PSV/PVR/VA

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L.) NO.14172 of 2021

Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors. **..Petitioners**

Versus

Union of India & Anr. **..Respondents**

AND
PUBLIC INTEREST LITIGATION (L.) NO.14204 OF 2021

Nikhil Mangesh Wagle **..Petitioner**

Versus

Union of India **..Respondent**

…

Mr.Darius Khambata, Senior Advocate with Mr.Mihir Desai, Senior Advocate, Mr.Karan Rukhana and Mr.Ammar Faizullabhoy and Mr.Varun Thomas Mathew, Advocates i/b. Ms.Meenaz Kakalia, for the Petitioner in Writ Petition (L) no.14172 of 2021.

Mr.Abhay Nevagi with Mr.Amit Singh and Mr.Vivek Patil, Advocates i/b. Abhay Nevagi & Associates for the Petitioner in PIL (L) no.14204 of 2021.

Mr.Anil C.Singh, ASG with Mr.Aditya Thakkar, Mr.D.P.Singh and Ms.Smita Thakur, Advocates for the Respondents in both petitions.

…

CORAM: DIPANKAR DATTA, CJ &
G. S. KULKARNI, J.

DATED : AUGUST 14, 2021.

P.C:-

1. These two petitions mount a challenge to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (for short "the 2021 Rules"), on the ground that they are *ultra vires* the Information Technology Act, 2000 (for short "the IT Act") and the provisions of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution.

2. Writ Petition (L) no.14172 of 2021 (for short "the first petition") is filed by petitioner no.1 company which owns and operates a digital news web portal known as "The Leaflet". It is stated that Leaflet was started in the year 2018, which has published articles, opinion pieces and reportage pertaining to various social and political issues, including news and current affairs related content. It offers a platform to eminent personalities, renowned journalists, academics, social workers and common citizens to express their views.

3. PIL (L) no.14204 of 2021 (for short "the second petition") is a Public Interest Litigation filed by Shri.Nikhil Mangesh Wagle who is stated to be in the field of journalism since the year 1977. It is stated that he is also part of the print media being the editor of newspaper "Mahanagar". He has also worked as the editor of news channels "IBN Lokmat" and "Maharashtra-1". He has hosted talk

shows for various television channels and is a socio-political commentator and published more than 100 books.

4. Mr.Khambata, learned senior counsel for the petitioners in the first petition and Mr.Nevagi, learned counsel for the petitioner in the second petition have made extensive submissions in support of the interim prayers as made in the two petitions. It is their submission that the 2021 rules are *ex-facie* draconian, arbitrary and patently *ultra vires* the provisions of the IT Act and the provisions of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution, which guarantees fundamental rights to the petitioners.

5. The 2021 rules were notified on February 25, 2021. They are framed in exercise of powers conferred by sub-section (1) and clauses (z) and (z)(

6. g) of sub-section (2) of section 87 of the IT Act in super-session of Information Technology (Intermediaries Guidelines) Rules, 2011. Rule 2 of the 2021 Rules is the definition clause providing for definitions of the various terms as used in the rules which are from clauses 1(a) to 1(y). The definitions relevant in the context of the present proceedings read thus:-

> "**2. Definitions**
>
> **(**l) '**Ministry**' means, for the purpose of Part II of these rules unless specified otherwise, the Ministry of Electronics and Information Technology, Government of India, and for the purpose of Part III of these rules, the

Ministry of Information and Broadcasting, Government of India;

(n) '**newspaper**' means a periodical of loosely folded sheets usually printed on newsprint and brought out daily or at least once in a week, containing information on current events, public news or comments on public news;

(q) '**online curated content**' means any curated catalogue of audio-visual content, other than news and current affairs content, which is owned by, licensed to or contracted to be transmitted by a publisher of online curated content, and made available on demand, including but not limited through subscription, over the internet or computer networks, and includes films, audio visual programmes, documentaries, television programmes, serials, podcasts and other such content;

(s) '**publisher**' means a publisher of news and current affairs content or a publisher of online curated content;

(t) '**publisher of news and current affairs content**' means an online paper, news portal, news aggregator, news agency and such other entity called by whatever name, which is functionally similar to publishers of news and current affairs content but shall not include newspapers, replica e-papers of the newspaper and any individual or user who is not transmitting content in the course of systematic business, professional or commercial activity;

(u) '**publisher of online curated content**' means a publisher who, performing a significant role in determining the online curated content being made available, makes available to users a computer resource that enables such users to access online curated content over the internet or computer networks, and such other entity called by whatever name, which is functionally similar to publishers of online curated content but does not include any individual or user who is not transmitting online curated content in the course of systematic business, professional or commercial activity;.....

