

Google India Pvt Ltd V M/s Visaka Industries Limited (2016)

Google India Private Limited vs M/S Visaka Industries Limited And ... on 18 November, 2016

Google India Private Limited..Appellant

M/S Visaka Industries Limited and 2 others.. Respondents

THE HONBLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL NO.505 OF 2016

JUDGMENT:

The 2nd defendant-Google India Private Limited in O.S.No.143 of 2010 filed the present second appeal under Section 100 of C.P.C, challenging the decree and judgment passed in A.S.No.50 of 2014 by the I Additional Chief Judge, City Civil Court, Secunderabad, reversing the judgment of XVIII Junior Civil Judge-cum-Additional Rent Controller, Secunderabad in O.S.No.143 of 2010.

The Appellate Court while declaring that message ID c9c2524a080731712p120a3110rc120b94a135de0b2@mail.gmail.comURLhttp://groups.google.co.in/group/banasbestosindia/msgf3 0988efldfd0826d?hl=en&dmode=source dated 31.07.2008 (hereinafter referred to as Message 1) and message ID c9c2524a0811202054t4ae0a4dudec0dec0d29fc4b0901@mail.gmail.comURLhttp://groups.google.co.in/group/banasbestosindia/msg/6 cde794a4082157?hl=en&dmode=source dated 21.11.2008 (hereafter referred to as Message 2) posted by the 1st defendant on the blogsite of the defendants 2 & 3 as defamatory in nature and directed the defendants 2 & 3 to withdraw Message 1 & Message 2 posted by the 1st defendant on their blogsite, by mandatory injunction.

For convenience of reference, the ranks given to the parties in O.S.No.143 of 2010 will be adopted throughout the judgment.

The plaintiff M/s Visaka Industries Limited is a registered company carrying on business of asbestos cement sheets since 1981, having 7 manufacturing plants and more than 25 marketing offices all over India, filed suit claiming declaration that the Messages 1 & 2 are defamatory and also sought for mandatory injunction for removal of the Messages 1 & 2 posted by the 1st defendant in the blogsite of the defendants 2 & 3.

The 1st defendant is a coordinator of Ban Asbestos India, a group which is hosted by 2nd defendant, publishes regular articles regarding various issues. On 21.11.2008, the 1st defendant posted an article with a caption Poisoning the system: Hindustan Times, aimed at the plaintiffs company, as if it is a single manufacturing company of Asbestos cement products. Further, the names of renowned politicians like Sri G.Venkataswamy and Smt. Sonia Gandhi who have nothing to do with the ownership or management of the plaintiff company were mentioned in the said article. He also published an article dated 31.07.2008 with a caption Visaka Asbestos Industries making gains. The said article contained defamatory statement against the plaintiffs company which was available for worldwide audience.

The asbestos cement sheets are being manufactured in India for more than 70 years and there is no single case where the health of the people has been effected by usage of Chrysotile asbestos (white) fibre which is a raw material for manufacturing asbestos cement sheets. The Government of India has permitted manufacturing Asbestos cement sheets with Chrysotile asbestos fibre and granted environmental clearance for all manufacturing units of the plaintiff.

The acts and misdeeds of the defendants in continuing the postings of the above said article in the cyber space aimed not only the company but also its employees. There are other industries like Everest group, Ramco group who are engaged in the manufacture of asbestos cement sheets, but the plaintiff company is singled out in both the above mentioned articles and those defendants are trying to bring down the image of the plaintiffs company by running Hate Campaign against them through the said articles. Even though there is no ban on production and usage of asbestos products in 95% of the world nations including countries like USA and Canada,

the contents of the above said article read that Visaka Industries Manufacturers asbestos products i.e., banned in 50 countries is a defamatory statement. The plaintiff further contended that the contents of the said article dated 30.03.2008 read that the plaintiff company belongs to Sri G. Venkataswamys family and in the article dated 21.03.2008 it was titled as poisoning the system: Hindustan Times. The article posted on 31.07.2008 under the caption it has opened asbestos cement plant in Raebareli, Uttar Pradesh (Parliamentary constituency of Smt. Sonia Gandhi) to signalling patronage the asbestos industry enjoys the highest political level and leaders like Mrs. Gandhi and Venkataswamy are least concerned about the death toll due to their profit making with a malafide intention to bring down its image in India and world wide. Such statements of defendant no.1 posted in blogsite which are against the plaintiffs company interest caused annoyance and business sufferance which cannot be compensated by granting monetary compensation.

The 2nd defendant who is an Internet Service Provider (ISP) has made it easier than ever before to disseminate defamatory statement to worldwide audience without taking any care to prevent it: that the defendants in connivance with each other have intentionally disseminated the above articles in the cyber space to bring down the image of the plaintiff company to cause damage to its reputation and harm its business, which is a cyber crime.

The plaintiff on noticing the defamatory articles in the blogsite of defendants 2 & 3 issued a notice dated 09.12.2008, requesting the defendants 1 & 2 to delete the articles posted by 1st defendant, while claiming compensation of Rs.20-00 crores towards damage caused to the plaintiffs company reputation, but the defendants did not respond. Therefore, criminal prosecution was launched against defendants 1 & 2 which is registered as C.C.No.679/09 on the file of XI Additional Chief Metropolitan Magistrate at Secunderabad. The defendants 2 & 3 filed a Criminal Petition No.7207 of 2009 before this Court to quash the criminal case against them.

The plaintiffs company sent entire information on 13.10.2009 to the 3rd defendant and also addressed a letter dated 21.11.2009 and on receipt of the same, a reply notice dated 16.12.2009 from defendants 2 & 3 was issued, informing to obtain a direction to remove the above referred defamatory content, through their website. Since the Messages 1 & 2 in the blogsite of defendants 2 & 3 are defamatory, the plaintiff sought for the aforesaid reliefs against the defendants 1 to 3.

The 1st defendant remained exparte and the 2nd defendant filed written statement refuting the contentions raised in the plaint by the plaintiff while contending that the 2nd defendant is a subsidiary of 3rd defendant i.e. Google Inc., which is a company incorporated under the laws of United States of America. It is further contended that the 2nd defendant is incorporated under the provisions of Companies Act and that the services on Google groups available on Google groups website are not controlled by 2nd defendant and that the reliefs claimed by the plaintiffs company against the 2nd defendant are misdirected and not maintainable.

The 2nd defendant contended that the Google groups website is a platform enabling users to post their content online which was developed outside India and that no employee or defendant no.2 has access or ability to remove or delete the content when once it is posted on the Google Groups website. The criminal complaint filed against the 2nd defendant is unjustified as it has any connection or no control over the Google Groups website. It is further contended that the 2nd defendant does not act as a representative or agent of the 3rd defendant, particularly, for the services on Google Groups website. It is also submitted that the Criminal complaint against 2nd defendant is unjust as it has no connection or control over the Google Groups website. The 2nd defendant is not acting as a representative or agent to 3rd defendant for the services of Google Group website. The 2nd defendant further contended that the above article in question does not amount to defamatory statement.

The 3rd defendant who is a service provider did not perform the functions of publishing the alleged content and upholding any articles. Such article is completely written, selected, edited by the concerned author and therefore in the control of author and the service is nothing but an online bulletin board where users upload articles and views subject to certain guidelines which clearly advises users not to upload defamatory content.

