

Google India Pvt Ltd V M/s Visaka Industries Limited (2009)

High Court of Andhra Pradesh

Google India Pvt. Ltd.

Versus

M/s. Visaka Industries Limited and another

Criminal Petition number 7207 OF 2009 [19-04-2011]

THE HONOURABLE SRI JUSTICE SAMUDRALA GOVINDARAJULU

:ORDER:

The petitioner/A-2 is accused of offences punishable under Sections 120-B, 500, 501/34 I.P.C in C.C. No.679 of 2009 on the file of XI Additional Chief Metropolitan Magistrate, Secunderabad along with another. The petitioner/A-2 is Google India Private Limited represented by its Managing Director (Sales and Operations). The 1st respondent/complainant is Visaka Industries Limited, Secunderabad represented by its authorised signatory who is its Deputy Manager-Legal. The complainant is engaged in business of manufacturing and selling of Asbestos cement sheets and allied products. It is alleged that A-1 viz., Gopala Krishna is a Co-ordinator "Ban Asbestos India" a group which is hosted by A-2 and publishes regular articles in the said group and that on 21.11.2008 an article was published in the said group and it was captioned as "poisoning the system; Hindustan Times" aiming at a single manufacturer of Asbestos cement products viz., the complainant and names of renowned politicians of the country G.Venkata Swamy and Sonia Gandhi who have nothing to do with the ownership or management of the complainant-company were named in that article. It is further alleged that on 31.07.2008 another article captioned as "Visaka Asbestos Industries making gains" and that both the above articles contained defamatory statements against the complainant and they are available in Cyber space in the form of articles for world wide audience. In the complaint, details of defamatory remarks made in several other articles published by A-1 in A-2 group are given in detail, which details may not be necessary for the purpose of disposal of this criminal petition.

2) It is contended by the senior counsel appearing for the petitioner/A-2 that actions of intermediaries such as Google Inc., which is a service provider providing platform for end users to upload content, does not amount to publication in law and consequently the question of holding such intermediaries liable for defamation does not arise. Senior Counsel appearing for the petitioner placed reliance on Section 79 of the Information Technology Act, 2000 (in short, the Act) in support of this contention.

3) Section 79 which occurs in Chapter XII of the Act originally as it stood enacted in the year 2000 reads as follows:

"CHAPTER XII

NETWORK SERVICE PROVIDERS NOT TO BE LIABLE IN CERTAIN CASES

79. Network service providers not to be liable in certain cases:

For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

Explanation. For the purposes of this section,

(a) "network service provider" means an intermediary;

(b) "third party information" means any information dealt with by a network service provider in his capacity as an intermediary."

The said provision exempts network service providers from liability under the Act, rules or regulations made thereunder for any third party information or data made available by him. It did not exempt a network service provider from liability muchless criminal

liability for the offences under other laws or more particularly under the Indian Penal Code. Further, the above provision exempts network service provider from liability, only on proof that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. Proof in that regard can be let in by way of leading evidence by the accused.

Therefore, the said question is a question of fact which this Court may not go into in this petition filed under Section 482 Cr.P.C.

4) Chapter XII of the Act including Section 79 was amended by the Information Technology (Amendment) Act, 2008 (10 of 2009) dated 05.02.2009 with effect from 27.10.2009 by way of substituting the following in the place of original chapter:

"CHAPTER XII: INTERMEDIARIES NOT TO BE LIABLE IN CERTAIN CASES

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 functions 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 induces whether by threats or promise or otherwise in the commission of the unlawful act;
- (b) upon receiving actual knowledge, or on being notified by 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.

Explanation.- For the purposes of this section, the expression "third party information" means any information dealt with an intermediary in his capacity as an intermediary."

It is only under the said amendment, non-obstanti clause was incorporated in Section 79 keeping application of other laws outside the purview in a fact situation covered by the said provision. Now, after the amendment, an intermediary like a network service provider can claim exemption from application of any other law in respect of any third party information, data or communication link made available or hosted by him; provided he satisfied the requirements under Sub-section (2) of Section 79. Further, as per amended Sub-section (3) of Section 79, the exemption under Sub-section (1) cannot be applied by any Court and cannot be claimed by any intermediary in case the intermediary entered into any conspiracy in respect thereof. Also, the intermediary cannot claim exemption under Sub-section (1) in case he fails to expeditiously remove or disable access to the objectionable material or unlawful activity even after receiving actual knowledge thereof. In the case on hand, in spite of the 1st respondent issuing notice bringing the petitioner about dissemination of defamatory material and unlawful activity on the part of A-1 through the medium of A-2, the petitioner/A-2 did not move its little finger to block the said material or to stop dissemination of the unlawful and objectionable material.

Therefore, the petitioner/A-2 cannot claim any exemption either under Section 79 of the Act as it stood originally or Section 79 of the Act after the amendment which took effect from 27.10.2009. The present case in the lower Court was instituted in January, 2009 relating to the offences which are being perpetrated from 31.07.2009 onwards i.e., since long prior to the amendment to the said provision.

5) There is no exemption of any criminal liability in respect of a company which is a juristic person and which has no body that can be damned or contemned. In case found guilty, the petitioner company can be awarded with appropriate punishment though not corporal punishment. In that view of the matter, I find no merit in this criminal petition.

6) Accordingly, the Criminal Petition is dismissed.