

ITEM NO.3

COURT NO.4

SECTION PIL(W)

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Writ Petition (Civil) No.341/2008

SABU MATHEW GEORGE

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(With appln. (s) for permission to file additional documents)
(For final disposal)

Date : 16/11/2016 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE DIPAK MISRA
HON'BLE MR. JUSTICE AMITAVA ROY

For Petitioner(s) Mr. Sanjay Parikh, Adv.
Ms. Manjula Gupta, AOR
Ms. Ninni Susan Thomas, Adv.

For Respondent(s) Mr. P.S. Narasimha, ASG
Ms. Binu Tamta, Adv.
Ms. Gunwant Dara, Adv.
Mr. G.S. Makker, Adv.
Mr. Ajay Sharma, Adv.
Mr. R.R. Rajesh, Adv.
Mr. D. S. Mahra, AOR

For R-4 Mr. Anupam Lal Das, AOR
Mr. Anirudh Singh, Adv.
Mr. Sahil Monga, Adv.

For R-3 Dr. A.M. Singhvi, Sr. Adv.
Mr. Mahesh Agarwal, Adv.
Mr. Priyadarshi Banerjee, Adv.
Mr. Praveen Sehrawat, Adv.
Mr. Saransh Jain, Adv.
Mr. E. C. Agrawala, AOR
Mr. Vikrant Pachnanda, Adv.
Mr. Shashank Manish, Adv.

For R-5 Mr. K.V. Vishwanathan, Sr. Adv.
Mr. Tanuj Bhushan, Adv.
Mr. S. S. Shroff, AOR

UPON hearing the counsel the Court made the following
O R D E R

On 19th September, 2016, the learned Solicitor General of India had submitted that there was a meeting with three software companies, namely, Google India Private Limited, Yahoo ! India and Microsoft Corporation (I) Pvt. Ltd. and prior to the meeting, the companies were asked to respond to certain questions. The said questions read as under:

- "(a) Whether respondents feel obligated to comply with the provisions of PC-PNDT Act, especially section 22 of the Act as directed by this Hon'ble Court vide its order dated 28.01.2015?
- (b) Whether Respondents are ready to publish a "Warning Message" on top of search result, as and when any user in India submits any "key word searches" in search engines, which relates to pre conception and pre natal deermination of sex or sex selection?
- (c) Whether Respondents are ready to block "auto-complete" failure for "key word" searches which relates to pre-conception and/or pre-natal determination of sex or sex selection?
- (d) Whether the words/phrases relating to pre-conception and pre natal determination of sex or sex selection to be provided and regularly updated by the Government for the 'key word search' or shall it be the onus of the Respondents providing search engine facilities?
- (e) Whether it is feasible for the Respondents to place this Hon'ble Court order dated 28.01.2015 on their respective Home Page(s), instead of placing them on Terms of Service (TOS) pages?

- (f) What is the suggested timeline to incorporate "Warning Message", blocking of the "auto-complete" feature for key word search & related terms etc. relating to pre-conception and pre-natal determination of sex or sex selection?
- (g) Any other information as Respondents would like to share?"

The responses of the companies were brought to the notice of the Court by way of a chart supported by an affidavit. On the previous occasion, the Court has produced the said chart and, thereafter, taken note of the submission of the learned Solicitor General that the companies are bound to develop a technique so that, the moment any advertisement or search is introduced into the system, that will not be projected or seen by adopting the method of "auto block". The said concept was clarified by stating that if any person tries to avail the corridors of these companies, this device shall be adopted so that no one can enter/see the said advertisement or message or anything that is prohibited under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, 'the 1994 Act'), specifically under Section 22 of the said Act. Be it stated, at that juncture, Mr. Sanjay Parikh, learned counsel for the petitioner had pointed out that the respondent-companies were still engaged in publishing advertisements or accepting messages which are violative of Section 22 of the 1994 Act. Needless to say, that was

refuted by the respondent-companies.

The learned Solicitor General had submitted a 'proposed list of words' and put forth that the principle of "auto-block" should be applied to the said words. The Court had taken note of the "proposed list of words", which need not be repeated today. On behalf of the three companies, a submission was put forth that apart from the "proposed list of words", if anyone, taking recourse to any kind of ingenuity, feed certain words and something that is prohibited under the 1994 Act comes into existence, the "principle of auto block" shall be immediately applied and it shall not be shown.

Today, an affidavit has been filed on behalf of the respondent No.3, Google India Private Limited, the respondent No.3 herein. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the Google India Private Limited has placed reliance on the said affidavit, especially paragraph 9, that deals with contractual commitments, policy measures, technical and other measures to enforce the policy restrictions, shopping, auto-complete and related search terms and warning messages. That apart, it is urged by him that Section 22 of the 1994 Act only relates to advertisement and cannot travel beyond it. According to him, Section 79(1) of the Information Technology Act, 2000 as amended by the Information Technology (Amendment) Act, 2008, has been read

down in Shreya Singhal vs. Union of India (2015) 5 SCC 1, so that it could be constitutionally treated as valid.