(w) '**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;

7. The petitioners in the first petition are primarily aggrieved by Rules 9, 14 and 16 which read thus:-

> "**9. Observance and adherence to the Code**.—
>
> (1) A publisher referred to in rule 8 shall observe and adhere to the Code of Ethics laid down in the Appendix annexed to these rules.
>
> (2) Notwithstanding anything contained in these rules, a publisher referred to in rule 8 who contravenes any law for the time being in force, shall also be liable for consequential action as provided in such law which has so been contravened.
>
> (3) For ensuring observance and adherence to the Code of Ethics by publishers operating in the territory of India, and for addressing the grievances made in relation to publishers under this Part, there shall be a three-tier structure as under—
>
> (a) Level I - Self-regulation by the publishers;
>
> (b) Level II - Self-regulation by the self-regulating bodies of the publishers;
>
> (c) Level III - Oversight mechanism by the Central Government.
>
> .. ..
>
> **14. Inter-Departmental Committee**.—
>
> (1) The Ministry shall constitute an Inter-Departmental Committee, called the Committee, consisting of representatives from the Ministry of Information and Broadcasting, Ministry of Women and Child Development, Ministry of Law and Justice, Ministry of Home Affairs, Ministry of Electronics and Information Technology, Ministry of External Affairs, Ministry of Defence, and such other Ministries and Organisations, including domain experts, that it may decide to include in the Committee:
>
> Provided that the Authorised Officer designated under sub-rule (2) of rule 13 shall be the Chairperson of such Committee.
>
> (2) The Committee shall meet periodically and hear the following complaints regarding violation or

contravention of the Code of Ethics by the entities referred to in Rule 8 -

(a) arising out of the grievances in respect of the decisions taken at the Level I or II, including the cases where no such decision is taken within the time specified in the grievance redressal mechanism; or

(b) referred to it by the Ministry.

(3) Any complaint referred to the Committee, whether arising out of the grievances or referred to it by the Ministry, shall be in writing and may be sent either by mail or fax or by e-mail signed with electronic signature of the authorised representative of the entity referring the grievance, and the Committee shall ensure that such reference is assigned a number which is recorded along with the date and time of its receipt.

(4) The Ministry shall make all reasonable efforts to identify the entity referred to in Rule 8 which has created, published or hosted the content or part thereof, and where it is able to identify such entity, it shall issue a duly signed notice to such entity to appear and submit their reply and clarifications, if any, before the Committee.

(5) In the hearing, the Committee shall examine complaints or grievances, and may either accept or allow such complaint or grievance, and make the following recommendations to the Ministry, namely:—

(a) warning, censuring, admonishing or reprimanding such entity; or

(b) requiring an apology by such entity; or

(c) requiring such entity to include a warning card or a disclaimer; or

(d) in case of online curated content, direct a publisher to—

(i) reclassify ratings of relevant content; or

(ii) edit synopsis of relevant content; or

(iii) make appropriate modification in the content descriptor, age classification and parental or access control;

(e) delete or modify content for preventing incitement to the commission of a cognisable offence relating to public order;

(f) in case of content where the Committee is satisfied that there is a need for taking action in relation to the reasons enumerated in sub-section (1) of section 69A of the Act, it may recommend such action.

(6) The Ministry may, after taking into consideration the recommendations of the Committee, issue appropriate orders and directions for compliance by the publisher:

Provided that no such order shall be issued without the approval of the Secretary, Ministry of Information and Broadcasting, Government of India (hereinafter referred to as the "Secretary, Ministry of Information and Broadcasting").

16. Blocking of information in case of emergency.—

(1) Notwithstanding anything contained in rules 14 and 15, the Authorised Officer, in any case of emergency nature, for which no delay is acceptable, shall examine the relevant content and consider whether it is within the grounds referred to in sub-section (1) of section 69A of the Act and it is necessary or expedient and justifiable to block such information or part thereof and submit a specific recommendation in writing to the Secretary, Ministry of Information and Broadcasting.

(2) In case of emergency nature, the Secretary, Ministry of Information and Broadcasting may, if he is satisfied that it is necessary or expedient and justifiable for blocking for public access of any information or part thereof through any computer resource and after recording reasons in writing, as an interim measure issue such directions as he may consider necessary to such identified or identifiable persons, publishers or intermediary in control of such computer resource hosting such information or part thereof without giving him an opportunity of hearing.

(3) The Authorised Officer, at the earliest but not later than forty-eight hours of issue of direction under sub-rule (2), shall bring the request before the Committee for its consideration and recommendation.