The 2nd defendant is contended that under Section 79 of Information Technology Act, 2002, an intermediary service provider is not liable for content uploaded by third parties. The allegation that the 2nd defendant did not take due care and diligence to prevent uploading of allegedly defamatory content is incorrect and the 2nd defendant does not act as a moderator for any of the groups

including the specific group in question and it has no legal obligation to scrutinize, edit or monitor the material as authored by a user of the service prior to it being uploaded on the website. Therefore, the 2nd respondent being an intermediary has no liability and not responsible for posting of such statements in the site and prayed for dismissal of the suit.

The 3rd defendant filed separate written statement contending that they provided the service for sharing information and knowledge without exercise of any editorial control or monitoring by 3rd defendant. Considering the letter of the plaintiff, it was informed through their letter dated 16.12.2009 their policy for removal of allegedly defamatory content from the Google Groups website through an order from Court of competent jurisdiction identifying certain content to be prima facie defamatory and that the persons who have uploaded blogs and content in the Google groups website or the service provider at no point of time assume responsibility of such content.

As per Section 79 of Information Technology Act, 2000, as amended, an intermediary service provider is not liable for content uploaded by third parties. In the present case, the plaintiff at best is entitled to claim relief against the 1st defendant, who is the author of the alleged defamatory article. The 3rd defendant, as a service provider has no connection with the disputes of 1st defendant and plaintiff and it does not have any malafide intention. The 3rd defendant denied the other allegations against it and specifically contended that the 3rd defendant did not indulge in any cyber defamation and prayed for dismissal of the suit.

Basing on the above pleadings, the followings six issues were framed by the Trial Court.

- (1) Whether this Court has got jurisdiction to try the present suit filed by the plaintiff?**
- (2) Whether the suit filed by the plaintiff discloses any cause of action against defendants 2 and 3?**
- (3) Whether an intermediary service provider is liable for contents uploaded on the website by the 3rd parties?**
- (4) Whether the messages dated 31.7.08 and 21.11.08, alleged to have been published by the 1st defendant and hosted by 2nd and 3rd defendants are defamatory in nature?**
- (5) Whether the plaintiff is entitled for mandatory injunction against the defendants?**
- (6) To what relief?**

During Trial, on behalf of the plaintiffs P.Ws 1 to 3 were examined and marked Exs.A-1 to A-22. On behalf of the defendants D.Ws.1 & 2 were examined and marked Exs.B-1 to B-4, besides Exs.C-1 & C-2.

Upon hearing argument of both the counsel and considering oral and documentary evidence on record, the Trial Court dismissed the suit holding all the issues against the plaintiff and in favour of the defendants.

Aggrieved by the decree and judgement passed by the Trial Court, the plaintiff filed an appeal in A.S.No.50 of 2014 on the file of the I Additional Chief Judge, City Civil Court, Secunderabad. Upon hearing argument of both the counsel, the First Appellate Court while concurring with the finding recorded by trial Court on Issue No.3 in paragraphs 21(b) & 23, held the 2nd defendant (appellant) liable to remove the alleged cyber defamatory statements, granting relief against both, while holding that the intermediary (appellant) not liable for posting such defamatory statements.

Assailing the decree passed by the first Appellate Court against the defendants 2 & 3, the 2nd defendant alone filed the appeal raising several contentions, mainly contending that the findings of the First Appellate Court in paragraph 23 of the judgment is contrary to the finding in paragraph 21(b) and that when the 2nd defendant-appellant herein being an intermediary is not liable for any such postings and upheld the findings recorded by the Trial Court on Issue No.3 that it ought not to have granted relief against 2nd defendant-appellant. Therefore, the judgment of the First Appellate Court is erroneous.

It is further contended that the First Appellate Court did not assign any reason to come to a conclusion that how the postings in the blogsite of 3rd defendant are defamatory and issuing a direction for removal of the content in the postings against the 3rd defendant along with 2nd defendant is nothing but fastening liability on 2nd defendant and it is contrary to the findings recorded in paragraph 21(b). Therefore, the judgment of the First Appellate Court is erroneous and self contradictory.

During hearing, the learned Senior Counsel Sri Raghunandan appearing on behalf of Sri N. Vijay, Advocate on Record, drawn attention of this Court to various paragraphs in the judgment of First Appellate Court, more particularly 7(b), 21(b) & 23 which are self contradictory. That apart, the original Court refused to rely on the judgments of Foreign Courts on the ground that they are not binding on Courts in India, but the First Appellate Court, based on [Shreya Singhal v. Union of India](#) concluded that the foreign judgments can be considered and the Supreme Court has responded positively (vide paragraph 22 of the judgment).

In the absence of any judgment from our Indian Courts, the judgements of foreign Courts are having highest persuasive value though not binding precedent, as those judgments are not the law declared by the Apex Court under Article 142 of Constitution of India. Therefore, the Trial Court and the Appellate Court would have accepted the highest persuasive value of the judgments of foreign Courts, but ignored totally. It is also drawn attention of this Court to Section 79 (3) of Information Technology Act, 2000, which is amended by Act.10/2009 with effect from 27.10.2009 to claim immunity from liability, since 2nd defendant is only an intermediary having no control over the contents of the postings and the definition of the term intermediary under The Information Technology Act, 2000, and placed reliance on the judgments in Vodafone International Holdings B.V. v. Union of India and another, ISI SRA v Google Italy Srl, Google Infrastructure Srl, Yahoo! Italia Srl. - Court of Milan translated version, A v Google New Zealand Ltd., Duffy v Google Inc. & anr, Crop Care Federation of India v. Rajasthan Patrika (Pvt.) Ltd. And Ors. and R.Rajagopal @ R.R. Gopal @ Nakkheeran Gopal and another v. J.Jayalalitha and another, on the strength of those judgments and principles laid down in those judgments, learned counsel for the appellant (D-3) would contend that 2nd defendant being an intermediary has no liability, since it has no control over the postings in the blogsite and the 2nd defendant proved exercise of due diligence.

Per contra, Sri N.V. Anantha Krishna, learned counsel for the plaintiff supported the judgment of the First Appellate Court in all respects, while contending that the 2nd defendant is only an agent of 3rd defendant in India and therefore, all the defendants are liable for the reliefs claimed in the suit and contents of those statements on the blogsite of the 3rd defendant is totally defamatory in nature and issuing direction declaring that the contents of Messages 1 & 2 referred above are defamatory in nature which effects the business of the plaintiff company worldwide and adversely affects its business and its employees. In such circumstances, the findings of the Trial Court that contents of those Messages 1 & 2 referred supra as defamatory cannot be interfered with in the present second appeal, as its jurisdiction is confined to substantial question of law under Section 100 of C.P.C.

Learned counsel further contended that, though relief of mandatory injunction under Section 39 of Specific Relief Act is the harshest remedy, issuing such direction to the defendants including defendants 2 & 3 for removal of Messages 1 & 2 on the blogsite on the defendants 2 & 3 by 1st defendant is justifiable for the reason that the contents of those postings 1 & 2 would adversely effect the business of the plaintiff and it would create fear complexion in the minds of general public in the commercial world and issuing such direction by way of mandatory injunction is justifiable in those circumstances and prayed for dismissal of the appeal, confirming the decree and judgment passed by the First Appellate Court.

