

## Avnish Bajaj vs State (Bazee.com case)

Summary : CEO of E-Commerce Portal was arrested and given bail later under Section 67 of IT Act on account of an obscene video uploaded on Bazee.com for sale. He proved Due Diligence but in 2005, Information Technology Act did not have any provisions related to 'Intermediary' !

### Delhi High Court

**Avnish Bajaj vs State (N.C.T.) Of Delhi on 21 December, 2004 (2005) 3 CompLJ 364 Del, 116 (2005) DLT 427**

JUDGMENT Vikramajit Sen, J.

1. Allowed, subject to all just exceptions.
2. The accused is the CEO of Baaze. Com, which Company facilitates the sale of any property, for which it receives commission and also generates revenue from advertisements carried on its web pages. There is no gainsaying that it does not own the items offered for sale, the payment and delivery of which can be via a wholly independent agency. In the present case, Counsel for the State has argued that the accused was remiss, at the pain of culpability, in not stopping payment through Banking channels after learning of the illegal nature of the transaction. This prima facie indicates that, at the present stage of investigation the sale consideration was not routed through the accused. It is also not the case of the prosecution that the actual recording was viewable on the website. She, however, contends that the Item's description "DPS Girl having fun" should have raised alarm.
3. It has been strenuously contended that if bail is not granted it will adversely impact e-commerce, for which India may be the eventual loser. These are not considerations which would prevail or tamper the Courts decision whether to grant or reject bail.
4. A preliminary objection has been raised to the effect the petitioner should have first approached the Sessions Judge, although this Court has concurrent jurisdiction under Section 439 of the Code of Criminal Procedure, 1973. My attention has been drawn to K.C. Jyaa and etc. v. State of Karnataka, 1985 Cr.L.J. 214; Rameshchandra Kashiram Vora and etc. v. State of Gujarat and Anr., 1988 Cr.L.J. 210; and Hajjalisher v. The State of Rajasthan, 1976 Cr.L.J. 1658 where the Karnataka, Gujarat and Rajasthan High Courts have favored this view. Per contra, in Sri Ram v. Panna Lal, 2nd (1976) II Delhi 401 this Court has struck down its own High Court Rules which prohibited the filing of revisions in non-appealable cases unless the Sessions Judge had been approached. The Notification dated 15.12.2004 must receive similar consideration. Since High Courts enjoys concurrent jurisdiction it would be a salutary practice to direct the petitioners to approach the Sessions Judge first, but that would remain a self-imposed constraint, akin to the exercise of the extraordinary jurisdiction reposed in it by virtue of Article 226 of the Constitution. The matter has been argued at great length and the State ought to have articulated this objection at the very first instance, on the previous date of hearing.
5. Mr. Jaitely, has underscored that in Section 67 of the Information Technology Act, 2000 an offence is committed by a person who publishes or transmits any material which is lascivious or appeals to the prurient interest. Sections 292 and 294 of the Indian Penal Code have also been mentioned which contemplate the selling, letting on hire, distribution or public exhibition of obscene matter. He has emphasized that the provision does not bring within its sweep the causing of the transmission in contradistinction to the publication of obscene material. Prima facie it has not been established from the evidence that has been gathered till date that any publication took place by the accused, directly or indirectly. The actual obscene recording/clip cannot be viewed on the portal of Baaze.com. This question will have to be decided. It has been argued on behalf of the accused that on coming to learn of the illegal character of the sale, remedial steps were taken within 38 hours, since the intervening period was a weekend. Prima facie Baaze.com has endeavored to plug the loophole although it is to be expected that similarly placed persons should do so with immediate alacrity. This case will indubitably bring to the fore the dangers endemic in this business, which must be addressed forthwith.
6. It has also been shown that only 14 days J/C General had been requested for on the submission that "investigation reveal that same MMS clipping was listed for sale on 27th November, 04 in the name of DPS Girl having fun". It has also been contended that initially the prosecution had conceded the grant of bail, but it was subsequently argued to the contrary.

7. Learned Counsel for the accused relies on *Gurcharan Singh and Ors. v. State (Delhi Administration)*, AIR 1978 SC 179. The normal rule is that ordinarily bail should be granted, and its refusal should not act as a substitute for punishment.

8. The accused has actively participated in the investigations, and even before me it has not been suggested to the contrary by Counsel for the State. The nature of the alleged offence is such that the evidence has already crystallized and may even be tamper proof. Even though the accused is no longer an Indian National, he is of Indian origin with family roots in our country. It cannot possibly be argued that a foreign national is disentitled to the grant of bail. Reference to *Ram Govind Upadhyay v. Sudarshan Singh and Ors.*, may not be relevant at this stage since the evidence that has been collected indicates only that the obscene material may have been unwittingly offered for sale on the website; and that heinous nature of the alleged crime may be attributable to some other person.

9. The accused is enlarged on bail subject to furnishing two sureties in the sum of Rs. 1,00,000/- each to the satisfaction of the concerned Court/ Metropolitan Magistrate/Duty Magistrate. The accused shall also not leave the territories of India without the leave of the Court and for this purpose shall surrender his passport to the Magistrate. It is implicit in the grant of bail that he shall participate and assist in the investigation.

10. In view of the aforesaid directions, the Bail Application stands disposed of.

11. A copy of this Order be given to Counsel for both the parties.