

A.F.R.

Reserved on 15.09.2022

Delivered on 17.10.2022

Court No. - 48

Case :- CRIMINAL MISC. WRIT PETITION No. - 3487 of 2019

Petitioner :- Flipkart Internet Private Limited

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Kartikeya Saran

Counsel for Respondent :- G.A., Samarth Sinha

Hon'ble Suneet Kumar, J.

Hon'ble Syed Waiz Mian, J.

Suneet Kumar, J.

1. Heard Sri Anurag Khanna, learned Senior Advocate, assisted by Sri Kartikeya Saran and Ms. Suchita Mehrotra, learned counsels appearing for the petitioner and Mrs. Manju Thakur, learned A.G.A. for the State.
2. By the instant writ petition, petitioner is seeking quashing of the First Information Report¹ dated 26 January 2019, bearing Case Crime No. 0208 under Sections 406, 420, 467, 468, 471, 474 and 474-A IPC, registered at Police Station Kavi Nagar, District Ghaziabad.
3. Petitioner is a Company incorporated under the Companies Act, 1956², having its registered office at Bengaluru (hereinafter referred to as "Company").
4. The fourth respondent, claims to be a practising lawyer at Ghaziabad, filed an application under Section 156(3) Code of

1. for short 'FIR'

2. for short "Act, 1956"

Criminal Procedure, 1973³ on which the learned Magistrate vide order dated 14 January 2019, directed the concerned police station to register a case in terms of the application and investigate into it, wherein, it is alleged that complainant regularly purchases products from the sellers on the website of the petitioner-Company knowing to be of quality goods provided by the Company. The fourth respondent on 12 October 2018, placed an order for purchase of a Laptop being H.P. 15 A.P.U., Dual Core, A-6 (4GB/I TB HDD/Windows 10 Home) 15” B.W. Model, accordingly, made payment at Rs. 17,990/- through online payment for the product. The booking ID generated for the said purchase being OD 113621553490664000.

5. Grievance of the fourth respondent is that the Laptop delivered on 22 October 2018, was having processor of brand ‘A.M.D’ instead of brand ‘Intel’, thus, according to the fourth respondent, delivery of the product was not as per the specifications for which order was placed. Aggrieved, complainant-fourth respondent registered a complaint with the petitioner-Company regarding the alleged discrepancy of the product.

6. The complaint was taken up by the Company as per their Dispute Redressal Policy, with the Seller i.e. Tech Connect Retail Private Limited, but Seller declined to replace or refund the consideration of the product, stating that the product was dispatched as per specifications purchased by the fourth respondent.

7. Thereafter, fourth respondent lodged a criminal complaint against the petitioner-Company directly with the Senior Superintendent of Police, Ghaziabad. It appears that nothing was

3. for short ‘Cr.P.C.’

done on the complaint, accordingly, fourth respondent filed an application under Section 156(3), Cr.P.C. before the Chief Judicial Magistrate, Ghaziabad, being Application No. 6474 of 2018. On the said complaint the Magistrate passed an order dated 14 January 2019, in terms of the application directing the concerned police station to register a case for the offence disclosed in the application.

8. In the impugned F.I.R. the fourth respondent reiterated that he is a long time user of the Company's website and had placed order on down payment for the purchase of H.P. Laptop from the market place Seller (petitioner-Company). It is alleged that the product received by the fourth respondent was not as per the specification for which the order was placed. The matter was raised by a complaint with the petitioner-Company, but, the Seller declined to replace the product and refund the consideration stating that the product is as per the specifications for which the order was placed. It is further alleged that the product delivered to the fourth respondent was having brand 'A.M.D.' processor as against brand 'Intel' for which order was placed as per the specification of the product displayed by the Seller on the Company's website on the date of purchase.

9. The petitioner-Company has raised challenge to the impugned F.I.R. seeking its quashing, *inter alia*, on the ground that petitioner-Company is an e-commerce Marketplace/Platform that provides access to Buyers and Sellers through their website www.flipkart.com. Buyers and Sellers meet and interact to execute purchase and sale transaction, subject to terms and condition as set out in the Buyers/Sellers Terms of Use (Flipkart Terms of Use). The relevant conditions of the Terms of Use, *inter alia*, includes:

a. The website of the petitioner-Company is a platform that users, i.e. buyers, and/or, sellers, utilize to meet and interact with one another for their transactions. As such, the Company merely provides a platform for the transactions of its users and petitioner-Company is not a party to or in control of any such transaction between its users.