Considering the contentions of both the counsel and findings recorded by the First Appellate Court, the substantial questions of law that arise for determination by this Court are as follows: (1) Whether the judgment of the first appellate court is in consonance with Order XLI Rule 31 of C.P.C.?

(2) Whether the 2nd defendant is an intermediary within the definition of intermediary under Guideline No.2(i) read with subsection (1) of Section 2 of Information Technology Act, 2000 (and Information Technology Rules, 2011). If so, whether the 2nd defendant (appellant) is having any control over the postings by Google Groups. If so, liable for the acts of the Google Groups for removing the contents of Messages 1 & 2.

SUBSTANTIAL QUESTION NO.1:

The first and foremost contention raised by the counsel for the appellant defendant No.2 is that the findings of the appellate Court are self contradictory and those findings cannot be sustained in view of mandatory procedure prescribed under Order XLI Rule 31 of C.P.C. He has drawn the attention of this Court to certain findings recorded by the first appellate Court and the trial Court.

The trial Court framed as many as 6 issues and one of the issues framed by the trial Court is with regard to liability of intermediaries i.e. issue No.3, which is extracted hereunder:

Whether an intermediary service provider is liable for contents uploaded on the website by the 3rd parties?

This issue was answered in negative, recording a specific finding in paragraph No.54 by the trial Court and held the issue against the plaintiff before the trial Court.

Aggrieved by the finding on issue No.3 and other issues, an appeal was preferred before the Additional Chief Judge, City Civil Court, Secunderabad. The first appellate Court framed a point for determination in most casual manner without adhering to the mandatory procedure prescribed under Order XLI Rule 31 of C.P.C. and grounds urged before the Court. The point for consideration framed by the first appellate Court is as follows:

Whether the appellant has established substantial ground to set aside the judgment and decree of the trial Court and to decree the suit as prayed for or not?

While deciding the point for determination in paragraph No.21 (b), the first appellate Court recorded a specific finding with regard to liability of intermediary i.e. the appellant herein and it is extracted hereunder for better appreciation.

In the light of the above observations, the finding on issue No.3 is not liable to be set aside to the effect that defendant No.3 being an intermediary service provider is not liable for the contents posts on the website by third parties i.e. defendant No.1. The first appellate Court in the said paragraph instead of holding that the defendant No.2 is an intermediary held that the defendant No.3 is an intermediary, which appears to be a typographical mistake since the defendant No.3 is an internet service provider.

In paragraph No.23, while allowing the appeal held as follows:

The suit is liable to be decreed as the messages referred above would amount to defamatory in nature and defendant Nos.2 and 3 were directed to withdraw the messages posted by the 1st defendant on their blogs by way of mandatory injunction.

When the Court found that the appellant/defendant No.2 is not liable for the contents posted in the website of the defendant No.3, which is having total control over the postings in their blog and the appellant defendant No.2 is only an intermediary, who is making arrangements for advertisements etc. from India. Therefore, the first appellate Court having affirmed the findings recorded by the trial Court on issue No.3 and recorded a finding in paragraph No.21 (b) holding that the defendant No.2/appellant is not liable for the contents uploaded by the third parties, ought not to have issued a direction by way of mandatory injunction to withdraw the defamatory statements made by defendant No.1 in the website of the defendant No.3.

The trial Court and the first appellate Court having adverted to Section 79 (3) (b) of the Information Technology Act, 2000 did not consider the requirement under Section 79 (3) (b) failed to record a specific finding as to whether the defendant No.2 exercised due diligence as amended by Act 10 of 2009 with effect from 27.10.2009.

Strangely, the plaintiff did not file any appeal against the decree and judgment of the first appellate Court challenging the specific finding recorded on issue No.3 by the trial Court and affirmed by the first appellate Court in paragraph No.21 (b) of the judgment and the plaintiff not filed any cross objections and not advanced any argument on the said issue during hearing of the appeal. Therefore, the findings on issue No.3 recorded by the trial Court and affirmed by the first appellate Court in paragraph No.21

(b) of the judgment cannot be disturbed by this Court in the absence of any appeal or cross objections filed by the plaintiff while

considering the second appeal under Section 100 of C.P.C. Hence, recording a finding regarding exercise of due diligence or actual knowledge both by the trial Court and first appellate Court while deciding the issue No.3 by the trial Court and affirmed by the first appellate Court in paragraph No.21 (b) is insignificant.

The first appellate Court is required to frame appropriate points determination and required to answer each and every point independently as mandated by the Order XLI Rule 31 of C.P.C. On the contrary the first appellate Court framed a point for determination in a most nonchalant manner without advertng to any of the contentions raised in the grounds of appeal before it and points raised during hearing strictly adhering to Order XLI Rule (1) of C.P.C. but on this ground the judgment of trial Court and finding recorded by the first appellate Court regarding liability of intermediary in paragraph No.21 (b) cannot be disturbed since it was not challenged by the plaintiff before this Court either by filing cross objections or by separate appeal or at least during hearing before this Court. Therefore, finding recorded by the first appellate Court in paragraph No.21 (b) and direction issued in paragraph No.23 are self contradictory and the first appellate Court is not expected to issue such direction against the defendant No.2/appellant having found that the defendant No.2 is not liable for the contents posted or uploaded in the website of the defendant No.3. Therefore, the direction of the first appellate Court in paragraph No.23 directing the defendant No.2 along with defendant No.3 to withdraw the messages posted by the 1st defendant on their blogs is liable to be set aside. Therefore, mandatory injunction issued by the first appellate Court against the defendant Nos.2 directing to withdraw the defamatory statements posted by the 1st defendant is erroneous and liable to be set aside. Accordingly set aside by answering the substantial question of law in favour of the appellant/defendant No.2 and against the plaintiff/respondent.

SUBSTANTIAL QUESTION NO.2:

One of the contentions raised before the trial Court and the first appellate Court is that the defendant No.2/appellant is only an intermediary, whose liability is subject to proof of due diligence or actual knowledge by the defendant No.2 as contemplated under Section 79 (3) of the Information Technology Act, 2000 while drawing the attention of trial Court and the first appellate Court to various judgments of foreign courts with regard to similar issue. The trial Court while observing that the judgments of the foreign courts are not binding precedents and they need not be followed, thereby failed to place reliance on the judgments of foreign courts as observed in paragraph No.54 of the judgment of the trial Court. Whereas the first appellate Court while advertng to various judgments of foreign courts relied on by the counsel for the defendant No.2/appellant herein before it; in paragraph No.22 observed that regarding applicability of foreign law was considered in [Shreya Singhal v. Union of India](#)], (referred supra) but did not record any finding based on the principles laid down by various foreign courts.

Sri Raghunandan, learned Senior Counsel for the defendant No.2/appellant again placed reliance on the same judgments, which he relied before the first appellate Court and trial Court, whereas Sri N.V.Anantha Krishna, learned counsel for the plaintiff/1st respondent before this Court while accepting the observations made in paragraph No.22 contended that it is not the law laid down by the Apex Court to fall within the ambit of Article 141 Constitution of India and thereby they are not binding precedents.

