



RIGHT TO FREEDOM OF SPEECH AND EXPRESSION INCLUDES STRIKING DOWN OF SEC. 66A OF IT ACT – A CRITICAL LEGAL STUDY

Dr. Girijarani Reddy

M. A, LL. M, Ph. D.

Abstract: The term 'freedom of speech and expression' includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used. Based on John Milton's arguments, freedom of speech is understood as a multi-faceted right including not only the right to express or disseminate information and ideas but also including the right to seek, receive and impart information and ideas.

India is one of such paradises on earth where you can speak your heart out without the fear of someone gunning you down for that, or, it has been until now. Even if the situation of Indians is a lot better than that of their fellow citizens of other nations, the picture is not really soothing or mesmerizing for Indians any more. This observation is being made with regard to the exercise of the right of freedom of speech and expression in the context of social media and the hurdles placed on that by the arbitrary use of the so called cyber laws of the nation, particularly Section 66A of the Information Technology Act, 2000. Before delving into the issue in details, it is but desirable to first understand the concepts of social media and freedom of speech and expression.

A division bench of Justices J. Chelameswar and R.F. Nariman in 'Shreya Singhal v Union of India' ruled that Section 66A of IT Act, 2000 is unconstitutional for "being violative of Article 19(1)(a) and not saved under Article 19(2)." Article 19(1)(a) gives people the right to speech and expression whereas 19(2) accords the state the power to impose "reasonable restrictions" on the exercise of this right.

The court said: "Every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another". The court also held that blocking of information for public access given under Section 69A of IT Act is constitutionally valid in nature.

Speaking on behalf of the Court, Justice Nariman in Shreya Singhal v Union of India addressed the various factors that can be used to determine whether speech restrictions can be justified under Article 19(2) of the Indian Constitution. Further, the Court held that the 'public order' restriction under Article 19(2) of the Constitution would not apply to cases of 'advocacy', but only to 'incitement', specifically incitement which has a proximate relation to public disorder.

One of the most important element for a healthy democracy is establishing a space where citizens can participate completely and effectively in the decision-making process of the particular country. Significantly, Constitution of India also guarantees every citizen the Right to freedom of speech and expression, this right is not only guaranteed by constitution but also through various international conventions like International Covenant on Civil and Political Rights (ICCPR), Universal Declaration of Human Rights (UDHR) and European Conventions on Human Rights and Fundamental Freedom.

At the same time, cases regarding hatred, false information and Sensational reporting of critical issues in order to obtain viewership is also increasing. Therefore, in order to maintain sovereignty and integrity of country the Government also imposes some reasonable restrictions, because the right to freedom of speech and expression under the constitution of India is not absolute.

Introduction:

Over the years judicial creativity, judicial activism, judicial wisdom, judicial

craftsmanship have widened the scope of freedom of speech and expression by way of delivering outstanding landmark



judgements by our apex court i. e Supreme Court of India.

Freedom of speech and expression is broadly understood as the notion that every person has the natural right to freely express themselves through any media and frontier without outside interference, such as censorship, and without fear of reprisal, such as threats and persecutions. Freedom of expression is a complex right. This is because freedom of expression is not absolute and carries with it special duties and responsibilities therefore it may be subject to certain restrictions provided by law. The term freedom of expression itself had existed since ancient times, dating back at least to the Greek Athenian era more than 2400 years ago. The following are some of the most commonly agreed upon definitions of freedom of expression that are considered as valid international standards:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

“Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Similarly, Article 19 (1) (a) of the Constitution of India also confers on the citizens of India the right “to freedom of speech and expression”. The freedom of speech and expression means the right to

express one’s convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It also includes the right to propagate or publish the views of other people

The term ‘freedom of speech and expression’ includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used. Based on John Milton’s arguments, freedom of speech is understood as a multi- faceted right including not only the right to express or disseminate information and ideas but also including the right to seek, receive and impart information and ideas.

