

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 24th JANUARY, 2023

IN THE MATTER OF:

+ **W.P.(C) 4319/2021**

NEHA KAPOOR & ANR.

..... Petitioners

Through: Ms. Neha Kapoor, Advocate.

versus

MINISTRY OF INFORMATION AND BROADCASTING & ANR.

..... Respondents

Through: Ms. Shiva Lakshmi, CGSC with Ms. Srishti Rawat and Ms. Ridhima Malhotra, Advocates for R-2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SATISH CHANDRA SHAMAR, C.J.

1. The instant Writ Petition under Article 226 of the Constitution of India has been filed by the Petitioner for a direction to the Respondents herein to constitute a Regulatory Authority/censor board to censor/review the non-film songs, their lyrics and videos which are made available to the general public through various media platforms like Television, YouTube, etc. and make it mandatory for composers of non-film songs to receive certification before such songs are made available in public domain. Petitioner also seeks a direction to Respondent No.2 herein to constitute a body to screen every non-film song and its contents, including lyrics and video, before they are released on the internet through any

platform/application and to ban all such non-film songs available on the internet having obscene/vulgar content with immediate effect.

2. Notice was issued in the matter on 07.04.2021 and counter affidavit has been filed.

3. The Union of India in exercise of powers conferred by sub-section (1), clauses (z) and (zg) of sub-section (2) of Section 87 of the Information Technology Act, 2000 (*hereinafter referred to as 'the IT Act'*) and in supersession of the Information Technology (Intermediaries Guidelines) Rules, 2011 (*hereinafter referred to as 'the Rules'*) has brought out the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (*hereinafter referred to as 'the Ethics Code'*). The Ethics Code lays down a regimen to be followed by every intermediary. An intermediary has been defined under Section 2(w) of the IT Act and the same reads as under:

"2. (w) "intermediary" with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message;"

4. Significant Social Media Intermediary and Social Media Intermediary has been defined under Sections 2(v) and 2(w) respectively of the Ethics Code and the same reads as under:

"2.

(v) 'Significant social media intermediary' means a social media intermediary having number of registered users in India above such threshold as notified by the Central Government;

(w) ‘Social media intermediary’ means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services;”

5. Section 3 of the Ethics Code lays down the due diligence that is to be followed by all the intermediaries and the same reads as under:

“3. (1) Due diligence by an intermediary: An intermediary, including social media intermediary and significant social media intermediary, shall observe the following due diligence while discharging its duties, namely:—

(a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement for access or usage of its computer resource by any person;

(b) the rules and regulations, privacy policy or user agreement of the intermediary shall inform the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that,—

(i) belongs to another person and to which the user does not have any right;

(ii) is defamatory, obscene, pornographic, paedophilic, invasive of another’s privacy, including bodily privacy, insulting or harassing on the basis of gender, libellous, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force;

(iii) is harmful to child;

(iv) infringes any patent, trademark, copyright or other proprietary rights;

(v) violates any law for the time being in force;

(vi) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any information which is patently false or misleading in nature but may reasonably be perceived as a fact;

(vii) impersonates another person;

(viii) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting other nation;

(ix) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;

(x) is patently false and untrue, and is written or published in any form, with the intent to mislead or harass a person, entity or agency for financial gain or to cause any injury to any person;

(c) an intermediary shall periodically inform its users, at least once every year, that in case of non-compliance with rules and regulations,

privacy policy or user agreement for access or usage of the computer resource of such intermediary, it has the right to terminate the access or usage rights of the users to the computer resource immediately or remove non-compliant information or both, as the case may be;

(d) an intermediary, on whose computer resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act, shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force:

Provided that any notification made by the Appropriate Government or its agency in relation to any information which is prohibited under any law for the time being in force shall be issued by an authorised agency, as may be notified by the Appropriate Government:

Provided further that if any such information is hosted, stored or published, the intermediary shall remove or disable access to that information, as early as possible, but in no case later than thirty-six hours from the receipt of the court order or on being notified by the

Appropriate Government or its agency, as the case may be:

Provided also that the removal or disabling of access to any information, data or communication link within the categories of information specified under this clause, under clause (b) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such intermediary, shall not amount to a violation of the conditions of clauses (a) or (b) of sub-section (2) of section 79 of the Act;

(e) the temporary or transient or intermediate storage of information automatically by an intermediary in a computer resource within its control as an intrinsic feature of that computer resource, involving no exercise of any human, automated or algorithmic editorial control for onward transmission or communication to another computer resource shall not amount to hosting, storing or publishing any information referred to under clause (d);

(f) the intermediary shall periodically, and at least once in a year, inform its users of its rules and regulations, privacy policy or user agreement or any change in the rules and regulations, privacy policy or user agreement, as the case may be;