According to Article 141 of the Constitution of India, the law declared by the Supreme Court of India is binding on all the courts in India since the Supreme Court is the highest Court of record in the country and final Court of appeal. Thus, by virtue of Article 141 of Constitution of India what the Supreme Court lays down is the law of the land and its decisions are binding precedents on all the Courts till they are overruled by larger bench. Therefore, Article 141 of Constitution of India does not include the law declared by the Foreign Courts and thereby there is any amount of justification in the observations made by the trial Court in paragraph No.54 of the Judgment, but the first appellate Court basing on the judgment of the Apex Court rendered in [Shreya Singhal v. Union of India](#)] (referred supra) concluded that the Apex Court responded positively but did not decide the applicability of the foreign judgments to the Courts in India.

In *Chatturbhuj Vithaldas Jasani v. Moreshwar Parshram* the Apex Court held that the authority of English Cases and their dicta do not bind the Supreme Court.

The Court can resort to the position in law as it obtained in England or in other countries if there is any patent or latent ambiguity and the courts are required to find out what was the true intendment of the legislature as held in *STO v. Kanhaiya Lal Makund Lal*

Saraf The Supreme Court held that the Indian Courts have to build their own jurisprudence and cannot surrender Judgment and accept as valid in India whatever has been decided in England and that the foreign decisions are not helpful in interpreting post-independence enactments in *National Textile Workers Union v. P.R.Ramakrishnan and Aruna Basu Mullick v. Dorothea Mitra* .

The Apex Court also observed that there is a large body of company jurisprudence which is common to all the Commonwealth countries. Hence, a foreign decision is either worthy of acceptance or not depending upon the reasons contained in it and not on its origin or age. Unless a well reasoned foreign decision, is opposed to our ethics or otherwise unsuited to Indian conditions, should be followed. Where provisions are in pari materia between the English Act and the Indian Act and the conditions in both the countries do not materially differ. Indian Courts can profitably take the help of the decisions of the foreign courts. But Indian Courts cannot bodily import English decisions in our system to develop a hybrid legal system as held in *Cotton Corpn. India Ltd. v. United Industrial Bank Ltd.*

In *Forasol v. ONGC* the Apex Court observed that the English decisions are of high persuasive value and our Courts should be cautious enough whether the rule laid down can be applied by them in the context of our laws and legal procedure and the practical realities of litigation in our country. Where law is laid down by Supreme Court and reiterated in numerous subsequent judgments, a wider proposition of law laid down in foreign judgment is not acceptable in view of the judgment rendered in *BSES Ltd. v. Fenner India Ltd.*

Thus, the judgments of foreign courts though not fall within the ambit of Article 141 of Constitution of India, the Courts in India can draw the principle laid down in those judgments subject to similarity in the provisions of the Act i.e. if the provisions of a particular enactment in India and Foreign Countries are in Pari materia, however no precedent value can be attached to such judgments though they have higher persuasive value. In [Shreya Singhal v. Union of India](#), (referred supra) the Apex Court drawn the principles to decide the issue relating to similar case with reference to Section 79 (3) of the Act mostly relied on the judgments of Foreign Courts, but the Supreme Court did not conclude that those judgments are binding on the courts in India. Therefore, the trial Court rightly observed that the law declared by the Foreign Courts is not binding precedent on the Indian Courts within Article 141 of Constitution of India since the law declared by the Apex Court is binding on all the Courts in India. Therefore, the judgment of Apex Court in [Shreya Singhal v. Union of India](#), (referred supra) is a binding precedent on all the Courts in India including this Court being the Highest Court as a Court of record. Thus, this Court is bound to follow the law declared by the Apex Court in [Shreya Singhal v. Union of India](#), (referred supra) and other judgments of Apex Court.

The main contention of the appellant/defendant No.2 before this Court is that the appellant/defendant No.2 has no control over the postings and he is only an intermediary engaged for the purpose of advertisements etc. and drawn the attention of this Court to Google Groups Content Policy, which is marked as Ex.B.4, clause 3 of Ex.B.4 reads as under:

3. Hate Speech: If we learn of hate speech content, we may remove the reported content. By this, we mean, content that promotes hate or violence towards groups based on race, ethnicity, religion, disability, gender, age, veteran status, or sexual orientation/gender identity. For example, this would include content saying that members of a particular race are criminals or advocating violence against followers of a particular religion.

Google Groups: Terms of Service, marked as Ex.B.3. Clause 5 of Ex.B.3 deals with responsibility of the person, who posted the content and it reads as follows:

5. Content:

Your Responsibilities. You understand that all data, text, information, links and other content (collectively, Content), whether posted in public or restricted groups, is the sole responsibility of the person from which such Content originated. This means that you, and not Google, are entirely responsible for all Content that you publish, post, upload, distribute, disseminate or otherwise transmit (collectively, Post) via the Service. You understand that by using the Service, you may be exposed to Content that is offensive, indecent or objectionable. Under no circumstances will Google be liable in any way for any Content, including, but not limited to, for any errors or omissions in any Content, or for any loss or damage of any kind incurred as a result of the use of any Content

Posted via the Service. You agree that you must evaluate, and bear all risks associated with, the use of any Content, including any reliance on the accuracy, completeness, or usefulness of such Content. You understand that the technical processing and transmission of the Service, including Content, may involve (a) transmissions over various networks; and (b) changes to conform and adapt to technical requirements of connecting networks or devices.

Group Owners Rights and Responsibilities. Group Owners have additional capabilities and responsibilities in regard to the members and Content of a Group. The Owner of a Group decides whether a Group is restricted to certain members or accessible to the public generally, and the Owner may change the access to the Group at any time. In restricted Groups, the Owner decides who may be a member of the Group and can access and change the membership list in his or her sole discretion. A Group Owner may, at any time, transfer his or her ownership of a group to another Google Groups user. In regard to Content, a Group Owner shall be responsible for the maintenance and monitoring of the Content in the Group, including deleting any Group, Content or archived Content at any time and in his or her discretion.

Group Owners Must Mark Sexually Explicit Content. If you create a Group containing sexually explicit Content that is not suitable for minors, you agree to mark the Group as such. If your Group contains Content that is sexually explicit and you do not mark the Group appropriately, Google shall have the right to delete your Group, including all messages Posted to that Group.

Googles Rights. You acknowledge that Google does not pre-screen, control, edit or endorse Content made available through the Service and has no obligation to monitor the Content Posted via the Service. If Google discovers Content that does not appear to conform to the Terms of Service, Google may investigate and determine in good faith and in its sole discretion whether to remove the Content. Google will have no liability or responsibility for performance or non-performance of such activities. You acknowledge that certain Groups available through the Service are available only through the Service and others are available both through the Service and other sources, such as Usenet, over which Google has absolutely no control.

Content Removal and Archiving. If you are not the Owner of a Group, you may request removal of a message that you have Posted yourself or (2) prevent archival of your message (For more information about preventing archival, please see our FAQ). You agree to resolve directly and exclusively with third parties any disputes you may have about messages that they posted or you may contact the Group Owner to request a removal. In this regard, you understand that Google does not monitor or control the content of information Posted by others, and instead simply provides a service by allowing users to access information that has been made available.

According to clause 6 of Ex.B.3 the person, who posted such material in the blogsite alone is responsible for such violation. Defendant No.3 fixed responsibility on the person who posted those items, disowning its responsibility to any such postings.