(4) On receipt of recommendations of the Committee under sub-rule (3), the Secretary, Ministry of Information and Broadcasting, shall pass the final order as regard to approval of such request and in case the request for

> blocking is not approved by the Secretary, Ministry of Information and Broadcasting in his final order, the interim direction issued under sub-rule (2) shall be revoked and the person, publisher or intermediary in control of such information shall be accordingly, directed to unblock the information for public access."

8. It would be necessary to note the basic scheme of the 2021 Rules.

9. Part-I of the 2021 Rules provides for the definition clause. Part-II provides for due diligence by an intermediary and grievance redressal mechanism. Rule 7 as contained in Part-II provides for "Non-observance of Rules" which ordains that where an intermediary fails to observe these rules, the provisions of sub-section (1) of section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code.

10. Part-III of the 2021 Rules provides for "Code of Ethics and Procedure and Safeguards in Relation to Digital Media". Rule 8 thereunder provides for applicability of Part-III to apply to two categories of persons or entities, namely:- (a) publishers of news and current affairs content; and (b) publishers of online curated content who shall be administered by the Ministry of Information and Broadcasting, Government of India (referred as "Ministry") in

the said Part. A proviso incorporated below Rule 8, Part III of the Rules, is made applicable to intermediaries for the purposes of rules 15 and 16.

11. Rule 9 provides for "observance and adherence to the Code" which we have extracted hereinabove. It provides that a publisher referred to in rule 8 shall observe and adhere to the Code of Ethics laid down in the Appendix annexed to the rules. Sub-rule (2) of Rule 9 provides that notwithstanding anything contained in the 2021 Rules, a publisher referred to in rule 8 who contravenes any law for the time being in force, shall also be liable for consequential action as provided in such law which has so been contravened. Sub-rule (3) of Rule 9 provides that for ensuring observance and adherence to the Code of Ethics by publishers operating in the territory of India, and for addressing the grievances made in relation to publishers under Part III, there shall be a three-tier structure, namely:—(a) Level I - Self-regulation by the publishers; (b) Level II - Self-regulation by the self-regulating bodies of the publishers; and (c) Level III - Oversight mechanism by the Central Government. The 2021 Rules are thereafter divided in to several Chapters, - Chapter I, II and VI. Chapter-I providing for "grievance redressal mechanism", Chapter-II providing for "Self-Regulating mechanism Level-I", Chapter-III providing for "Self-regulating mechanism, Lever-II" and Chapter-IV providing for "oversight

mechanism – Level-III". Rule 13 provides for "Oversight Mechanism" and Rule 14 provides for "Inter-Departmental Committee" to consider complaints referred to the Committee, whether arising out of the grievances or referred to it by the Ministry. Rule 16 under Chapter IV provides for "blocking of information in case of emergency'. We have already extracted Rule 16. Thereafter, Chapter-V provides for "furnishing of information". Chapter-VI provides for "miscellaneous provisions".

12. There is an 'Appendix' to the 2021 Rules containing a "Code of Ethics" of which paragraph I reads thus:-

> " **CODE OF ETHICS**
>
> I. News and current affairs:
>
> (i) Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978;
>
> (ii) Programme Code under section 5 of the Cable Television Networks Regulation) Act, 1995;
>
> (iii) Content which is prohibited under any law for the time being in force shall not be published or transmitted.

13. In the context of the challenge as urged on behalf of the petitioners, some provisions of the IT Act are also required to be considered. The relevant being the definition of "intermediary" as contained in section 2(w) of the IT Act, extracted supra, and the provisions of Section 69A which provides for "*Power to issue*

directions for blocking for public access of any information through any computer resource" as well as Section 87 which provides for "*power of Central Government to make rules*", clauses (z) and 2(z)(g) of sub-section (2) and sub-section (3) thereof. These provisions read thus:-

> **69A. Power to issue directions for blocking for public access of any information through any computer resource**.–
>
> (1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.
>
> (2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.
>
> (3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.
>
> **87. Power of Central Government to make rules.**–
>
> (1) The Central Government may, by notification in the Official Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:–
>
> .....

> (z) the procedures and safeguards for blocking for access by the public under sub-section (3) of section 69 A;
>
> .....
>
> (zg) the guidelines to be observed by the intermediaries under sub-section (2) of section 79; .....
>
> (3) Every notification made by the Central Government under sub-section (1) of section 70A and every rule made by it shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule."

14. After noting the brief outline of the 2021 Rules and the provisions of the Act, we now consider the contentions as urged on behalf of the petitioners in support of the interim prayers.