(g) where upon receiving actual knowledge under clause (d), on a voluntary basis on violation of clause (b), or on the basis of grievances received under sub-rule (2), any information has been removed or access to which has been disabled, the intermediary shall, without vitiating the evidence in any manner, preserve such information and associated records for one hundred and eighty

days for investigation purposes, or for such longer period as may be required by the court or by Government agencies who are lawfully authorised;

(h) where an intermediary collects information from a user for registration on the computer resource, it shall retain his information for a period of one hundred and eighty days after any cancellation or withdrawal of his registration, as the case may be;

(i) the intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011;

(j) the intermediary shall, as soon as possible, but not later than seventy two hours of the receipt of an order, provide information under its control or possession, or assistance to the Government agency which is lawfully authorised for investigative or protective or cyber security activities, for the purposes of verification of identity, or for the prevention, detection, investigation, or prosecution, of offences under any law for the time being in force, or for cyber security incidents: Provided that any such order shall be in writing stating clearly the purpose of seeking information or assistance, as the case may be;

(k) the intermediary shall not knowingly deploy or install or modify technical configuration of computer resource or become party to any act that may change or has the potential to change

the normal course of operation of the computer resource than what it is supposed to perform thereby circumventing any law for the time being in force: Provided that the intermediary may develop, produce, distribute or employ technological means for the purpose of performing the acts of securing the computer resource and information contained therein;

(1) the intermediary shall report cyber security incidents and share related information with the Indian Computer Emergency Response Team in accordance with the policies and procedures as mentioned in the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013.

(2) Grievance redressal mechanism of intermediary:

(a)The intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the name of the Grievance Officer and his contact details as well as mechanism by which a user or a victim may make complaint against violation of the provisions of this rule or any other matters pertaining to the computer resources made available by it, and the Grievance Officer shall –

(i) acknowledge the complaint within twenty four hours and dispose off such complaint within a period of fifteen days from the date of its receipt;

(ii) receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction.

(b) The intermediary shall, within twenty-four hours from the receipt of a complaint made by an individual or any person on his behalf under this sub-rule, in relation to any content which is prima facie in the nature of any material which exposes the private area of such individual, shows such individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such individual, take all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it:

(c) The intermediary shall implement a mechanism for the receipt of complaints under clause (b) of this sub-rule which may enable the individual or person to provide details, as may be necessary, in relation to such content or communication link.”

(emphasis supplied)

6. Section 4 of the Ethics Code brings out additional due diligence that is to be observed by significant social media intermediary and the same reads as under:

“4. Additional due diligence to be observed by significant social media intermediary.—

(1) In addition to the due diligence observed under rule 3, a significant social media intermediary shall, within three months from the date of notification of the threshold under clause (v) of sub-rule (1) of rule 2, observe the following additional due diligence while discharging its duties, namely:—

(a) appoint a Chief Compliance Officer who shall be responsible for ensuring compliance with the Act and rules made thereunder and shall be liable in any proceedings relating to any relevant third-party information, data or communication link made available or hosted by that intermediary where he fails to ensure that such intermediary observes due diligence while discharging its duties under the Act and rules made thereunder:

Provided that no liability under the Act or rules made thereunder may be imposed on such significant social media intermediary without being given an opportunity of being heard.

Explanation.—For the purposes of this clause —Chief Compliance Officer means a key managerial personnel or such other senior employee of a significant social media intermediary who is resident in India;

(b) appoint a nodal contact person for 24x7 coordination with law enforcement agencies and officers to ensure compliance to their orders or requisitions made in accordance with the provisions of law or rules made thereunder.

Explanation.—For the purposes of this clause —nodal contact person means the employee of a significant social media intermediary, other than the Chief Compliance Officer, who is resident in India;

(c) appoint a Resident Grievance Officer, who shall, subject to clause (b), be responsible for the functions referred to in sub-rule (2) of rule 3.

Explanation.—For the purposes of this clause, —Resident Grievance Officer means the employee of a significant social media intermediary, who is resident in India;

(d) publish periodic compliance report every month mentioning the details of complaints received and action taken thereon, and the number of specific communication links or parts of information that the intermediary has removed or disabled access to in pursuance of any proactive monitoring conducted by using automated tools or any other relevant information as may be specified;

(2) A significant social media intermediary providing services primarily in the nature of messaging shall enable the identification of the first originator of the information on its computer resource as may be required by a judicial order passed by a court of competent jurisdiction or an order passed under section 69 by the Competent Authority as per the Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009, which shall be supported with a copy of such information in electronic form:

Provided that an order shall only be passed for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order, or of incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material, punishable with

imprisonment for a term of not less than five years:

Provided further that no order shall be passed in cases where other less intrusive means are effective in identifying the originator of the information:

Provided also that in complying with an order for identification of the first originator, no significant social media intermediary shall be required to disclose the contents of any electronic message, any other information related to the first originator, or any information related to its other users:

Provided also that where the first originator of any information on the computer resource of an intermediary is located outside the territory of India, the first originator of that information within the territory of India shall be deemed to be the first originator of the information for the purpose of this clause.