Defendant No.3 is a foreign company and governed by the laws of the said Country where it is incorporated and registered as a company. Even according to Clause 5 of Ex.B.3 Google Groups Terms of Service referred supra, the company is not responsible for any such postings and unless a person, who is claiming that the contents of such statement are defamatory and approached the Court, obtained order of injunction for removal of such content, defendant No.3 company has no obligation to remove such content that it is defamatory and cause damages substantially to the reputation of an person. In such a case, it is difficult for everyone to approach the Court to get order immediately and by the time they got order from the Court his/her reputation will be denounced in the public, which would cause incalculable loss and damage to the reputation. In such case, necessary steps have to be taken to make the service providers responsible when they are operating in our country. But the law does not permit to attach any such responsibility for posting of such defamatory statement in view of the law declared by this Court.

[Shreya Singhal v. Union of India](#)] (referred supra) the Apex Court advertent to Section 79 (3) (b) as amended by the Act concluded that in paragraph No.122 observed as follows:

Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This 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. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

In view observations recorded by the Apex Court in **Shreya Singhal v. Union of India** (referred supra) it is difficult to any intermediary to keep watch on millions of postings and requests by the users of internet, but when it is brought to the notice of the intermediary, the intermediary is under obligation to remove such objectionable content, here the case of the appellant/defendant No.2 is that the appellant/defendant No.2 has no control over the website and only the defendant No.3 is competent to remove such objectionable content posted in the website of the defendant No.3, but that cannot be accepted in view of the observations and law declared in paragraph No.122 of the judgment of the Apex Court in [Shreya Singhal v. Union of India](#) (referred supra).

Before going further to decide whether the appellant/defendant No.2 is intermediary or not, it is appropriate to advert to the definition of the intermediary. The word intermediary is defined in the Information Technology (Intermediaries Guidelines) Rules, 2011. Rule 2 (i) defined intermediary as intermediary as defined in clause (w) of sub- section (1) of Section 2 of the Act.

Clause (w) of sub-section (1) of Section 2 of the Act defined the word intermediary as follows:

"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, online payment sites, online- auction sites, online- market places and cyber cafes.

The appellant/defendant No.2 would come within the definition of intermediary being a web-hosting service provider though the overall control was only with the defendant No.3.

Intermediary cannot be equated with an agent under the Indian Contract Act since there is specific definition in the Information Technology Act for the word intermediary. Intermediaries are third party organizations that offer intermediation services between the parties trading amongst themselves. Such organizations act as ducts for services offered by a supplier to the relevant consumer. Value addition to the service in question is a key aspect of the trading platform offered by such intermediaries, which is highly improbable if the trading is done directly. Provision of a trading platform for any kind of electronic commerce is the key link of the existence of an intermediary. Even to such intermediary service, certain safeguards have to be provided by the main service provider.

As per Ex.B.4, the person, who accessing or posting any information in the website are bound by the general terms and conditions of the Google Groups Content Policy. In such case, intermediary is not liable for such postings in the web blog by the general public since the intermediary is only offers intermediary service between the parties subject to proof of requirement under Section 79 of the Information Technology Act.

The liability of intermediary came up for consideration in various judgments including the judgment in [Bazee.com case](#) in India for the first time before the Delhi High Court. Under the Information Technology Act, 2000, no categorization of OSP/ISP/NSP has been attempted despite the view that liability has been imposed having regard to the functions performed by the service provider in order to give a meaningful disposition to infringement cases.

To decide the liability of intermediary in India, Section 79 of Information Technology Act is relevant, which reads as follows:

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.

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

A bare look at Section 79 after introduction of Section 3 (b), it is clear that the provisions of sub-section (1) shall not apply if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; 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.

In the present facts of the case, it is not the case of the respondent No.1/plaintiff, that intermediary appellant/defendant No.2 has received actual knowledge about posting of defamatory statement by the defendant No.1 in the web blog of defendant No.3.

In *Shreya Singhal v. Union of India*, (referred supra) the Apex Court applied Rule 3 of the Rules framed thereunder, which reads as follows:

[Under the 2011 Rules](#), by Rule 3 an intermediary has not only to publish the rules and Regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2). Since Rule 3(2) and 3(4) are important, they are set out hereinbelow:

3. [Due diligence to be observed by intermediary](#).--The intermediary shall observe following due diligence while discharging his duties, namely:

(2) Such rules and Regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that--

- (a) belongs to another person and to which the user does not have any right to;
- (b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, 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;
- (c) harm minors in any way;
- (d) infringes any patent, trademark, copyright or other proprietary rights;
- (e) violates any law for the time being in force;
- (f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;
- (g) impersonate another person;
- (h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;
- (i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

(4) 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 e-mail signed with electronic signature about any such information as mentioned in Sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of Sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

Learned counsel for the plaintiff assailed Rules 3 (2) and 3 (4) on two basis grounds. Firstly, the intermediary is called upon to exercise its own judgment under sub-rule (4) and then disable information that is in contravention of sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet.

Therefore, to avoid liability by the intermediaries, he has to exercise due diligence as contemplated under Rule 3.

But due diligence is not exactly defined by the Act, but in *Bharat Petroleum Corporation Ltd. v. Precious Finance Investment Pvt. Ltd* The Dictionary meaning of the expression "due diligence" as given in the Blacks Law Dictionary, Sixth Edition, 1990 means "Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Similarly the Law Lexicon by P. Ramanatha Aiyer, Second Edition (Reprint) 2001 explains "due diligence" to mean such watchful caution and foresight as the circumstances of the particular case demands. While examining the explanation offered or cause shown as to why in spite of due diligence a party could not have raised the matter before commencement of trial, the Court may have to see the circumstances in which the party is seeking amendment. In short the explanation as to "due diligence" depends upon the particular circumstances and the relative facts of each case to reach a conclusion one way or the other.

In *Chander Kanta Bansal v. Rajinder Singh Anand* the Apex Court while deciding a matter pertaining to amendment of pleadings under Order VI Rule 17 of C.P.C. discussed about the word due diligence in paragraph No.16 as follows:

The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

In view of the definition of due diligence referred supra in the judgment of Bombay High Court and Apex Court, to avoid its liability by the intermediary, the intermediary has to prove that he has acted as an ordinary reasonable prudent man and it is a question of fact.

In the pleadings before the trial Court, there is no allegation that the appellant/defendant No.2 negligently allowed postings in the web-blog and such posting of content is in actual knowledge, in the absence of any such pleading to claim exemption under Section 79 (3) of the Act, the appellant/defendant No.2 is not expected to adduce any evidence to disown its liability under the penumbra of Section 79 (3) of I.T. Act. However, it is a question of fact and when the trial Court and the first appellate Court held that the appellant/defendant No.2 is not liable while answering issue No.3 by the trial Court and point for consideration by the first appellate Court in paragraph No.21 (b), this Court while exercising jurisdiction under Section 100 of C.P.C. cannot disturb such findings in view of lack of evidence regarding exercise of due diligence by the appellant/defendant No.2 and actual knowledge as required under Section 79 (3) of the Information Technology Act and Rule 3 of the Rules.

On this ground, no liability can be attached to the appellant/defendant No.2 for the defamatory content posted by the plaintiff/defendant No.1 in the web-blog of defendant No.3.

