

ATUL

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 2315 OF 2016

IN

SUIT (L) NO. 751 OF 2016

WITH

NOTICE OF MOTION (L) NO. 2147 OF 2016

Eros International Media Ltd. & Another ...Plaintiffs

Versus

Bharat Sanchar Nigam Ltd., and 49 Others ...Defendants

Mr. N. Rodrigues *i/b R.M. Partners, for the Plaintiffs.*

Mr. V. Tulzapurkar, Senior Advocate, *with mr. Ashish Bhan, Mr. U. Mendiratta, Mr. Mohit Rohatgi, Ms. Padmaja Kaul & Ms. S. Agarwal, i/b Trilegal, for Defendant No. 11.*

Mr. Omprakash Dharmani, *General Manager (GIMEC), Tata Communications, present.*

CORAM: G.S. PATEL, J

DATED: 30th August 2016

PC:-

1. I have heard Mr. Tulzapurkar for Tata Communications and Mr. Rodrigues for the Plaintiffs briefly.

2. This is in continuation of the previous order regarding the error message to be displayed when a person visits a URL that has been blocked by an order of the Court.

3. Mr. Omprakash Dharmani from Tata Communications is present in Court. He says that the firewall being used by Tata Communications and almost all other ISPs has an inbuilt software limitation: it does not allow the display of a file in excess of 32 kb. This is an absurdly small file size. Tata Communications acknowledges this, and says that it has achieved this size by compressing the underlying HTML code. I am most dissatisfied with this. It is difficult to see how affected person's rights can be allowed to be compromised because of this kind of "technical limitations". Mr. Tulzapurkar, for his part, readily agrees that there is a need to ensure that the correct information is made available. He states that Tata Communications is already in discussions about increasing the permissible file size, so that a more complete message can be displayed. I will not accept that this will continue indefinitely. Between Tata Communications and their principals or suppliers overseas, they must ensure that this happens in an appropriate time-frame at the earliest. Tata Communications will forward a copy of this order to their hardware or software suppliers overseas and will impress upon them the need to relax that file size limitation from 32 kb to something that is more meaningful and useful. We are attempting here to make necessary information available in the public interest.

4. For the present, therefore, as a temporary measure, all ISPs will display an amended generic message in the form noted below:

“This URL has been blocked under instructions of a competent Government Authority or in compliance with the orders of a Court of competent jurisdiction. Infringing or abetting infringement of copyright-protected content including under this URL is an offence in law. Ss. 63, 63-A, 65 and 65-A of the Copyright Act, 1957, read with Section 51, prescribe penalties of a prison term of upto 3 years and a fine of upto Rs.3 lakhs. Any person aggrieved by the blocking of this URL may contact the Nodal Officer at xyz@[isp-domain] for details of the blocking order including the case number, court or authority to be approached for grievance redressals. Emails will be answered within two working days. Only enquiries regarding the blocking will be entertained.”

5. The notice requires each of these ISPs to designate a Nodal Officer with a dedicated email address. The appropriate email address of each ISP’s nodal officer is to be customized and used for the generic placeholder text shown in boldface and underlining above.

6. Mr. Tulzapurkar points out that there are ISPs that are non-compliant. Vodafone is one of them. MTNL is another. Mr. Rodrigues for the Plaintiffs states that he will communicate a copy of this order with generic message to all the ISPs and Anti Piracy Cell once again. I expect all the ISPs and Anti Piracy Cell to apply this error message, including Vodafone and MTNL. If not, a notice will be issued to them individually.

7. I have raised the question how one is supposed to monitor the functioning of this Nodal Officer or whether the Court is supposed to take these ISPs on faith. The answer at least for today is that we will have to take them on faith. I am not at all satisfied by this answer. But I do not see what option is currently available. This underscores the need, one that has been expressed in a previous order and which I have more recently seen in an article entitled *In Bollywood's Battle Against Piracy, A Neutral Ombudsman Might Be the Answer*, by Prof. Shamnad Basheer¹ for these ISPs to come together in an association and establish an office of an ombudsman, to whom all such grievances and complaints could be routed. In the form in which it has been conceptualized, I imagine that such an agency would be of great assistance to the Court in these John Doe matters and other ISP, Internet, and software-related issues. In John Doe cases, the ombudsman might serve to provide a first level of checking of the Plaintiffs' claim. At a later stage, it could monitor the addressing of individual grievances (in the context of *Great Grand Masti*, there was a complaint by such an individual of a wrongful blocking). The ombudsman might also work more closely and meaningfully with ISPs to ensure effective communications and responses to aggrieved parties. I would urge the ISPs to consider this proposal urgently.

8. To identify more precisely the problems we face and the need for an ombudsman:

1. Available at: <http://thewire.in/61034/of-bollywood-blocks-and-john-does-towards-a-neutral-ombudsman/>

- (a) John Doe orders are very wide, often over-broad, in their sweep.
- (b) Many John Doe orders are granted without a sufficient checking of the Plaintiffs' claim. This results in overbroad orders and wholesale site blocking without adequate verification of the legitimacy of all content. The assumption that some some websites only host illicit content and nothing else is unwarranted without further proof.
- (c) These orders often affect innocent third parties not before the Court. The number of those affected is irrelevant. If even one innocent party is affected, the damage is incalculable. The rights being affected are cardinal and fundamental. This makes over-sight and supervision that much more imperative.
- (d) These orders tend to last for a long time without effective oversight. This is partly addressed by time-limiting them when they are granted, but even then they tend to continue for several months.
- (e) Block removals are slow, cumbersome and inefficient, with consequent impact on third parties.
- (f) Implementing blocks is not a no-cost endeavour for the ISPs. This is an issue that has never been addressed.
- (g) Communication of relevant information about the blocking is an ongoing problem, unsatisfactorily addressed so far.

9. There is a limit beyond which no Court can micro-manage these matters. I will keep the matter for review on 23rd September 2016 at 3.00 p.m for the limited purpose of examining whether, by then, a better solution is available to offer a more appropriate error page.

10. Incidentally, for general edification of the technology nay-sayers, I note that the file size of this order, from start to finish, is under 60kb; and that includes all formatting, headers, footers, etc. It is safe to say, I think, that the order has rather a lot of 'information'. What I ask of the ISPs is far less.

11. I make it clear that these Nodal Officers are required to respond only to messages and communications about blocks and nothing else.

12. In conclusion, I only note Mr. Tulzapurkar's submission that these blocks and John Doe orders seem to be sought only for forthcoming or anticipated box office flops. Whether or not this is true, and whether or not it is a relevant consideration in law I leave for another day.

(G. S. PATEL, J.)