(3) A significant social media intermediary that provides any service with respect to an information or transmits that information on behalf of another person on its computer resource—

(a) for direct financial benefit in a manner that increases its visibility or prominence, or targets the receiver of that information; or

(b) to which it owns a copyright, or has an exclusive license, or in relation with which it has entered into any contract that directly or indirectly restricts the publication or transmission of that information through any

means other than those provided through the computer resource of such social media intermediary, shall make that information clearly identifiable to its users as being advertised, marketed, sponsored, owned, or exclusively controlled, as the case may be, or shall make it identifiable as such in an appropriate manner.

(4) A significant social media intermediary shall endeavour to deploy technology-based measures, including automated tools or other mechanisms to proactively identify information that depicts any act or simulation in any form depicting rape, child sexual abuse or conduct, whether explicit or implicit, or any information which is exactly identical in content to information that has previously been removed or access to which has been disabled on the computer resource of such intermediary under clause (d) of sub-rule (1) of rule 3, and shall display a notice to any user attempting to access such information stating that such information has been identified by the intermediary under the categories referred to in this sub-rule:

Provided that the measures taken by the intermediary under this sub-rule shall be proportionate having regard to the interests of free speech and expression, privacy of users on the computer resource of such intermediary, including interests protected through the appropriate use of technical measures:

Provided further that such intermediary shall implement mechanisms for appropriate human oversight of measures deployed under this sub-

rule, including a periodic review of any automated tools deployed by such intermediary:

Provided also that the review of automated tools under this sub-rule shall evaluate the automated tools having regard to the accuracy and fairness of such tools, the propensity of bias and discrimination in such tools and the impact on privacy and security of such tools.

(5) The significant social media intermediary shall have a physical contact address in India published on its website, mobile based application or both, as the case may be, for the purposes of receiving the communication addressed to it.

(6) The significant social media intermediary shall implement an appropriate mechanism for the receipt of complaints under sub-rule (2) of rule 3 and grievances in relation to the violation of provisions under this rule, which shall enable the complainant to track the status of such complaint or grievance by providing a unique ticket number for every complaint or grievance received by such intermediary:

Provided that such intermediary shall, to the extent reasonable, provide such complainant with reasons for any action taken or not taken by such intermediary in pursuance of the complaint or grievance received by it.

(7) The significant social media intermediary shall enable users who register for their services from India, or use their services in India, to voluntarily verify their accounts by using any appropriate mechanism, including the active Indian mobile number of such users, and where any user voluntarily verifies their account, such

user shall be provided with a demonstrable and visible mark of verification, which shall be visible to all users of the service:

Provided that the information received for the purpose of verification under this sub-rule shall not be used for any other purpose, unless the user expressly consents to such use.

(8) Where a significant social media intermediary removes or disables access to any information, data or communication link, under clause (b) of sub-rule (1) of rule 3 on its own accord, such intermediary shall,—

(a) ensure that prior to the time at which such intermediary removes or disables access, it has provided the user who has created, uploaded, shared, disseminated, or modified information, data or communication link using its services with a notification explaining the action being taken and the grounds or reasons for such action;

(b) ensure that the user who has created, uploaded, shared, disseminated, or modified information using its services is provided with an adequate and reasonable opportunity to dispute the action being taken by such intermediary and request for the reinstatement of access to such information, data or communication link, which may be decided within a reasonable time;

(c) ensure that the Resident Grievance Officer of such intermediary maintains appropriate oversight over the mechanism for resolution of any disputes raised by the user under clause (b).

(9) The Ministry may call for such additional information from any significant social media intermediary as it may consider necessary for the purposes of this part.”

7. Rule 3 & 4 of the Ethics Code applies to various intermediaries like Youtube, WhatsApp, Twitter, Facebook, etc.. These guidelines regulate the nature of content that should not be hosted by these platforms. These guidelines read with the IT Act also provides for offences in case of violation of the Ethics Code. In addition to offences under the IT Act, the violators can also be booked under the Indian Penal Code. Thus, the grievance of the Petitioner that there is no Regulatory Authority/censor board to censor/review the non-film songs, their lyrics and videos which are made available to the general public through various media platforms like Television, YouTube, etc. has been taken care of by the Ethics Code and the regime framed thereunder.