In view of the law declared by the Apex Court in *Shreya Singhal v. Union of India*, (referred supra), it is for the intermediary to prove that it had exercised due diligence in allowing posting of any content on the web-blog of the defendant No.3. Here, the Gate keeping theory is applicable to the Internet, it has already been discussed in detail by more than one scholar Jonathan Zittrain, in his book *History of Online Gate keeping* and *Harvard Journal of Law and Technology* 2 (2006), where authors described the intermediaries as Gatekeepers and concluded that making gatekeepers liable for enforcing law is a common choice within legal frameworks. It has been explored in some detail by Reinier Kraakman, who distinguishes it from other kinds of collateral or third party liability by explaining that gatekeepers are private parties who are in a position to disrupt misconduct by withholding their cooperation from wrongdoers in his book *the Anatomy of a Third-Party Enforcement Strategy*.

But the theory of gatekeeper attached more responsibility to the intermediary and it is only an effort to control online content by leveraging the position of the gatekeepers to flow of information online. The reasoning here is that since online intermediaries such as *Avnish Bajaj v. State* (referred to as the *Bazee.com* case) (or Facebook, Gmail, Google or The Pirate Bay) host and facilitate access to vast amounts of Internet content, and since internet service providers such as Airtel or BSNL physically connect users to the Internet, they are the gatekeepers presiding over the flow of information. Therefore, making these gatekeepers liable for blocking, filtering and removing illegal content, is seen as an effective way to put a stop to the sharing of illegal content. This is particularly appealing in contexts in which the author of illegal content is difficult to identify, or is based in another country, and cannot be located, much less prosecuted, in India. In these contexts, it is very difficult for the government to raise the expected penalties applicable to the wrongdoers. Therefore, direct deterrence becomes ineffective, creating the need to explore third party liability.

Coming to India in *Baazee.coms* case the High Court of Delhi had an occasion to deal with a similar situation with reference to provisions of the Act and later it was dealt at length with reference to foreign judgments in *Shreya Singhal v. Union of India*, (referred supra) elaborately and pointed out that it is difficult to attach liability to the intermediaries and propounded the theory of due diligence based on Section 79 (3) of the Act and the law declared by the Apex Court in *Shreya Singhal v. Union of India*,

(referred supra) is binding on the courts in India.

Various theories of liability like strict liability standard cannot be applied to the provisions of Information Technology Act.

As observed in the earlier paragraphs, the judgments of Foreign Courts are not binding precedents under Article 141 of Constitution of India. But the law in India on the intermediaries liability is not yet developed except for the first time in *Shreya Singhal v. Union of India*, (referred supra) by the Apex Court. One of the reasons for non-adverting to the liability declared by the Foreign Courts by the trial Court is that the judgments of Foreign Courts are not binding precedents, but in *Shreya Singhal v. Union of India*, (referred supra) the Apex Court formulated its principles based on the principles laid down in the foreign judgments. However, the judgments of Foreign Courts have highest persuasive value though not binding precedents as held in *Forasol v. ONGC* (referred supra). Therefore, the law declared by the Foreign Courts can be looked into but lay down the law with the assistance of those Judgments.

Learned counsel for the appellant defendant No.2 drawn the attention of this Court to a judgment of the Apex Court rendered in *Vodafone International Holdings BV v. Union of India* and another (referred supra), wherein the conflict is with regard to liability of the directors of the company was decided but it is of no help to the present issue involved.

Learned counsel for the appellant also drawn the attention of this Court to a judgment of Court of Milan, Division Specialising in the Field of Industrial and Intellectual Property, rendered in *ISI SRL v Google Italy Srl, Google Infrastructure Srl, Yahoo! Italia Srl.*, (G.R.No.61372/2011) wherein it is held in paragraph No.2 as follows:

In relation to the position of Google Italy and Google Infrastructure, the objection raised concerning the Defendants lacking the capacity to be sued, appears to be founded. The records of proceedings show that the Google Groups services are managed directly and exclusively by Google Inc., a company governed by US Laws, which is separated and independent from the defendants. This is confirmed by the contractual terms, which can easily be consulted by accessing the Terms of Service link present in every page of the service in question. Moreover, the interlocution at the out-of-Court stage (see doc.15 of the plaintiff), was unable to raise doubts on the point, so much so that Google responses expressly invoked current U.S.law. Furthermore, there are no subscriptions or other indications of origin from the answer that can itself be traced back in any way to one of the two defendant parties listed.

Regarding the issue and solely with reference to the residual position of Yahoo, the claim is not founded and as such it must be denied.

Learned counsel for the appellant further drawn the attention of this Court to another judgment of High Court of Newzealand in *A v. Google Newzealand Ltd.* (referred supra), wherein the question came up before the said Court is that the responsibility of a search engine service provider for the content of information on third party websites accessed from search results and after analyzing provisions of Newzealand enactments it is held that the plaintiffs causes of action cannot succeed against the defendant. Accordingly, the plaintiffs application is dismissed, and summary judgment is awarded to the defendant against the plaintiff.

Learned counsel for the appellant drawn the attention of this Court to another judgment rendered by the District Court of South Australia in *Duffy v. Google Inc.* and another (referred supra). It is only District Court judgment in Australia, which I need not advert to the principle laid down therein.

Time and again similar issues came up before Foreign Courts.

In *Playboy Enterprises INC v Frena* it is held as follows: This was one of the initial cases wherever liability of ISPs for the copyright infringement of subscribers was examined. The defendant, George Frena, operated a Bulletin Board Service (BBS) for those who purchased bound product from the suspect and anyone who paid a fee might log on and browse through totally different BBS directories to look at the pictures and they might conjointly transfer copies of the photographs. Among several images that the defendant created offered to his customers, one hundred and seventy were unauthorized proprietary photographs that belonged to the litigant. The Court noted that the intent of the BBS operator was irrelevant and applied strict liability principle of the Copyright Act. The BBS operator was liable for direct infringement as a result of the defendants system itself equipped unauthorized copies of

proprietary work and created them offered to the public. It was irrelevant that the suspect did not create infringing copies itself. However, with time the Courts ruling was widely debated and discredited.

In *Religious Technology Center v. Netcom* it is held as follows:

Few years later, came the *Netcom* case. The plaintiffs, Religious Technology Center (RTC) control copyrights in the unpublished and revealed works of L Ron Hubbard, the founder of the Church of Scientology. The suspect, Erlich was a former minister of religion who had later on become a vocal critic of the Church. On an online forum for discussion and criticism of religion, Erlich announced portions of the works of L Ron Hubbard. Erlich gained his access to the web through BBS that was not directly joined to web, however was connected through Netcom On-Line Communications INC. After failing to win over Erlich to stop his postings, RTC contacted BBS and Netcom. The owner of BBS demanded the litigant to prove that they owned the copyrights of the works announced by Erlich therefore that he would be unbroken off the BBS. The plaintiffs refused BBS owners request as unreasonable. Netcom similarly refused plaintiffs request that Erlich not be allowed to gain access to web through its system. Netcom contended that it would be not possible to prescreen Erlich's postings and that to forestall Erlich from victimization the web meant doing the same to hundreds of users of BBS. Consequently, plaintiffs sued BBS and Netcom in their suit against Erlich for copyright infringement on the web. The Court reasoned that even though copyright is a strict liability statute, there ought to be some part of volition or causing that is lacking wherever a defendant's system is simply used to produce a copy by third party. The Court additionally noted that, when the subscriber is directly liable it is senseless to hold different parties (whose involvement is simply providing Internet facilities) liable for actions of the subscriber. The Court conjointly noted that the notice of infringing activity of service supplier can implicate him for contributory negligence as failure to forestall associated infringing copy from being distributed would constitute substantial participation.

