

# MAY IT DISPLEASE YOUR HONOR!!!

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## ABSTRACT

*In case of Shreya Singhal Supreme Court struck down section 66A of Information Technology Act. The author has analyzed the said judgment has put forward his own views about the judgment. The author dissents with the judgment by Hon. Supreme Court and has is own explanations for the same. This critical review is only for academic purpose and debate and dose not constitute disrepute of any institution.*

**Keyword-** CYBERSPACE, FREEDOM OF SPEECH, COMMENT ON SHREYA SINGHAL CASE, SECTION 66A OF O I T A C T

### 1. May it displease your Honor!!! Critical review of Shreya Singhal Judgment

The Shreya Singhal judgment has open Pandora's Box in cyberspace as regards to Freedom of Speech and expression in cyberspace is considered and How far Fundamental rights can be protected in Cyberspace? The scrapping of Section 66A Of I T Act by Supreme Court is critically reviewed by the researcher.

The reference number should be shown in square bracket [1]. However the authors name can be used along with the reference number in the running text. The order of reference in the running text should match with the list of references at the end of the paper.

Shreya Singhal Case – The basic challenge in this case was to provisions of section 66A of Information Technology Act which read as:

**“66-A. Punishment for sending offensive messages through communication service, etc.** —Any person who sends, by means of a computer resource or a communication device, — (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

*Explanation* — For the purposes of this section, terms “electronic mail” and “electronic mail message” means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.”

The petitioner's contention was that most of the terms used in section were not properly defined and hence the creator of post is uncertain about applicability or meaning of those terms and due to which his freedom of expression is under restrain and hence the section should be stuck down. According to arguments against 66A, first and foremost Section 66A infringes the fundamental right to free speech and expression and is not saved by any of the

eight subjects covered in Article 19(2). The causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill-will are all outside the purview of Article 19(2). Further, in creating an offence, Section 66A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said Section.

Article 19(2) of Indian Constitution states:

**“Article 19: Protection of certain rights regarding freedom of speech, etc.—**(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.”

Hon. Judges’ reliance was on following cases, citation.

- 1) Justice Brandeis, in his famous concurring judgment in *Whitney v. California*, (71 L. Ed. 1095) said, “To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.” “The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.” The court observed that if there is no clear and present danger by the speech then the speech cannot be curtailed or suppressed.
- 2) Judges observed in present case that, “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 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.”
- 3) There is a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved – that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication.
- 4) We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquillity of society undisturbed? Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned. (Save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent – there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquillity. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel ‘annoying’ girls is telling – this Court has held that mere ‘annoyance’ need not cause disturbance of public order. Under Section 66A, the offence is complete

by sending a message for the purpose of causing annoyance, either 'persistently' or otherwise without in any manner impacting public order.

Clear and present danger – tendency to affect; Viewed at either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates. It will be noticed that for something to be defamatory, injury to reputation is a basic ingredient. Section 66A does not concern itself with injury to reputation. Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation. It is clear therefore that the Section is not aimed at defamatory statements at all.

5) Section 66A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66A has nothing to do with "incitement to an offence". As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved under Article 19(2), is declared as unconstitutional.

6) What has been said with regard to public order and incitement to an offence equally applies here. Section 66A cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality' in that what may be grossly offensive or annoying under the Section need not be obscene at all – in fact the word 'obscene' is conspicuous by its absence in Section 66A.

Counsel for the petitioners argued that the language used in Section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a particular communication will fall.

7) The U.S. Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in **Musser v. Utah**, 92 L. Ed. 562, a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.

8) Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined. Incidentally, none of the expressions used in Section 66A are defined. Even "criminal intimidation" is not defined – and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

9) Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise – suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions – and that is what renders the Section unconstitutionally vague.

10) The parties agreed with the rulings of the Divisional Court that it is for the Justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an affectionate way, or may be adopted as a badge of honour ("Old Contemptible"). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

11) Ultimately, applying the tests referred to in Chintaman Rao and V.G. Row's case, referred to earlier in the judgment, it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

12) Chilling Effect and Over breadth

Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to

governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by “liberal views” – such as the emancipation of women or the abolition of the caste system or whether certain members of a non proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

13) The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the field of constitutional prohibitions. It further held that the Section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of over breadth.

14) It has been held by us that Section 66A purports to authorize the imposition of restrictions on the fundamental right contained in Article 19(1) (a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action.

**The views of researcher:** With humble submission and with due respect to Hon. Judges’ and entire judicial system, in my views, “The judgment has been pronounced almost two years ago and its impact is such that it’s still debated and discussed on many forums. When issue about protection of Fundamental rights of people in Cyberspace arises, this judgment is often at the centre stage. The background matter of the case is that one girl put certain comments about an incident which according to her was not proper and this comment was liked by her friend. Some people felt irritated / annoyed by the comment and lodged a police complaint and hence FIR was registered against the girls under available provisions of I T Act. The matter was very hotly debated on media as well as social and huge media trial initiated before the commencement of the present litigation. In present litigation, which was filed by persons in public interest, the courts pronounced that section 66A is unconstitutional and should be struck down. Few observations by the Hon. Court which they relied upon prior to arriving to the decision are also highlighted above.”