15. Mr.Khambata, learned Senior Counsel for the petitioner has made the following submissions:

(I) That the provisions of Rule 9, 14 and 16 are patently *ultra vires* Article 19(1)(a) of the Constitution inasmuch as such provisions travel beyond the ambit of the restrictions as imposed under Article 19(2). It is his submission that in seeking to control the information, the 2021 Rules go beyond the restrictive ambit of Section 69A of the IT Act. It is submitted that the 2021 Rules are

so wide that they expressly transgress not only the provisions of the IT Act but also fundamental right of free speech and expression. It is submitted that the 2021 Rules have a terrible chilling effect in their applicability to the internet as they bring about a manifestly unreasonable and an arbitrary regime amounting to an affront to the constitutional guarantee of right of citizens to exercise freedom of free speech and expression. It is also his submission that the earlier rules namely the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (for short, the 2009 Rules), which are still in operation, provide for a complete mechanism for blockage of public access to any information, nonetheless the 2021 Rules have been framed as if it is a substantive legislation, completely transgressing the rule making power available under Section 89 of the IT Act. It is submitted that not a single provision under the IT Act and much less Section 69-A and Section 87 would provide having such restrictions and control as brought about by the impugned rules. It is his submission that a subordinate legislation is intended to sub-serve the provisions of the principal Act and cannot result in creating fresh rights, obligations and liabilities not traceable in the enactment conferring power to frame rules.

(II) It is submitted that the chilling effect is of such extent that a citizen who is enjoying a fundamental right of free speech and

expression is dissuaded from writing articles or disseminating information because the sword of fear of an adverse/penal action that could be taken under the 2021 Rules hangs on him, and that would amount to an unreasonable restriction not saved by Article 19(2). It is his submission that the freedom of speech and expression includes liberty of thought and expression, and freedom of exchange of information of all kinds and every nature, which stand completely scuttled by the 2021 Rules. It is next submitted that such subordinate legislation cannot control the constitutional right of free speech and expression, that too contrary to the provisions of the substantive legislation (IT Act).

(III) It is submitted thus that considering the settled principles of law as laid down by the Supreme Court in its decisions in State Of Tamil Nadu & Anr vs P. Krishnamurthy & Ors., (2006) 4 SCC 517, Global Energy Vs. CERC (2009) 15 SCC 570 and Bhavesh D. Parish & Others vs Union Of India And Another, (2000) 5 SCC 471, this is a clear case where the interim prayers as made by the petitioners in the nature of Rules 9, 14 and 16 of the 2021 Rules be granted.

16. Mr.Abhay Nevagi, learned Counsel for the petitioner has supported the submissions as made by Mr.Khambata. It is his submission that the 2021 Rules amount to a virtual censorship on the information that is openly available not only in the

print/electronic media but also on the social media. It is his submission that no other country has such mechanism to control the information in such manner as contemplated by the impugned rules, hence, there is opposition to the 2021 Rules even by the foreign countries. It is submitted that the respondents cannot exercise powers of censorship or scrutiny, in traffic of the messages or information, unless it is falling within the parameters of Article 19(2) of the Constitution. It is his submission that the 2021 Rules are patently in the teeth of the principles as laid down by the Supreme Court in its decision Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1, as it imposes mass censorship which is not permissible. It is also his submission that by the impugned rules, an attempt is made to overcome the mandate of the law laid down by the Supreme Court in Shreya Singhal v. Union of India, (2013) 12 SCC 73. Mr.Nevagi has submitted that such rules ought not to have been brought into force without involvement of all the stakeholders and discussion on such rules prior to their publication when they impose such drastic provisions offending the constitutional rights. It is his submission that the rules create a situation of an absolute *fait accompli* inasmuch as it is imminent that the citizens would suffer harsh consequences in clear violation of the fundamental rights guaranteed under Article 19(1)(a). He has prayed for stay of Rule 7 on the ground that a statutory protection

granted to an intermediary by Section 79 of the IT Act has been taken away.

17. Mr.Anil Singh, learned ASG in opposing the prayers for interim relief has referred to the short affidavit of Shri.Amarendra Singh, Deputy Secretary to the Government of India in the Ministry of Information & Broadcasting filed in opposition on behalf of the respondents. Mr.Singh, at the outset, would submit that there is a presumption of constitutionality of the rules and considering the settled principles of law as laid down by the Supreme Court in Bhavesh D. Parish (supra), the provisions of the rules ought not to be stayed. It is submitted that there is no urgency and any need to stay the 2021 Rules inasmuch as the inter-departmental Committee as contemplated by Rule 14 has not been constituted. It is his submission that so far no adverse action has been initiated against the petitioners; hence, it cannot be presumed that there is a cause of action for filing these petitions. Mr.Singh submits that out of 1800 digital media publishers, 97% publishers of news and current affairs houses, have not challenged the 2021 Rules and thus the provisions are accepted and implemented. He has also drawn our attention from paragraph 13 of the affidavit in opposition that writ petitions are filed before different High Courts challenging the 2021 Rules and that a transfer petition has been filed by the Union of India seeking transfer of all such petitions including these