Substantial participation is wherever the suspect has data of primary infringers infringing activities and induces, causes or materially contributes to the infringing conduct of primary infringer. The Court rejected the argument of the suspect that associated ISP is similar to a common carrier and so entitled to exemption from strict liability written in Section III of the Copyright Act and declared that carriers are not sure to carry all the traffic that passes through them. Nevertheless, the Court did not impose direct infringement liability on ISP as that would result in liability for every single server transmitting information to each different laptop.

In *Viacom International, INC. v. Youtube, INC* the Court of Appeals for the Second Circuit discussed about safe harbor to an intermediary and held that in construing the statutory safe harbor, the District Court concluded that the actual knowledge or aware(ness) of facts or circumstances that would disqualify online service provider from safe harbor protection under US laws. The Court further held that item-specific knowledge of infringing activity is required for a service provider to have the right and ability control.

It is further held that the basic function of the YouTube website permits users to "upload" and view video clips free of charge. Before uploading a video to YouTube, a user must register and create an account with the website. The registration process requires the user to accept YouTube's Terms of Use agreement, which provides, inter alia, that the user "will not submit material that is copyrighted unless [he is] the owner of such rights or ha[s] permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein." When the registration process is complete, the user can sign in to his account, select a video to upload from the user's personal computer, mobile phone, or other device and instruct the YouTube system to upload the video by clicking on a virtual upload "button." The same is the procedure in Google Website. Thus, if the actual knowledge to the intermediary is proved, then intermediary cannot escape its liability.

In *Barnhart v. Sigmon Coal Co.* certain guidelines were framed to claim benefit under safe harbor, which are as follows:

- (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.

If these principles are applied, intermediary cannot be made liable.

In *Godfrey v. Demon Internet Ltd.* the responsibility of intermediary for publication of defamatory statement came up for consideration, while considering the scope of intermediary liability expressed its view that as a service provider who transmitted or facilitated the transmission to any of their news group subscribers of a posting received and stored by them via the Internet the defendants were a publisher of that posting at common law; that they were not merely the passive owner of an electronic device through which postings were transmitted but actively chose to receive and store the news group exchanges containing the posting which could be accessed by their subscribers, and could have chosen to obliterate the posting complained of, as they later did; that, although they were not a publisher within the meaning of section 1 (2) and (3) of the 1996 Act and could therefore satisfy section 1 (1) (a) of that Act, once they knew of the defamatory content of the posting and chose not to remove it from their news server they could no longer satisfy the additional requirements of section 1 (1) (b), that they took reasonable care in relation to the publication, or section 1 (1) (c), that they did not know and had no reason to believe that what they did caused or contributed to the publication; and that, accordingly, the parts of their pleaded defence which relied on section 1 (1) of the 1996 Act would be struck out.

High Court of Australia in *Dow Jones and Company INC v. Joseph Gutnick* had an occasion to decide posting of sexually explicit photographs and heavily relied on such publication under laws of Australia and held that it not single publication which contained defamatory material complained and when the subordinate distributor did not know that the publication contained the defamatory material complained of; the subordinate distributor did not know that the publication was of a character likely to contain defamatory material and such want of knowledge was not due to negligence on the part of the subordinate distributor, but the publication under the rules would give rise to a separate cause of action in view of Australia and English law. Therefore, the torts of libel and slander are committed when and where comprehension of the defamatory matter occurs. The rules have been universally applied to publications by spoken word, in writing, on television, by radio transmission, over the telephone or over the internet. In *Browne v. Dunn* the House of Lords held that there was no publication of a defamatory petition to a person (Mrs Cook) who had signed but not read the petition. On an overall consideration, the Court concluded that the Court has got jurisdiction since it amounts to defamatory in nature.

The Supreme Court of the United States in *United States v. X-Citement Viedo, INC., ET AL.* held as follows:

Because the term knowingly in 2252 (a) (1) and (2) modifies the phrase the use of a minor in subsections (1) (A) and (2) (A), the Act is properly read to include a scienter requirement for age of minority. This Court rejects the most natural grammatical reading, adopted by the Ninth Circuit, under which knowingly modifies only the relevant verbs in subsections (1) and (2), and does not extend to the elements of the minority of the performers, or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation. Some applications of that reading would sweep within the statutes admit actors who had no idea that they were even dealing with sexually explicit material, an anomalous result that the Court will not assume congress to have intended. Moreover, *Morissette v. United States*, 342 U.S. 246, 271, 72 S.Ct. 240, 254, 96 L.Ed. 288, reinforced by *Staples v. United States*, 511 U.S. 600, 619, 114 S.Ct. 1793, 1804, 128 L.Ed.2d 608, instructs that the standard presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct, and the minority status of the performers is the crucial element separating legal innocence from wrongful conduct. The legislative history, although unclear as to whether Congress intended knowingly to extend to performer age, persuasively indicates that the word applies to the sexually explicit conduct depicted, and thereby demonstrates that knowingly is emancipated from merely modifying the verbs in subsections (1) and (2). As a matter of grammar, it is difficult to conclude that the word modifies one of the elements in subsections (1) (A) and (2) (A), but not the other. This interpretation is supported by the canon that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.

Supreme Court of Florida in *Jane Doe, mother and legal guardian of John Doe, a minor v. America Online, INC.* based on policy underlying the CDA and the CDAs explicit legislative history held as follows:

It is inconceivable that Congress intended the CDA to shield from potential liability an ISP alleged to have taken absolutely no actions to curtail illicit activities in furtherance of conduct defined as criminal, despite actual knowledge that a source of child

pornography was being advertised and delivered through contact information provided on its service by an identified customer, while profiting from its customer's continued use of the service. Such an interpretation transforms a statute intended to further and support responsible ISP efforts to protect children and the public from even questionably harmful and illegal materials into a statute which both condones and exonerates a flagrant and reprehensible failure to act by an ISP in the face of allegedly specific, known dissemination of material unquestionably harmful to children. In my view, the interpretation adopted today provides a foundation for far-ranging forms of illegal conduct (possibly harmful to society in far different ways) which ISPs can, very profitably and with total immunity, knowingly allow their customers to operate through their Internet services. I fear that the blanket immunity interpretation adopted by the majority today thrusts Congress into the unlikely position of having enacted legislation that encourages and protects the involvement of ISPs as silent partners in criminal enterprises for profit.

The Supreme Court of the United States in *Edmund G. Brown, JR., Governor of California, ET AL. v. Entertainment Merchants Association ET AL.* held as follows:

The majority's circular argument misses the point. The question is not whether certain laws might make sense to judges or legislators today, but rather what the public likely understood "the freedom of speech" to mean when the First Amendment was adopted. See *District of Columbia v. Heller*, MANU/USSC/0047/2008: 554 U. S. 570, 634-635 (2008). I believe it is clear that the founding public would not have understood "the freedom of speech" to include speech to minor children bypassing their parents. It follows that the First Amendment imposes no restriction on state regulation of such speech. To note that there may not be "precedent for [such] state control," ante, at 8, n. 3, "is not to establish that [there] is a constitutional right," *McIntyre v. Ohio Elections Comm'n*, MANU/USSC/0036/1995 : 514 U. S. 334, 373 (1995) (SCALIA, J., dissenting).