India is one of such paradises on earth where you can speak your heart out without the fear of someone gunning you down for that, or, it has been until now. Even if the situation of Indians is a lot better than that of their fellow citizens of other nations, the picture is not really soothing or mesmerizing for Indians any more. This observation is being made with regard to the exercise of the right of freedom of speech and expression in the context of social media and the hurdles placed on that by the arbitrary use of the so called cyber laws of the nation, particularly Section 66A of the Information Technology Act, 2000. Before delving into the issue in details, it is but desirable to first understand the concepts of social media and freedom of speech and expression.

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¹ Citation: AIR 2015 SC 1523 - Court: Honourable Supreme Court Of India Bench/Judge: Justice J.Rohinton Fali

Nariman, Justice J. Chelameswar. Judgment Date: 24th March, 2015

² see Bare Act of Information Technology Act - 2000



Article 19(2).” Article 19(1)(a) gives people the right to speech and expression whereas 19(2) accords the state the power to impose “reasonable restrictions” on the exercise of this right. The court said: “Every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another”. The court also held that blocking of information for public access given under Section 69A of IT Act is constitutionally valid in nature. Speaking on behalf of the Court, Justice Nariman in *Shreya Singhal v Union of India* addressed the various factors that can be used to determine whether speech restrictions can be justified under Article 19(2) of the Indian Constitution. Further, the Court held that the ‘public order’ restriction under Article 19(2) of the Constitution would not apply to cases of ‘advocacy’, but only to ‘incitement’, specifically incitement which has a proximate relation to public disorder.

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The Court first discussed three fundamental concepts in understanding the freedom of expression: discussion, advocacy, and incitement. According to the Court, “[m]ere discussion or even advocacy of a particular cause howsoever unpopular is at the heart” of the right. And, the law may curtail the freedom only when a discussion or advocacy amounts to incitement.³

Sec 66A has been challenged on the ground that it casts the net very wide – “all information” that is disseminated over the internet is included within its reach. It will be useful to note that Section 2(v) of Information Technology Act, 2000 defines information as follows:

“2. Definitions.-(1) In this Act, unless the context otherwise requires,-

(v) “Information” includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche.”

Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public’s right to know is directly affected by Section 66A. Information of all kinds is roped in – such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause

³ Para3 of 2015 SC 1523



annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know – the market place of ideas – which the internet provides to persons of all kinds is what attracts Section 66A. That the information sent has to be annoying, inconvenient, grossly offensive etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc. The petitioners are right in saying that Section 66A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66A.

In this regard, the observations of Justice Jackson in *American Communications Association v. Douds*, 94 L. Ed. 925 are apposite:

“Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.”

Article 19(2) One challenge to Section 66A made by the petitioners’ counsel is that the offence created by the said Section has no proximate relation with any of the eight subject matters contained in Article

19(2). We may incidentally mention that the State has claimed that the said Section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

As applied to the case in hand, the Court found that Section 66A is capable of limiting all forms of internet communications as it makes no distinction “between mere discussion or advocacy of a particular point of view, which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc.”⁴

The Court further held that the law fails to establish a clear proximate relation to the protection of public order. According to the Court, the commission of an offence under Section 66A is complete by sending a message for the purpose of causing annoyance or insult. As a result, the law does not make distinction between mass dissemination and dissemination to only one person without requiring the message to have a clear tendency of disrupting public order.

As to whether Section 66A was a valid attempt to protect individuals from defamatory statements through online communications, the Court noted that the main ingredient of defamation is “injury to reputation.” It held that the law does not concern this objective because it also condemns offensive statements that may annoy or be inconvenient to an individual without affecting his reputation.⁵

The Court also held that the government failed to show that the law intends to prevent communications that incite the commission of an offence because “the mere causing of annoyance, inconvenience, danger etc., or being

⁴ Para20 of 2015 SC 1523

⁵ Para43 of 2015 SC 1523



grossly offensive or having a menacing character are not offences under the Penal Code at all.”⁶

As to petitioners’ challenge of vagueness, the Court followed the U.S. judicial precedent, which holds that “where no reasonable standards are laid down to define guilt in a Section which creates an offense, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offense and which is vague must be struck down as being arbitrary and unreasonable.”⁷ The Court found that Section 66A leaves many terms open-ended and undefined, therefore making the statute void for vagueness.