b. All commercial/contractual terms (including the price, shipping costs, payment methods, payment terms, date, period and mode of delivery, warranties related to products and services and after sales services related to the products and services are offered by and agreed to between the Buyers and Sellers alone, as such, the petitioner-Company does not have any control or does not determine or advise or in any way involve itself in the offering or acceptance of such commercial/contractual terms between the Buyers and Sellers.

c. All discounts and offers on the website are provided by the sellers/brands and not by the petitioner-Company.

d. The petitioner-Company does not make any representation or warranty as to specifics of the products or services (such as quality, value, salability) proposed to be sold or offered to be sold or purchased on the website, as such, the petitioner-Company does not explicitly or even impliedly support or endorse the sale or purchase of any products or services on the website.

e. The website is only a platform that can be utilized by users to reach a larger base to buy and sell products or services and the petitioner-Company is only providing a platform for communication; the actual contract for sale of any of the products or services is strictly between the Seller and the Buyer of such product.

f. The product offered for sale and the related content including the product description, prices, images, texts, graphics, user interfaces, visual interfaces, photographs, trademarks, logos, sounds, music and artwork on the website of the petitioner is a third party user generated content and the petitioner-Company has no control over such third party user generated content. Therefore, the website of the petitioner-Company operates as a neutral e-commerce platform which serves as a mere conduit for Buyers and Sellers to conduct their business.

10. In this backdrop, it is submitted by the learned counsel for the petitioner-Company that in terms of functionality, the petitioner-Company is an ‘intermediary’ as defined under Section 2(1)(w) of The Information Technology Act, 2000⁴ providing an online platform. The transactions between the Buyers and Sellers on the platform are completely independent. No criminal offence whatsoever is made out against the petitioner-Company, the fourth respondent being an aware citizen was fully aware of the marketplace model and had voluntarily signed the Buyers Terms of Use; the fourth respondent has ex-facie made contradictory averments that the Laptop was purchased from the petitioner-Company and that petitioner-Company hatched a criminal conspiracy with the marketplace Seller. It is further submitted that expressions like ‘conspiracy’, ‘cheating’ and ‘forgery’ has been employed in the impugned F.I.R. but the ingredients thereof has not been asserted or detailed in the impugned F.I.R. It is further submitted that the impugned F.I.R. has been lodged maliciously to extract money from the petitioner-Company and to damage its goodwill, reputation and customer base. The Company claims protection under Section 79 of the I.T. Act, 2000. In this backdrop, it is submitted that the F.I.R. be quashed.

4. for short ‘I.T. Act, 2000’

11. Learned State Counsel on specific query submits that the State does not intend to file counter affidavit to the writ petition. As per their instructions police report (closure) under Section 173(2) of Cr.P.C. has been filed by the Investigating Officer, hence, it is submitted that nothing remains for the State to submit.

12. Learned counsel for the fourth respondent despite putting in appearance has not filed counter affidavit to the averments made in the writ petition.

13. The petitioner-Company is governed by the provisions of the I.T. Act, 2000, petitioner-Company is an 'intermediary' and the role being that of a facilitator or a conduit. It is an e-commerce platform where Sellers and Buyers can interact and select and purchase products and items offered by the seller. The facts, *inter se*, parties are not in dispute that petitioner-Company is an e-commerce intermediary where the platform does not take title to the goods being sold on their marketplace platform. Intermediary stands on a different footing being only facilitator of exchange of information or sales under the I.T. Act, 2000. Intermediaries are not liable for the goods put up for sale by the Seller on the platform. Such e-commerce networks are exempted from liability under the I.T. Act, 2000, Rules or Regulations made thereunder concerning any third party. As per the impugned F.I.R. the date of alleged offence is 22 October 2018 i.e. on the date when the defective laptop purchased by the fourth respondent was received.

14. "Intermediary" is defined under Section 2(1)(w) of the I.T. Act, 2000, which reads as follows:

2(1)(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.

15. In other words, the obligation of the intermediary is to observe due diligence and follow the guidelines that may be prescribed by the Government in this behalf. Therefore, reference will have to be made to the Information Technology (Intermediaries Guidelines) Rules, 2011⁵. The I.T. Guidelines was enacted under Section 87 of I.T. Act, 2000, and came to force in 2011. What is due diligence to be observed by the intermediary has been provided under Rule 3(1), which, inter alia, reads as follows:

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

(1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person.

