires of the parent act.

> *"Where a law purports to authorize the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as if may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the*

*State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional an*d valid to any extent.".

xxxviii) The impugned rules, with the broad list of unlawful information mentioned in sub-rule (2) of rule 3, can be used for purposes not sanctioned by the Constitution, and hence the rules, as a whole, are liable to be held as unconstitutional and struck down.

xxxix) That the impugned rules place a burden on the intermediaries to decide on the lawful nature of the content as a pre-condition for exemption from liability. The intermediaries, on receiving a complaint, to ensure that they continue to receive the protection offered by Section 79 of the Act, are forced to disable access to the content posted by a user.

5. That the Petitioner has not filed any other Petition before this Hon'ble Court or any other Court seeking same or similar relief.

6. The Petitioner submits that there exists no other efficacious remedy except to approach this Hon'ble Court.

PRAYER

Therefore, the Petitioner humbly prays that this Hon'ble Court be pleased to:

a. To issue an appropriate writ, order or direction in the nature of Writ of Certiorari quashing the Information Technology (Intermediaries Guidelines) Rules, 2011 as illegal, null and void as the same is ultravires of the Constitution;

b. To issue an appropriate writ, order or direction directing the Respondent No.1 to promulgate new rules in line with the statement and objects of the Information Technology Act, 2000 (21 of 2000).

c. To issue such other appropriate writ, order or directions as this Hon'ble court may deem just and proper to issue in the circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONERS AS IN DUTY BOUND SHALL EVER PRAY.

DRAWN AND FILED BY

M/s. Lawyer's Knit & Co.
Advocate for the Petitioners

Place: New Delhi
Drawn on: 13.03.2013
Filed on: 11.04.2013

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. OF 2013

IN THE MATTER OF:
Mouthshut.com(India) Private Limited & Anr.

Petitioners

Versus

Union of India & Ors.
Respondents

AFFIDAVIT

I, Faisal farooqui, son of Idris Farooqui, aged about 36 years, resident of Mumbai, India do hereby solemnly affirm and state as under:-

1. I say that I am the Petitioner No.2 and Chief Executive Officer of the Petitioner No.1 in the above mentioned matter and as such conversant with the facts and circumstances of the case and hence, competent to swear the present affidavit.

2. I say that the contents of Synopsis & List of Dates at pages B to H and contents of Writ Petition as contained at para 1 to 7 at pages 1 to 49 are true and correct to my knowledge and information derived from the record of the case and those submissions of law made in question of law, ground and para 1 of Writ Petition, Prayers and Applications are true and correct to the best of my knowledge and belief.

3. That the contents of averments made are true and correct. I say that the Annexure P-1 to P-5 at pages 50 to 75 produced along with the Writ Petition are true and correct to my knowledge, no part of its is false and nothing material has been concealed therefrom.

4. That the averments of facts stated herein above are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

DEPONENT

VERIFICATION:

Verified at Mumbai on this 16th day of March 2013 that the contents of the above affidavit are true and correct to the

best of my knowledge and belief. No part of this affidavit is false and nothing material has been willfully concealed therefrom.

DEPONENT