The Court also addressed whether Section 66A is capable of imposing chilling effect on the right to freedom of expression. It held that because the provision fails to define terms, such as inconvenience or annoyance, “a very large amount of protected and innocent speech” could be curtailed.⁸

The Court also noted the intelligible difference between information transmitted through internet and other forms of speech, which permits the government to create separate offenses related to online communications. Accordingly, the Court rejected petitioners’ argument that Section 66A was in violation of Article 14 of the Constitution against discrimination.⁹

The Court declined to address the Petitioners’ challenge of procedural unreasonableness since the law was already declared unconstitutional on substantive grounds. It also found Section 118(d) of the Kerala Police Act to be

unconstitutional as applied to Section 66A.

Based on the forgoing reasons, the Court invalidated Section 66A of ITA in its entirety as it violated the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution of India.

Section 66A of the Information Technology Act, 2000 was introduced with an amendment in 2009, the section punishes offence or annoyance caused through electronic communication or media. The section comprises some specific words namely Grossly offensive, Annoyance, inconvenience, Danger, Obstruction, Insult, Injury, and Criminal intimidation which do not have clear meanings thus this section was being used by the police in an arbitrary and illegal way. Therefore, this section was struck down by the Supreme court of India in the case of Shreya Singhal Vs Union of India.

Article 19 of the Constitution of India – Article 19 of the Indian constitution is a part of the Right to Freedom. Article 19 is applicable to all citizens and guarantees six rights:

1. Right To Freedom of Speech and Expression
2. Right to assemble peaceably and without arms.
3. The right to form associations or unions or co-operative societies.
4. Right to move freely throughout the territory of India.
5. Right to reside and settle in any part of the territory of India.
6. The right to practice any profession or to carry on any occupation, trade, or business

Now, talking about the famous case which stated the importance of the Article 19 of the Constitution of India

⁶ Para44 of 2015 SC 1523

⁷ Para52 of 2015 SC 1523

⁸ Para83 of 2015 SC 1523

⁹ Para98 of 2015 SC 1523



Shreya Singhal Vs Union of India

Facts of the case:-

- Two girls in 2012 were arrested on a Facebook post regarding the displeasure of Bandh in Mumbai post-Bal Thackeray's death
- Both the girls were booked and arrested under section 66A of the Information Technology Act 2000.
- Later in the year 2013 the Union Government recommended that the arrest of a person made under section 66A of the Information Technology Act shall not be made without prior authorization of the superior officer who is not below the rank of inspector general of Police
- In response to this, numerous petitions were filed by the people across the country to strike down the unconstitutional provision of the Information Technology Act.
- The Apex Court of India clubbed those petitions into a Single Public Interest Litigation and the case came to be known as Shreya Singhal Vs Union of India
- The writ petition filed seeking a remedy to declare sections 66A, 69A, and 79 of the Information Technology Act ultra-vires to the constitution of India as they have ambiguous interpretation.
- Also, these particular sections were against Fundamental Right to Article 14, 19(1)(a) and 21 of the Indian Constitution.

ISSUES INVOLVED IN SHREYA SINGHAL V UNION OF INDIA

The primary issues involved in Shreya Singhal v. Union of India were:

1. Whether Section 66A of the Information Technology Act is constitutionally valid or not?
2. Whether Section 69A and the Rules are unconstitutional?

3. Whether Section 79(3) (b) and Information Technology "Intermediary Guidelines" Rules, 2011 is constitutionally valid or not?

Queries by bench to respondent's advocate :

Mr.Sorabjee stated that the terms used in the section are vague and stated by an example that if some minister is not carrying out his duties properly and someone points that out, that may be grossly offensive to the minister. To this J. Chalmeshwar observed that what is offensive is a matter of value judgment and same speech can have different meanings in different context