8. Section 7 of the Ethics Code states that whenever 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.

9. Part III of the Ethics Code applies to publishers of news and current affairs content and publishers of online curated content and other intermediaries which disseminate information on various social media/digital media platforms. This is apart from the guidelines under Rule 3 & 4 of the Ethics Code and is applicable to digital media platforms and OTT platforms. The Government of India has ensured that these platforms,

despite not being intermediaries, are also regulated and do not upload content that violates the below-mentioned rules and regulations. Section 9 of the Ethics Code directs publishers of news and current affairs content and publishers of online curated content or of publishers of OTT platforms to observe and adhere to the Code of Ethics laid down in the Appendix appended to these rules. The said Appendix reads as under:

“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.

II. Online curated content:

(A) General Principles:

(a) A publisher shall not transmit or publish or exhibit any content which is prohibited under any law for the time being in force or has been prohibited by any court of competent jurisdiction.

(b) A publisher shall take into consideration the following factors, when deciding to feature or transmit or publish or exhibit any content, after duly considering the implications of any content as falling under the following categories, and shall exercise due caution and discretion in relation to the same, namely:—

(i) content which affects the sovereignty and integrity of India;

(ii) content which threatens, endangers or jeopardises the security of the State;

(iii) content which is detrimental to India's friendly relations with foreign countries;

(iv) content which is likely to incite violence or disturb the maintenance of public order.

(B) Content Classification:

(i) All content transmitted or published or exhibited by a publisher of online curated content shall be classified, based on the nature and type of content, into the following rating categories, namely:—

(a) Online curated content which is suitable for children as well as people of all ages shall be classified as "U" rating;

(b) Online curated content which is suitable for persons aged 7 years and above, and can be viewed by a person under the age of 7 years with parental guidance, shall be classified as "U/A 7+" rating;

(c) Online curated content which is suitable for persons aged 13 years and above, and can be viewed by a person under the age of 13 years with parental guidance, shall be classified as "U/A 13+" rating;

(d) Online curated content which is suitable for persons aged 16 years and above, and can be viewed by a person under the age of

16 years with parental guidance, shall be classified as “U/A 16+” rating; and

(e) Online curated content which is restricted to adults shall be classified as “A” rating.

(ii) The Content may be classified on the basis of.—i) Themes and messages; ii) Violence; iii) Nudity; iv) Sex; v) Language; vi) Drug and substance abuse; and (vii) Horror as described in the Schedule, as may be modified from time to time by the Ministry of Information & Broadcasting.

(C) Display of Classification:

(a) The publisher of online curated content shall prominently display the classification rating specific to each content or programme together with a content descriptor informing the user about the nature of the content, and advising on viewer discretion (if applicable) at the beginning of every programme enabling the user to make an informed decision, prior to watching the programme.

(b) The publisher of online curated content making available content that is classified as U/A 13+ or higher shall ensure that access control mechanisms, including parental locks, are made available for such content.

(c) A publisher of online curated content which makes available content or programme that is classified as “A” shall implement a reliable age verification mechanism for viewership of such content.

(d) A publisher of online curated content must strive to include classification rating and consumer advice for their programmes in any print, televised or online promotional or publicity material and prominently display the classification rating specific to each such content.

(D) Restriction of access to certain curated content by a child: Every publisher of online curated content providing access to online curated content which has an “A” rating shall take all efforts to restrict access to such content by a child through the implementation of appropriate access control measures.

(E) Measures to improve accessibility of online curated content by persons with disabilities:

Every publisher of online curated content shall, to the extent feasible, take reasonable efforts to improve the accessibility of online curated content transmitted by it to persons with disabilities through the implementation of appropriate access services.” (emphasis supplied)

10. It is thus clear that there is a clear regulation/regime that has been laid down by the Central Government to regulate the information/content which is available to the general public through various media platforms. As far as television is concerned, the Cinematograph Act, 1952, and the Cable Television Networks (Regulation) Act, 1995, addresses the issue regarding regulation of content which is being telecasted on these platforms. The contention of the Petitioner that there is no regulatory authority is incorrect. Directing for appointment of a regulatory authority would result in legislation by this Court which is not permissible. The concept of separation of powers between legislature, judiciary and executive has been laid down in

various judgments by the Apex Court. Courts cannot mandate a statute or add provisions to a Statute as it would amount to legislation which is not permissible in the constitutional scheme of this country.

11. The Apex Court *vide* Judgment dated 16.04.2021 in **W.P. (C) No. 428/2021** titled as John Paily v. The State of Kerala, has held that Courts do not possess the power to set up an adjudicatory committee or a tribunal by way of issuing a writ of mandamus. The role of judiciary is primarily only to test the legality of a statute and not to amend/modify a statute. Setting up of tribunals, authorities, regulators come purely within the domain of legislature and not in the domain of Courts.

12. In view of the above, there is no merit in the instant Writ Petition.

13. Accordingly, the Writ Petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JANUARY 24, 2023

Rahul