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AMENDED IT RULES ON FACT CHECK UNIT IS *ULTRA VIRES*

On September 20, 2024, the High Court of Bombay ("**HC**"), in the *Kunal Kamra* case,[1] held that the 2023 amendment to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("**Rules**"), issued under the Information Technology Act, 2000 ("**Act**"), establishing Fact Check Units ("**FCU**"), is *ultra vires* the Act.

Brief Facts

Stand-up comedian Kunal Kamra ("**KR**") challenged before the HC, the validity of Rule 3(1)(b)(v) of the Rules ('**Amended Rule**"), by which the Central Government could establish FCUs for identifying 'fake news' were against the government on social media platforms.

The differing views of the Division Bench of the HC were:[2]

- As per Jus. Gautam Patel, the Amended Rule was *ultra vires* the provisions of Articles 14,[3] 19(1)(a)[4] and 19(1)(g)[5] of the Constitution of India, Section 79 of the Act,[6] against the principles of natural justice and failed to satisfy the test set out in the Supreme Court's decision in the *Shreya Singhal* case of 2015.[7]
- However, Jus. Dr. Neela Gokhale opined that the Amended Rule was not violative of Article 14 on the ground that the FCU comprised solely of government officials; it also met the test of proportionality; and the measures adopted by the government were consistent with the object of the Act.

Given the split verdict, a reference was made before a 'tie-breaker judge' Jus. Atul Chandurkar of the HC ("**Judge**") to opine as to whether or not the provisions of the Amended Rule are *ultra vires* the Act and are unconstitutional.

HC's Reference Judgement and Reasoning

The Judge held that the Amended Rule:

- Is violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution;
- Is *ultra vires* the Act;
- Cannot be saved either by reading it down or on the basis of any concession made in that regard of limiting its operation;
- Does not satisfy the test of proportionality; and
- Results in a chilling effect *qua* an intermediary.

He relied on a plethora of judgments[8] to re-emphasise that free speech on the internet is an integral part of Article 19(1)(a) and any restriction on it must conform to Article 19(2).

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[1] *Kunal Kamra vs Union of India.*, 2024:BHC-OS:14371-DB.
[2] WP No. WP(L)9792/2023 dated January 31, 2024.
[3] Article 14: Equality before law.
[4] Article 19(1)(a): All citizens shall have the right to freedom of speech and expression.
[5] Article 19(1)(g): All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.
[6] Section 79: Exemption from liability of intermediary in certain cases.
[7] *Shreya Singhal vs. Union of India*, 2015 INSC 257.
[8] *Ibid*, *Anuradha Bhasin vs Union of India and Others*, 2020 INSC 31.

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He stated that: "*the Central Government by itself did not constitute a class of its own so as to justify preferential treatment to it*" and "*there was no justification* [as to] *why business of the Central Government should stand on special footing to be distinct from other information*."[9]

He opined that, in the absence of an opportunity of hearing especially when serious civil consequences were to follow is violative of the principles of natural justice. Additionally, it is also violative since, "*there was no requirement of a reasoned order being passed by the FCU due to which it would not be possible to gather the material on the basis of which the FCU had acted*.[10]

He held that "*I am therefore inclined to agree with the view of Patel J that as the Central Government itself would constitute the FCU, it is an arbiter in its own cause*."[11] The Judge observed that *"…what is provided under Article 19(1)(a) is only the right to freedom of speech and expression and not some 'right to the truth.'*"[12]

The Judge highlighted the difference pre-amendment and post-amendment and observed that, "*with regard to non-Central Government business, the focus is on the user's awareness of falsity and untruth or misleading nature of information while with regard to Central Government business, the focus is on the intermediary permitting continuance of what the FCU has determined to be fake or false or misleading*."[13]

He further opined that "*the absence of any indication as regards the manner of identifying fake or false or misleading information and there being no guidelines whatsoever in that regard renders the expression "vague or false or misleading" to be vague and overbroad*."[14]

He agreed with Jus. Patel that "*when the totality of the challenge is considered and all grounds of attack are taken together, the fact that the impugned Rule also results in a chilling effect qua an intermediary would render it invalid….the impugned Rule being vague and broad, it has the potential of causing a "chilling effect" on that premise*."

The Judge also noted that FCU would only apply to social media and not print media and also no action was envisaged against any 'fake news' published against the state governments.

Finally, he held that *'In my opinion therefore Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 is liable to be struck down*."[15] So holding, he directed the WP to be placed before the Division Bench for decision.

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[9] Paragraph 24(a) of the Judgement.
[10] Paragraph 24(b) of the Judgement.
[11] *Ibid.*
[12] Paragraph 27 of the Judgment.
[13] *Ibid.*
[14] Paragraph 44 of the Judgment.
[15] Paragraph 56 of the Judgment.