petitions, and for such reasons, the prayers for interim relief as made by the petitioners ought not to be considered. He next contended that the Central Government has legislative competence to enact the IT Act which is administered by the Ministry of Electronics and Information Technology of the Government of India and it is submitted that "the special news and current affairs contains an OnLine platform" and "films and audio-visual programmes made available by OnLine contents providers", lie with the administrative ambit of the Ministry of Information and Broadcasting. Hence, Part III of the Rules has been administered by the Ministry of Information and Broadcasting utilizing power of delegation by Ministry of Electronics and Information Technology. It is his submission that from the perspective of the administration of the Rules, Part III is well within the legislative competence of the Ministry of Electronics and Information Technology, to make subordinate legislation. It is, hence, his submission that in the absence of any cause of action, interim prayers as made by the petitioners ought to be rejected.

18. Having heard learned Counsel for the parties, at the outset, we may note that the primary grievance of the petitioners in supporting the prayers for interim reliefs is *qua* the application of Rules 7, 9, 14 and 16 of the impugned rules.

19. We may observe that as far as Rule 14 is concerned, in our opinion, there is no immediate urgency inasmuch as inter-departmental committee is yet to be constituted. It is also required to be noted that, no material has been brought to our notice that the authorized officer as contemplated under sub-rule (2) of Rule 13 has been appointed. In these circumstances, the oversight mechanism which would be made effective by appointing inter-departmental committee itself has not taken effect. We, accordingly, grant liberty to the petitioners to urge for relief on this issue as and when the inter-departmental committee is constituted.

20. In regard to Rule 16 which provides for blocking of information in case of emergency, such rule is *pari materia* to Rule 9 of the 2009 Rules which are still in operation. Also, it is not the petitioners case that they were at any time aggrieved by Rule 9 of the 2009 Rules. We accordingly find that no case is made out by the petitioners to stay Rule 16 of the 2021 Rules. In any event, blocking of information in case of emergency as provided by Rule 16 is on the grounds traceable in sub-section (1) of Section 69A of the IT Act which is a provision falling in line with the restrictions as imposed by Article 19(2) of the Constitution of India, namely, when the authority finds that blocking of public access of any information is 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 commission of any cognizable offence in relation to such issues. We are, thus, not inclined to consider the prayer for stay of Rule 16. The prayer stands rejected.

21. Insofar as Rule 9 is concerned, it has been severely criticized by the petitioners as noted by us above to be an affront on the guarantee of right of freedom of free speech and expression conferred by Article 19(1)(a) of the Constitution. What is peculiar of Rule 9 is that the publishers referred to in Rule 8, namely, the publishers of news and current affairs content and publishers of online curated content, are under a mandatory obligation to observe and adhere to the Code of Ethics laid down in the Appendix annexed to the impugned Rules. The Appendix as noted above contains Code of Ethics. In paragraph (1) it obligates adherence for news and current affairs content to norms of Journalistic Conduct of the Press Council of India under the Press Council Act,1978 (for short, the PC Act); and of the Programme Code prescribed under Section 5 of the Cable Television Networks (Regulation) Act,1995 (for short, the CTVN Act); it further prescribes that the content which is prohibited under any law for the time being in force shall not be published or transmitted. The petitioners have contended that the IT Act does not seek to censor the content on internet; secondly, it is impermissible for the Central Government to have a

subordinate legislation in the form of Rule 9 inasmuch as it provides for restrictions which travel beyond the provisions of Section 69A of the IT Act; and thirdly, the rule making power itself, as exercised in framing the impugned rules, namely, the power under Section 87 sub-section (1) and clauses (z) and (zg) of sub-section (2) itself does not provide for imposition of such restrictions.

22. We have noted above, the provisions of Section 69A of the IT Act, which imposes restrictions akin to the restrictions as contained in Article 19(2) of the Constitution being 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.

23. The provision of Section 87(2)(z) and (zg) of the IT Act which is invoked to frame the 2021 Rules speaks of rules that could be framed in regard to the procedure and safeguards for blocking of access by the public under sub-section (2) of Section 69-A. Sub-section (zg) provides for framing rules in the nature of guidelines to be observed by the intermediaries under sub-section (2) of Section 79.