(2) xxx xxx xxx

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

(e) to (i) xxx xxx (3) The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2):

provided that the following actions by an intermediary shall not amount to hosing, publishing, editing or storing of any such information as specified in sub-rule: (2) --

(a) xxx xxx

(b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorised by the intermediary pursuant to any order or direction as per the provisions of the Act;

(4) The intermediary, on whose computer system information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or

5. for short 'I.T. Guidelines Rules - 2011'

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

(5) The Intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to immediately terminate the access or usage rights of the users to the computer resource of Intermediary and remove non-compliant information.

(6) to (11) xxx xxx xxx||

16. I.T. Guidelines Rules, 2011, has since been superseded by the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules, 2021. The subsequent Guidelines does not apply to the facts of the instant case, having regard to the fact that the offence is alleged to have been committed on 22 October 2018 i.e. the date of purchase of the defective product.

17. Intermediary is obliged to publish the Guidelines, Rules, Regulations, Privacy Policy, and User/Buyer Agreement. However, non-compliance of these Guidelines/Rules have not been declared to be an offence under the I.T. Act, 2000. Chapter-XII of I.T. Act, 2000, provides for Offences, Penalties and Procedures.

18. The present matter relates to criminal liability and petitioner-Company claims protection under Section 79, further, it is submitted on behalf of petitioner-Company that the ingredients of the offence, taking the allegations on face value as alleged in the impugned FIR is not made out.

19. Section 79 of I.T. Act, 2000, as it earlier stood, came to be amended by the Information Technology (Amendment Act 2008), it came into force on 27 October 2009. In the given facts the amended Section 79 would be applicable and not the provisions

as it stood prior to the date of amendment. Section 79 as it stands after amendment reads thus:

“79 Exemption from liability of intermediary in certain cases:

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf (Inserted Vide ITAA 2008)

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act (ITAA 2008)

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

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

20. Section 79 accordingly is a safe harbour provision. Internet intermediaries give access to host, disseminate and index content, products and services originated by third parties on the internet which include e-commerce intermediaries where the platforms do

not take title of the goods being sold. Examples of such intermediaries include Amazon India, Myntra, AJIO etc.

21. The I.T. Act, 2000, has an overriding effect. Section 81 of I.T. Act, 2000, is extracted:

“81. Act to have overriding effect: The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

22. Intermediaries stand on a different footing being only facilitator of the exchange of information or sales. Prior to the amendment the exemption provision under Section 79 did not exist, therefore, an intermediary would have been liable for any third party information or data made available by it. The 2008 amendment introduced Chapter XII to the I.T. Act, 2000. The amendment purportedly was in the backdrop of the decision of the Delhi High Court rendered in **Avnish Bajaj vs. State (NCT of Delhi)**⁶. After the amendment, intermediary is not liable under any Act if it satisfied certain requirements as detailed in Section 79 of I.T. Act, 2000.

23. Petitioner-Company does not follow inventory based model of e-commerce, where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly. Petitioner-Company claims, it is an intermediary between Buyer and Seller within the meaning of Section 2(1)(w) of the I.T. Act, 2000 and does not control the transaction between the two parties. It only acts as a neutral platform to allow sellers to interact with the buyers/customers, without exercising ownership over any goods or indulging in the manufacture or dealing of any goods. Petitioner-Company claims, it only receives and stores the information on behalf of the seller/ buyer and acts as a facilitator/ intermediary.

6. 2004 SCC OnLine Del 1160

24. The question is as to whether an intermediary as defined under Section 2(1)(w) of the I.T. Act, 2000, would be liable for any action or inaction by a party or a vendor/seller making use of the facilities provided by the intermediary in terms of Buyers/Sellers Terms of Use of the Company.

25. It is stated that petitioner-Company has established a marketplace on the World Wide Web, more popularly known as the internet, enabling a Seller to upload, sell or even 'offer for sale' any product on the Company platform. For this purpose, a Seller has to create an account with the Company and contractually agree to Company's Buyers/Seller Terms of Use, Policies, Seller Agreement, which contains the basic terms and conditions of selling products over Company marketplace which every Seller/Buyer has to agree with.

26. Company being an intermediary cannot be disputed, it comes with the meaning and definition of 'intermediary' under Section 2(1)(w) of the I.T. Act, 2000, as amended by the Information Technology (Amendment) Act, 2008. Company would be entitled to the exemption from liability in terms of Section 79 I.T. Act, 2000, read with Section 81, if the requirements thereof are met.