However, the foreign judgments are not binding precedents within the scope of Article 141 of Constitution of India, at best they would have highest persuasive value and apart from that the provisions of the Act are in pari materia, in such case this Court can fallback on the principles laid down in those judgments. Moreover, in *Shreya Singhal v. Union of India* (referred supra), the Apex Court persuaded by those judgments came to such conclusion. In those circumstances, based on the principles laid down in the foreign judgments and the Apex Court in *Shreya Singhal v. Union of India* (referred supra), this Court can safely conclude that the appellant/defendant No.2 is not responsible for the defamatory, posted by the defendant No.1 in the web-blog of defendant No.3, which is directly under its control and the defendant No.2 has nothing to do with the content and it can neither edit or remove any such defamatory statement.

The order of the day in our country is that most of the websites are being mis-used by the general public for one reason or the other and internet users creating fake accounts both in the Face book and other internet service providers like Google and posting sexually explicit material and sometimes defamatory statements inviting comments from the net users, as such it is difficult for the service provider or intermediary to keep watch on such accounts of net users, which are in millions everyday. Moreover, such fake statements i.e. sexually explicit material and defamatory statements would cause incalculable damage to the reputation of the individuals, which reduces the image of the individual in the society and sometimes it would adversely effect the key position occupied by such person in the society. But the Information Technology Act produced some leverage to such intermediaries subject to attributing actual knowledge as required under Section 79 (3) (b) of Information Technology Act and proof of exercise of due diligence by the intermediary as per Rule 3 of rules framed thereunder. Sometimes, even after issue of notice of cease and desist, intermediary expressing its inability to remove or block those defamatory contents or sexually explicit material only on the ground that it has no control over it and the internet service provider directing the parties to approach the Court and obtain order for removal of such material; indirectly it amounts to encouraging the net users to post such defamatory content or sexually explicit material including child pornography in the websites and it will be continued on the website till a direction was issued by competent Court for removal of such content. It is also a known fact how much delay is being caused in the present adversarial system in Indian Courts and sometimes it will take years together and by the time direction was issued by the Courts, total reputation of such person against whom such defamatory content was posted would be greatly effected in the eye of the society and sometimes personal attacks against such persons and exposing those persons by sexually explicit material by morphing etc., would seriously effects the character and image of such person. Therefore, the Courts should give preference to such suits or petitions filed before the Courts and grant instant relief by way of interim orders to block or removal of such defamatory or sexually explicit content against the internet service provider, otherwise approaching Court for such relief is nothing but a futile exercise even if a direction is given after

lapse of few years and it would not serve any purpose and the loss caused to such persons would not be compensated in monetary terms, but the present law under Information Technology Act is not able to provide such immediate reliefs to the person aggrieved by such defamatory or sexually explicit content or hate speeches etc. Therefore, the Legislature has to take necessary steps to provide safeguard to the interest of public at large on account of such defamatory content, sexually explicit material or pornography etc. by creating fake accounts by the net users and to provide stringent punishment to such net users, who created fake accounts and posted such material, by necessary amendment to the Information Technology Act and Rules.

In the present facts of the case, the contention of the respondent No.1 - plaintiff was that a defamatory statement was posted by the respondent No.2 defendant No.1 in the web-blog of the defendant No.3 and the defendant No.2 hosted such content and despite the demand made by the plaintiff, the defendant No.2 did not remove the content or blocked access to the site and consequently claimed a mandatory injunction.

Thus, the principle laid down in all the judgments is only based on actual knowledge about posting of defamatory or any content by the 3rd parties on the web-blog. The same is the language used in Section 79 (3) (b) of the Information Technology Act. Added to that another safeguard is provided under Rule 3 of the Rules framed thereunder i.e. exercise of due diligence. If the intermediary exercised due diligence and when such posting of defamatory content in the web-blog came to their actual knowledge or brought to their actual knowledge, the intermediary has to take steps to block access to such content or remove such content from the blog after due verification. Therefore, the actual knowledge and exercise of due diligence is a matter of evidence and while deciding the lis before the trial Court and the first appellate Court, the Court has to consider the evidence adduced by both the parties to find out whether any actual knowledge was attributed to the intermediary by the plaintiff and whether the intermediary exercised due diligence and such question is a question of fact, which cannot be gone into by this Court in Second Appeal while exercising power under Section 100 of C.P.C.

The trial Court and the first appellate Court did not record any specific finding with regard to exercise of due diligence by the intermediary and on actual knowledge was attributed by the plaintiff to the defendant Nos.2 and 3 in the cease and desist notice demanding them to remove the said content. But no notice was issued to the defendant No.3 demanding it to remove such content. It is the contention of the defendant No.2 that defendant No.2 is only an intermediary and the entire control over the website is with the defendant No.3 and defendant No.3 alone is competent to remove or block any such postings of defamatory material on verification. As seen from Exs.B.3 and B.4 i.e. Google Groups Terms of Service and Google Groups content policy. It is clear that defendant No.3 is alone competent to remove or block any defamatory content or sexually explicit material posted by 3rd parties on the web-blog or URL of the defendant No.3. In such circumstances, even if any knowledge is attributed to the defendant No.2, it has no control over the website. In such case, it is impossible for defendant No.2 to block access to the defamatory content posted by the defendant No.1 or remove it from the web- blog. The trial Court rightly exonerated the defendant No.2/ appellant from its liability and the same was affirmed by the 1st appellate Court in paragraph 21 (b) of its judgment, but strangely without applying its mind issued a direction to remove the defamatory content posted by the defendant No.1 against the plaintiff in the message Nos.1 and 2 referred supra, such direction in the nature of mandatory injunction against defendant Nos.2 and 3 is erroneous. Therefore, the direction issued by the first appellate Court against defendant No.2 is liable to be set aside since it is contrary to its findings in paragraph No.21 (b) of the judgment.

Though, the adverse finding recorded by the first appellate Court against the plaintiff, the plaintiff had neither challenged the adverse finding recorded by the first appellate Court in paragraph No.21 (b) either by filing cross objections or separate appeal or at least during hearing of this appeal in view of Order XLI Rule 22 of C.P.C. In the absence of any separate appeal or cross objections by the plaintiff, it is impermissible to upset the finding of the first appellate Court recorded against the plaintiff and in favour of defendant No.2 in paragraph No.21 (b) of its judgment since the said finding attained finality as it remained unchallenged as per the procedure provided in C.P.C.

The trial Court exonerated the defendant No.2 totally from its liability to take any action for removal of defamatory content, but the appellate Court in its inconsistent finding at paragraph No.23 concluded that the defendant No.2 also liable and directed to withdraw the messages posted by the defendant No.1, but strangely the first appellate Court affirmed the finding recorded by the trial Court regarding appellant/defendant No.2. Therefore, on the face of the judgment, it is erroneous and inconsistent with one finding to the

other, such judgment cannot be sustained under law, more particularly when it is in compliance of Order XLI Rule 31 C.P.C. Therefore, it is liable to be set aside. Accordingly, the substantial question of law is answered in favour of the appellant/ defendant No.2 and against the plaintiff/respondent No.1 herein.

In the result, the appeal is allowed setting aside the judgment and decree dated 29.01.2016 passed in A.S.No.50 of 2014 by the I Additional Chief Judge, City Civil Court, Secunderabad dismissing the suit against the defendant No.2 in O.S.No.143 of 2010 on the file of the XVIII Junior Civil Judge cum Additional Rent Controller, Secunderabad. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.