24. It needs to be noted that Section 79 provides for 'Exemption from liability of intermediary in certain cases' and provides that an intermediary shall not be liable for any third party information, data

or communication link made available or hosted by him subject to provisions of sub-sections (2) and (3) thereof. Sub-section (2) provides that such immunity as recognized by sub-section (1) shall apply if 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 the intermediary does not initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission, as provided under clause (b) of sub-section (2), and as per clause (c) of sub-section (2), if 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.

25. Considering the effect of such substantive provisions of the parent Act, in our opinion, Rule 9, prima facie, suffers from two illegalities – firstly, it imposes an obligation on the publishers of news and current affairs content and publishers of online curated content, to observe the Code of Ethics under a completely different statutory regime alien to the IT Act, namely, by applying norms of Journalistic Conduct of the Press Council of India under the PC Act and Programme Code under Section 5 of the CTVN Act. Further, Section 87 does not confer any power on the Central Government to frame rules contemplating such provisions under clauses (z) and

(zg) of sub-section (2). Thus, it is difficult to accept the contention as urged by Mr. Singh that Rule 9 is intended to carry out the provisions of the IT Act. It cannot be overlooked that the two provisions referred to in the "Code of Ethics", namely, Norms of Journalistic Conduct of the Press Council of India under the PC Act and the Programme Code under Section 5 of the CTVN Act are under different statutory regimes occupying the field for the purposes of those two enactments. It is *prima facie* difficult to comprehend as to how such fields which stand occupied by independent legislations can be brought within the purview of the impugned rules and substantive action can be taken for their violation under the impugned rules.

26. Even otherwise, the IT Act does not seek to censor content on the internet, except to the extent mentioned in Section 69A thereof. The Norms of Journalistic Conduct, 2010 edition, of the Press Council of India (for short, the PCI) was placed before us. Its preface is written by Justice G.N. Ray, Chairman, PCI. It would be relevant to read the preface to understand why it was considered necessary to introduce a code of conduct for journalists and what are its contours. Relevant passages from the preface are set out below:

> *" 'Journalism', the concrete form of this expression has grown in power over a period of time. The fundamental objective of journalism is to serve the people with news, views, comments*

and information on matters of public interest in a fair, accurate, unbiased and decent manner and language. The media today does not remain satisfied as the Fourth Estate, it has assumed the foremost importance in society and governance. Such is the influence of media that it can make or unmake any individual, institution or any thought. So all pervasive and all-powerful is today its impact on the society. With so much power and strength, the media cannot loose sight of its privileges, duties and obligations.

However to enjoy these privileges, to this end, media is mandated to follow certain ethics in collecting and disseminating the information viz., ensuring authenticity of the news, use of restrained and socially acceptable language for ensuring objectivity and fairness in reporting and keeping in mind its cascading effect on the society and on the individuals and institutions concerned.

The freedom of the press has to be preserved and protected not only from outside interference but equally from those within: An internal mechanism for adherence to guidelines is sought to be ensured through mechanisms such as 'letters to the editor', internal Ombudsman, Media Council of peers and Media Watch Groups which focus the wrongs committed by the media persons, journalists or the management.

The mandate of the Press Council of India, as well as similar bodies across the world is to specifically promote the standards of the media by building up for it a code of conduct.

The sanction behind code of ethics is moral; the source of their motive-force is within the conscience of the media person concerned. The pronouncement and directions of the Council activate that conscience, and the principles articulated

by it, act as lights that lead and guide the journalist along the path of ethical rectitude. Compiled in a compendium titled "Norms of Journalistic Conduct', they act as a reference guide in varying circumstances for the journalists.

The Press Council of India has played a key role in maintaining public trust and confidence in the news media by promoting professional ethics, fairness, accuracy and balance. ……"

27. Therefore, the Norms of Journalistic Conduct are the guidelines framed by the PCI laying down the standards of conduct which each journalist/editor/publisher ought to strive to maintain in the discharge of his/her duties as a member of the Press. The sanction behind the code, as is evident, is **moral** and **not** statutory. Even the PCI Act does not envisage anything more than to warn, admonish or censure the newspaper, the news agency, the editor or the journalist, or disapprove the conduct of the editor or the journalist, as the case may be, as action taken thereunder for non-adherence to the code of journalistic ethics. However, adherence and/or observance of moral standards in the code has been exalted to the status of a mandatory compliance. One who violates the code does so at his own peril and would expose himself/itself to more rigorous action than what the PCI Act envisages. It is, therefore, incomprehensible as to how by a subordinate legislation, contravention of such code laying down standards of moral

behavior, could validly be made a ground for attracting action of the nature specified in Rule 14(5) of the 2021 Rules.