J. Chalmeshwar then asked Mr. Sorabjee if grossly offensive could be brought under the decency head found in art. 19(2). Mr. Sorabjee stated that we cannot stretch the grounds provided and the Freedom of expression should be preserved and given the widest amplitude. J. Chalmeshwar asked what's the meaning of decency under 19(2)? To this Mr. Sorabjee replied that it the standard of reasonable person in a society to which J. Chalmeshwar agreed. J. Chalmeshwar subsequently stated that whether any reasonable man will come to a conclusion whether particular information is grossly offensive or not is an individual choice but can just on that count can we say that the provision is unconstitutional? Mr. Sorabjee pointed to s. 67 of the Act and stated that decency and the said section can cover obscenity. To this J. Chalmeshwar stated that then we need to look whether 'grossly offensive' as provided has any meaning and is supposed to cover any acts which are beyond the scope of S. 67. Mr. Sorabjee stated that there is no objective standard and what is grossly offensive depends on person to person and in this case on the opinion of a



statutory authority. J. Bobde stated that it depends on the statutory authority only for the purpose of initiating the proceedings however the final decisions is with the courts whether the person is guilty or not. Mr. Sorabjee stated that in that case there will be a chilling effect.

J. Chalmeshwar stated that supposed that the law (s. 66A) is declared unconstitutional, then if a person gets an offensive message everyday, nothing can be done about it. Mr. Sorabjee said if a statement is offensive without being indecent or lascivious it falls outside the scope of Art. 19(2). J. Clameshwar said that a lot of statements can be offensive without being indecent and Mr. Sorabjee replied that then it is outside the scope of art. 19(2).

Moving on to s.66A(b) Mr. Sorabjee stated that the terms are very vague and subjective. J. Bobde stated that under IPC what is punishable is intimidating message sent from one person to another and on the Internet what seems to be a problem is that these messages are not sent to a particular person lot of times. Assuming that a message if a general threat to a community, then a person cannot go under IPC because the authorities will say that it is not directly targeted to you. Mr. Sorabjee that it is already covered under s. 153A IPC. J. Chalmeshwar stated that IPC states whoever by words written or spoke and does not talk about electronic communication.

. Sorabjee stated that IPC has been interpreted in such a way. He then stated that his main issue with the words grossly offensive and J. Chalmeshwar observed that people in power get annoyed very fast. Mr. Sorabjee stated that this section

can be used to have serious political censorship. Mr. Sorabjee then read out the meaning of some of these terms from the Dictionary and stated that there cannot be these vague expression to have restrictions on free speech. J. Bobde stated that based on these vague terms you cannot make criminal offences; these might be unpleasant words however you cannot punish a person under this. Mr. Sorabjee stated that no offence should be there for such terms but definitely not criminal offence. J. Chalmeshwar observed that if a person does not have a sense of humor then even a cartoon can be offensive. Mr. Sorabjee stated that I might have a certain opinion that you may find very unpleasant and offensive.

Sorabjee then refereed to certain cases of vagueness. State of M.P. v. Baldeo Prasad,¹⁰ and referred to pages 970 and 979. The case dealt with a section, which provided powers to police to detain 'gunda', however the court held who is a gunda is very vague. He then referred to the cases of Harakchand Ratanchand Bantia v. Union of India,¹¹ and K.A. Abbas v. Union of India,¹² and SCOTUS case of Burstyn v. Wilson, where he read out parts of the concurring judgment of J. Frankfurter.

Based on a query by the bench Mr. Sorabjee stated that this section is applying censorship. He the stated that there have been various instances in which the section has been applied in an arbitrary manner and the vagueness is inherent in the said section. He then gave certain examples including of Prof. Mahapatra in Kolkata, the Pahalgarr arrests, the Hudhud cyclone case.

He the stated that the said Section has a chilling effect on freedom of speech and

¹⁰ 1961 (1) SCR 970

¹¹ 1969 (2) SCC 166

¹² 1970 (2) SCC 780



expression and is thus violative of art. 19(1)(a). Mr. Sorabjee then explained the concept of chilling effect and cited two cases (R. Rajgopal v. State of Tamil Nadu,¹³; S. Khusboo v. Kanniammal,¹⁴ in which the Supreme Court has recognized this concept in India. He stated that self censorship is absolutely detrimental to a democracy.

He also stated the case of Cricket Association of Bengal to state that freedom of speech also includes the right to receive information and this has great significance in a country like India.