27. Company admittedly is not the Seller, it is the Sellers registered with Company who are the sellers of products and services on its platform, it is the Sellers who are solely responsible to the purchaser/customer.

28. The Seller Agreement as per Terms of Use, details out the terms and conditions relevant to the transaction, which has been brought on record. (Flipkart Terms of Use)

29. It cannot be expected that the provider or enabler of the online marketplace is aware of all the products sold on its Website/marketplace. It is only required that such provider or enabler put in place a robust system to inform all Sellers on its platform of their responsibilities and obligations under applicable laws in order to discharge its role and obligation as an intermediary. If the same is violated by the Seller of goods or service such Seller can be proceeded against but not the intermediary.

30. The manner in which the documents (Buyer/Seller Terms of Use) have been executed, contents thereof, as also the obligation of the parties stated therein establishes the due diligence exercised by the petitioner-Company, to be in accordance with and compliance of Section 79(2)(c) of the I.T. Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011, in ensuring that Vendors/Sellers who register on its Website conduct themselves in accordance with and in compliance with the applicable laws.

31. The Consumer Protection (E-Commerce) Rules, 2020, makes a distinction between marketplace e-commerce websites and inventory e-commerce websites. As such the petitioner-Company would come within the meaning of a marketplace e-commerce website, thereby, affording the above exemption to the Company so long as the requirements under Section 79 are followed by the petitioner-Company.

32. In the present case, as detailed above, petitioner-Company has complied with the requirements of sub-sections (2) and (3) of Section 79, as well as, the Information Technology (Intermediaries Guidelines) Rules, 2011.

33. In our considered opinion Company has exercised 'due diligence' under Section 79(2)(c) of the Information Technology Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011.

34. The petitioner-Company is exempted from any liability under Section 79 of the I.T. Act, 2000, no violation can ever be attributed or made out against the directors or officers of the intermediary, as the same would be only vicarious, and such proceedings as initiated against them would be unjust and bad in law.

35. The only liability of an intermediary under Section 79(3)(b) of the I.T. Act, 2000, is to take down third-party content upon receipt of either a court order or a notice by an appropriate government authority and not otherwise. As per complaint filed by the complainant indicates that the petitioner-Company, raised the grievance of the complainant with the Seller.

36. In terms of Section 79 of the I.T. Act, 2000, there does not appear to be any distinction between passive and active intermediaries in so far as the availability of the safe harbour provisions are concerned. An intermediary is not liable for any third-party (Seller) information, data or communication link made available or posted by it, as long as it complies with Sections 79(2) or (3) of the I.T. Act, 2000. The exemption under Section 79(1) from liability applies when the intermediaries fulfil the criteria laid down in either Section 79(2)(a) or Section 79(2)(b), and Section 79(2)(c). Where the intermediary merely provides access, it has to comply with Section 79(2)(a), whereas, in instances where it provides services in addition to access, it has to comply with Section 79(2)(b). The case of petitioner-Company is that they fulfil these conditions to qualify as intermediaries.

The factum that the petitioner-Company is an intermediary providing merely access to Sellers/Buyers is not under challenge nor disputed. The ingredients of the offence under Section 406, 467, 468, 471, 474 and 474-A IPC, insofar, it relates to the petitioner-Company is not made out taking the allegations made in the impugned FIR on face value.

37. In **State of Haryana and Ors. v. Bhajan Lal and Ors.**⁷, Supreme Court has set out the categories of cases in which the inherent power can be exercised. Para 102 of the judgment reads as follows: -

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2)

(3)

(4)

(5)

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. 2006 (6) SCC 736

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

38. Earlier the Supreme Court in **State of Karnataka v. L. Muniswamy and others**⁸ held as follows: -

“7.In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice.....”

(Principle reiterated in **Anand Kumar Mohatta and another vs. State (NCT of Delhi), Department of Home and another**⁹.)

39. Having regard to the law enunciated herein above and the facts and circumstances of the case, the writ petition is liable to succeed. Accordingly, the writ petition stands allowed. The impugned FIR and the consequent police report is set aside and quashed.

Order Date :- 17.10.2022

S.Prakash

(Syed Waiz Mian,J.)

(Suneet Kumar,J.)

8. (1977) 2 SCC 699

9. (2019) 11 SCC 706