28. Also, the Programme Code under Rule 6 of the Cable Television Networks Rules, 1994 framed in terms of Section 5 read with Section 22(2)(b) of the CTVN Act is mainly intended to provide a framework for regulation of programme carried in the cable service. The various "do's" and "don'ts" of the Programme Code may be relevant for a programme carried in the cable service but *per se* cannot bind writers/editor/publishers of content on the internet to express views which may be against good taste or even may not be decent. If a writer/editor/publisher has to adhere to or observe the Programme Code in toto, he would necessarily be precluded from criticizing an individual in respect of his public life [see: Rule 6(1)(i)].

29. Dissent in democracy is vital. It is, however, the checks and balances that make a democracy work. There can be no two opinions that a healthy democracy is one which has developed on criticism and acceptance of contra views. Opinion based on criticism reinforces its acceptance in a democratic society. For proper administration of the State, it is healthy to invite criticism of all those who are in public service for the nation to have a structured growth but with the 2021 Rules in place, one would have to think twice before criticizing any such personality, even if the

writer/editor/publisher may have good reasons to do so without resorting to defamation and without inviting action under any other provision of law. Allowing the operation of the 2021 Rules in its form and substance to operate would result in the writer/editor/publisher standing the risk of being punished and sanctioned, should the inter-departmental committee be not in favour of criticism of any public figure. It is, therefore, quite possible that the writer/editor/publisher on contravention of the provisions of clause (1) of Rule 9 of 2021 Rules, but without even transgressing the boundaries set by clause (2) of Article 19 of the Constitution, may expose himself/itself to punishment/sanction under the 2021 Rules. The indeterminate and wide terms of the Rules bring about a chilling effect *qua* the right of freedom of speech and expression of writers/editors/publishers because they can be hauled up for anything if such committee so wishes. The 2021 Rules are, thus, manifestly unreasonable and go beyond the IT Act, its aims and provisions.

30. A democracy would thrive only if the people of India regulate their conduct in accordance with the preambular promise that they took while giving to themselves the Constitution. Liberty of thought is one of such promises. Exercising this liberty, expressions take shape. Should at least a part of Rule 9 of the 2021 Rules be not interdicted even at the interim stage, it would generate a pernicious

effect. As it is, the constant fear of being hauled up for contravention of the Code of Ethics is a distinct possibility now. People would be starved of the liberty of thought and feel suffocated to exercise their right of freedom of speech and expression, if they are made to live in present times of content regulation on the internet with the Code of Ethics hanging over their head as the Sword of Damocles. This regime would run clearly contrary to the well-recognized Constitutional ethos and principles.

31. In our opinion, neither clause (z) nor clause (zg) of sub-section (2) of Section 87 under which the 2021 Rules are framed would confer any power on the Central Government to frame a provision in the nature of Rule 9. Thus, in our prima facie opinion, Rule 9 appears to be ultra vires the provisions of the IT Act being beyond the delegated power.

32. This apart, Rule 9 also prima facie appears to be infringing the constitutional guarantee of Freedom of Speech and Expression as conferred by Article 19(1)(a) in subjecting the publishers of news and current affairs content and publishers of online curated content subject to action under the statutory regime of the PC Act and the CTVN Act, which provides for an independent mechanism for any violation of the provisions of such legislation. We *prima facie* find much substance in the contentions as urged on behalf of

the petitioner that such transgression of powers occupied by different legislations cannot be disrupted by a subordinate legislation.

33. Now the question is whether in the facts of present case, interim relief of a stay to Rule 9 ought not to be granted to the petitioner by accepting the contention of the respondents that the Court should consider the principle of presumption of constitutionality, till the provision is struck down. It is true that the first consideration of the Court would always be to preserve the statutory provision when its constitutionality is challenged. However, if there are exceptions and the Court finds that the provision is ex-facie ultra vires, unreasonable or illegal, it may strike it down. The law in this regard is no more *res integra*. In this context, we refer to the decision of the Supreme Court in State of Tamilnadu vs. P. Krishnamurthy *(supra)* referred by the respondents in paragraph 18 of the affidavit, which lays down that although there is a presumption in favour of constitutionality or validity of subordinate legislation, it is well recognized that a subordinate legislation can be challenged on the ground of lack of legislative competence to make the subordinate legislation, violation of fundamental rights guaranteed under the Constitution of India, violation of any provisions of the Constitution of India, failure to conform to the statute under which it is made or

exceeding the limits of authority conferred by the enabling enactment and on the ground of manifest arbitrariness/ unreasonableness. The Court has held that when the rules are directly inconsistent with a mandatory provision of the statute, then, the task of the Court is simple and easy. In our opinion, for the purpose of interim relief, the present challenge would be required to be regarded as an exception to the general rule of presumption in favour of constitutionality of Rule 9 inasmuch as for the above reasons, we are prima facie of the opinion that Rule 9 does not conform to the statute, namely, of the Information Technology Act as also it is an intrusion into the fundamental rights guaranteed under Article 19(1)(a) of the Constitution of the publishers.