He concluded that the impugned heads of s. 66A cannot be served and are inextricably linked with other provisions of the said Section, however he would not present detailed arguments on this and leave it to the bench. He also stated that there are sections in IPC, which take care of all the offences under IT Act. J. Chalmeshwar stated that that would require a wider debate and each of those sections will have to be examined and seen whether it meets the requirement of electronic communication and if the petitioners are serious and want to argue that submission the Court will like hear them in detail. J. Bobde stated that another questions which needs to be looked into is whether IPC was found inadequate to deal with these issues and that is why the offences were made under the IT Act and whether this is a special situation which cannot be covered under IPC. Mr. Sorabjee stated that if such is the case then also these grounds should be brought under at. 19(2). J. Clameshwar gave the example of the Dramatic Performances act and stated that visual/spoken expressions might require a certain different and special law.

- There was the obligation of the legislature to address the needs of the people
- The court of law can interpret the law in a manner that makes it justly enforceable
- The abuse of legislation by the executive authorities cannot be the sole reason to pronounce the law ultra-vires to the constitution of India
- Broad terminology is used in the law to protect the rights of the citizens from those who infringe them by means of his medium.
- Judgement: -
- The court while delivering the judgement referred to the importance of freedom of speech and expression both from the point of view of liberty of the individual and from the point of view of our democratic form of government.
- The court relied on upon in the early case of Romesh Thappar Vs. State of Madras (1950) in this case the court stated that freedom of speech lay at the foundation of all democratic organizations. Also, in Sakal Papers Ltd. & Ors. Vs. Union of India, (1962) a constitution bench of this court said that freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved.
- The court said that section 2(v) of the Information Technology Act, 2000 defines information, it does not refer to what information can be. It only talks about the dissemination of information.
- Hence in view of the above the Supreme Court declared section 66A

¹³ 1994 (6) SCC 632

¹⁴ 2010 (5) SCC 600



of the Information Technology Act unconstitutional and struck it down on the grounds of the curtailment of free speech.

- The court said such a law which was often misused by police in various states to arrest innocent persons for posting critical comments about social and political issues and leaders on social networking sites, hit at the root of liberty and freedom of expression, the two cardinal pillars of democracy.
- Section 69A and Information Technology (Procedure and Safeguards for Interception, Monitoring, and Decryption of Information) Rules, 2009 was held intra-vires to the Constitution of India.
- Section 79 was affirmed to be legitimate subject to the reading down of section 79(3)(b) of the Information Technology Act.

Conclusion:

Justice Chalmeshwar pointed out that on a bare reading of the section under 66A (b) the information must be false and the person sending it should know it is false and the information should be sent persistently. If the information is true this does not allow and a stray instance of sending such information may not attract this.

This decision certainly expands the freedom of expression by narrowly interpreting the reasonable grounds of restricting the right, such as maintaining public order or protecting one's reputation.

However, in February 2019, almost four years later, the Supreme Court was presented with new litigation based on findings that the Singhal v. Union of India ruling was not being properly implemented. The Internet

Freedom Foundation published a study in November 2018 on the continued use of the Section which found about 65 to 70 cases cumulatively in different legal databases and that fresh cases were being registered in police stations, investigated and thereafter, considered by lower Courts. The study put the continued use of 66A on the radar and the People's Union for Civil Liberties, one of the petitioners in the original case, once again approached the Supreme Court in January, 2019, in an application for directions.

The application sought that a copy of the Shreya Singhal judgement be issued through appropriate circulars to all Chief Secretaries of States, and onwards to Directors Generals of Police. A similar direction was sought to all High Courts, for further dissemination to the District Courts under their jurisdiction. Finally, the application requested that the High Courts pass necessary orders in all pending cases of 66A to ensure disposal. The Supreme Court allowed the request with respect to dissemination of the judgment by order dated 15.02.2019. In a blog post, advocates involved with the petition, Sanjana Srikumar and Joanne D'Cunha, discuss the litigation and the challenge of post-decisional oovers

However, the present cyber laws of India are neither appropriate nor adequate in this respect. An analysis of the existing IT laws shows that there is unaccountable and immense power in the hands of the Government while dealing with security in the cyber space. Even then, it is not sufficient to check the misuse of social media. Hence, a specific legislation is desirable to regulate social media.