Researcher feels as per his understanding and without intension to disrespect anyone and only with a view to critically analyze the impact of said decision that court failed to consider the backdrop or context of the comments and magnitude of the social media and its destructive capability. The court only saw whether there is present and imminent danger due to those comments but failed to foresight the consequences which might have happened if police have not acted in such manner and registering the offence. It is always mandatory to understand the ground realities and the intentions of the lawmakers for adding this provision while enactment. Taking into account the growing trends of social media and need to regulate and discipline the same these provisions of 66A were enacted. The statement of objects and reasons makes it clear that a rapid increase in use of computer and internet has given rise to new forms of crimes related to data, pornography, e-commerce activities and offensive messages through communication services and penal provisions are required to be included in I T Act to prevent such crimes. The ever growing social media was/is unregulated and presently anarchy is prevailing in it due to non availability of any disciplinary measures. Section 66A was the first attempt to regulate the same and this fair intention behind the drafting of 66A was totally ignored by the Hon Court. The pure technical issue like definition is not elaborated or words used are not properly defined shows pre-mediated and biased mindset. The judges rather than adopting open ended views kept their views very narrow and missed a golden opportunity to regulate and discipline the cyberspace. As observed by Hon. Judges that the most of the definitions are kept as open-ended, it must be understood that this law aimed at regulating an arena which is most dynamic and caters to most innovative and unimaginative happenings, which no lawmaker can think of in advance.

The functions of legal provisions are not only retaliatory but sometimes aimed as proactive and deterrent for the infringers. By the same logic by which the Section 66A was struck down, the drunk drivers tests carried out by the police authorities can also be challenged. A person is presumed to be innocent till he is pronounced guilty by the court makes it clear that unless courts pronounce their judgments, even if a person is accused of some offence he is

treated to be at equal with others. By mere accusation nobody becomes a criminal and ultimately courts will decide whether accusations by police are substantiated by the evidences or not. But this logic doesn't prohibit police from registering the offences and initiate the initial investigation on the ground that in later stages courts will acquit the person. So by same logic by mere registration of offence under section 66A wherein terms were not adequately defined, court had this opportunity to define and elaborate those terms and in many cases courts have assumed those responsibilities on themselves like in Vishakha case. Rather than initiating a proactive measure of defining the terms to its common man's understanding language courts opted for safest exit root by scrapping the entire provision and thereby defeating the whole intention of enactment of section 66A.

The courts had cited, "The reasonableness of the restraint requires to be judged by the magnitude of the evil which it is the purpose of the restraint to curb or to eliminate."<sup>1</sup> The court themselves were not clear about whether restraint needs to be followed in cyberspace which is used by all sections of society with all age groups, while posting anything on social media and what is magnitude and reach of social media. Courts were not able to judge the trans-border virtual reach of the social media posts. How emotions can be ignited by use of the same within fraction of seconds and what could be its damaging capacity. As the globe has rarely witnessed the mass destructive capacity of this weapon of mass destruction(wmd), the courts would have thought that this wmd concept is a myth and will never come in reality and hence social media needs clear understanding about which acts will be legal and which acts will not. So it was responsibility of law to be ethical and reasonable for fighting unethical and unknown and unreasonable elements and enemies of the nation.

Surprisingly court cited, "The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and the urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions at the time, should all enter into the judicial verdict."<sup>2</sup> Court grossly failed to take notice of underlying purpose of the enactment that new forms of crimes are coming up and imminent need is to fight those crimes with penal provisions. The crimes modus operandi is innovative and fighting mechanism is not in place and in such situation best way is to have certain penal provisions which would act as deterrent to criminals. Courts failed to appreciate the urgency required and shown by government in enacting the section 66A to fight this evil and rather went on to discuss pure legal issue that words used were not properly defined. Court's failed to understand the need of provisions under present scenario and its future consequences.

Also courts cited, "It may be noticed that clause (2) uses the words "in the interests of public order" and not "for the maintenance of public order". A law may not be designed to directly maintain law and order yet it may be enacted in the "interests of public order". Also, not only such utterances as are directly intended to incite disorder, but also those that have the tendency to lead to disorder fall within the expression."<sup>3</sup> So even by going the citation even if the utterances are not directly intended to incite disorder but have tendency to lead to disorder, were termed as prohibitive. So here also court has taken a pragmatic view that words themselves may not be directly intended to do certain acts but might have tendency to incite those acts. So similarly the words may not been defined properly in definition sections but the intentions of those words were very clear and the person who used due diligence to read those words carefully will certainly understand that what those words were intended for. So while pronouncing the judgment, the over reliance of court on words are not defined and hence entire acts needs to be struck down does not go well with the researcher.

The researcher thinks that the circumstances under which the legal provisions were enacted and the development of cyberspace there after was not properly brought before the notice of the court. The political developments in entire process of litigation also played crucial role in government's defense policy. Those who were proactive and more vocal of scrapping section 66A suddenly were required to defend the constitutionality of the section and hence researcher thinks that matter was not properly defended before the court. The researcher concludes that a golden opportunity to provide new dimensions to section 66A in the present scenario was missed by the court and also till

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<sup>1</sup> 1970 AIR 1453

<sup>2</sup> Ebrahim Vazir Vs St of Baombay 1954 AIR 229

<sup>3</sup> Ramji Lal Modi v. State of U.P., AIR 1957 SC 620

date no new legislation is enacted to regulate messages through social media and this has resulted into anarchy in cyberspace.

Other dimension of the judgment was that there was possibility of application of principle of severability for provision 66 A(c) and it could have been saved. 66A(c) read as: Any person who sends, by means of a computer resource or a communication device any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine. At least this provision should not have struck down as meanings were self explanatory and normal citizen would have understood it by plain reading. The retention of this provision would have acted as deterrent to perpetrators of spam mails or phishing scams or those who indulge in spoofing crimes.