34. In Bhavesh D. Parish & Others (supra), the Supreme Court was concerned with the validity of Section 9 of the Reserve Bank of India Act as amended by the Amendment Act,1997, assailed on the ground that the said provision is violative of Articles 14 and 19(1)(g) of the Constitution of India. The petitioners were carrying on business as Shroffs. Their contention was that the impugned provision brought about unreasonable restrictions on their rights to carry on their business by utilizing public deposits, as Section 45-S which was introduced had restrained the firms of or individual shroffs from accepting any deposit from the public for the purposes

of their business activities. The Court observed that such provision was introduced on certain background of complaints being received in regard to the old provision of Section 45-S of 1984, which showed that public confidence had been shattered beyond description and the fate of several depositors stood sealed. The Supreme Court observed that the RBI had not acted hastily before it was thought that the provisions are required to be amended. It is in this context, the Supreme Court in proceedings of an Article 32 petition, observed that while considering an application for stay of operation of a piece of legislation, and that too pertaining to economic reform or change, the Courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in staying the applicability of the same, and the principle of presumption of the constitutional validity of any legislation, ought to be considered till the same is set- aside at the final hearing. In the present facts, this decision of the Supreme Court would certainly not assist Mr.Singh. In Health for Millions V/s Union of India (2014) 14 SCC 496, the Supreme Court has observed that the rules can be quashed if the same are found to be unconstitutional or ultra vires the provisions of the Act, however, the operation of the statutory provision cannot be stultified by granting an interim order except when the Court is fully convinced that the parts under enactment or the rules are ex facie

unconstitutional and the factors like balance of convenience, irreparable injury and public interest are in favour of passing an interim order. (emphasis added)

35. We, however, do not propose to grant stay of Rule 7 of the 2001 Rules in the absence of clear satisfaction that the petitioner in the second petition, who is himself a journalist and has sufficient personal interest in the subject matter of the dispute, has not been able to satisfy us that he is an 'intermediary' within the meaning of Section 2(w) of the IT Act.

36. In State of Bihar vs. Rai Bahadur Hurdut Roy Moti Lal Jute Mills, (1960) 2 SCR 331, the Supreme Court held as follows:

> "7. *** In cases where the vires of statutory provisions are challenged on constitutional grounds, it is essential that the material facts should first be clarified and ascertained with a view to determine whether the impugned statutory provisions are attracted; if they are, the constitutional challenge to their validity must be examined and decided. If, however, the facts admitted or proved do not attract the impugned provisions there is no occasion to decide the issue about the vires of the said provisions. Any decision on the said question would in such a case be purely academic. Courts are and should be reluctant to decide constitutional points merely as matters of academic importance."

From the pleadings in the second writ petition, we have not found a case having been set up for stay of Rule 7.

36. We may also note that although on behalf of the parties, other decisions are cited, and the principles of law as laid down in such decisions being well settled, we have found it appropriate not to burden the order by referring to such decisions, suffice it to observe that we have only referred to the relevant decisions considering our interim conclusion.

37. For the above reasons, as an interim relief on the petitions, we direct stay of operation of sub-rules (1) and (3) of Rule 9 of the 2021 Rules. Ordered accordingly.

38. We issue '**Rule**' on both the petitions. Respondents waive service.

39. Let the respondents file their reply affidavits within a period of three weeks from today. Rejoinder thereto, if any, may be filed by two weeks thereafter.

40. Stand over to September 27, 2021 for final hearing.

41. Before parting, we may observe that we had adjourned these proceedings on earlier occasions on the ground that the Union of India had filed a transfer petition before the Supreme Court. As informed to us by Mr.Singh and recorded by us in our earlier orders, the Transfer petitions could not be listed before the Supreme Court. Mr.Singh had hence prayed that the Union of India

be permitted to file a short reply affidavit, which we have permitted. We, accordingly, heard Mr.Singh in opposition to the admission and interim prayers.

42. Prayer for stay of operation of this order made by Mr.Singh, is considered and refused.

G.S. KULKARNI, J. **CHIEF JUSTICE**

PRASHANT VILAS RANE
Digitally signed by PRASHANT VILAS RANE
Date: 2021.08.14 20:49:00 +0530