Paragraph 122 of Shreya Singhal reads as under:-

"Section 79(3) (b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3) (b)."

Section 22 of the 1994 Act is to the following effect:-

"22. *Prohibition of advertisement relating to pre-conception and pre-natal determination of sex and punishment for contravention.*- (1) No person, organisation, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including Clinic, Laboratory or Centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form including internet, regarding facilities of pre-natal determination of sex or sex selection before conception available at such Centre, Laboratory, Clinic or at any other place.

(2) No person or organisation including Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or pre-conception selection of sex by any means whatsoever, scientific or otherwise.

(3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Explanation.- For the purposes of this section, "advertisement" includes any notice, circular, label, wrapper or any other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall-painting, signal, light, sound, smoke or gas."

Submission of Mr. P.S. Narasimha, learned Additional Solicitor General appearing for the Union of India today is that the term "advertisement" as used in Section 22 of the 1994 Act, if read in conjunction with *Explanation* appended thereto, is an inclusive definition and not restricted to the advertisement as is understood in common parlance. Learned Additional Solicitor General would lay emphasis on the legislative intendment to explain the term "advertisement" and contend that a broader meaning has to be conferred. Dr. Abhishek Manu Singhvi, Mr. K.V. Vishwanathan, learned senior counsel and Mr. Anupam Lal Das, learned counsel appearing for the three companies would contend that the term "advertisement" has to be understood in the commercial sense

and neither Section 22 of the 1994 Act nor the *Explanation* carries the meaning to a greater horizon. According to them, it requires further debate.

Mr. Sanjay Parikh, learned counsel appearing for the petitioner would submit that despite the order passed by this Court from time to time, one would still get the advertisements or the information pertaining to gender test, gender test in pregnancy, gender test kit in India, gender test by skin darkening, gender test in home, gender test with baking soda, gender test during pregnancy and gender test for boy or girl. According to Mr. Parikh, these are nothing but advertisements and it is difficult to close one's eye to these kinds of innovative approaches. Learned counsel would submit that the purpose and object of the 1994 Act is to provide for prohibition of sex selection before or after conception, and for regulation of pre-natal diagnostic techniques for the purpose of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders. He has also drawn our attention to the Preamble of the Act that provides for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.

As we have noticed today, the submission of the respondent-companies is that access to information of any

nature, unless it is not advertisement, which is prohibited under Section 22 of the 1994 Act, would come within the freedom of access to have information. Mr. P.S. Narasimha, learned Additional Solicitor General would refer to the affidavit filed by the Union of India, especially paragraph 9. We think it appropriate to reproduce the said paragraph, which reads as under:-

"The section 22 and the explanation appended to it is very wide and does not confine only to commercial advertisements. The intention of law is to prevent any message/communication which results in determination/selection of sex by any means what so ever scientific or otherwise. The different ways in which the communication/messages are given by the internet/search engine which promote or tend to promote sex selection are prohibited under Section 22. The search engines should devise their own methods to stop the offending messages/advertisements/communication and if the compliance in accordance with law is not done Ministry of Electronics and Information Technology (MeitY), shall take action as they have already said in their affidavits dated 15.10.2015 & 08.08.2016. The Ministry of Health and Family Welfare is concerned about the falling Child Sex Ratio and is taking all possible actions to ensure that the provisions of PC & PNDT Act are strictly implemented."

There can be no doubt that there has to be freedom of access to information but, a significant one, such freedom cannot violate a law that holds the field. Be it noted, this Court has shown its concern with regard to the decrease of sex ratio in three decisions, namely, Centre for Enquiry into Health & Allied Themes (CEHAT) and others vs. Union of India and others (2001) 5 SCC 577, Centre for Enquiry into Health

& Allied Themes (CEHAT) and others vs. Union of India and others (2003) 8 SCC 398, Voluntary Health Association of Punjab vs. Union of India and others (2013) 4 SCC 1, and recently in Voluntary Health Association of Punjab vs. Union of India and others 2016 (10) SCALE 531. The concern of the legislative response in the 1994 Act has been further articulated by this Court in last two decades. In such a situation, whether the companies can take shelter of free access or choose to be catalysts in the depletion of sex ratio, has to be debated.

At this stage, pending that debate, in addition to the earlier directions passed by this Court, we direct that the Union of India shall constitute a "Nodal Agency" and give due advertisement in television, newspapers and radio by stating that it has been created in pursuance of the order of this Court and anyone who comes across anything that has the nature of an advertisement or any impact in identifying a boy or a girl in any method, manner or mode by any search engine shall be brought to its notice. Once it is brought to the notice of the Nodal Agency, it shall intimate the concerned search engine or the corridor provider immediately and after receipt of the same, the search engines are obliged to delete it within thirty-six hours and intimate the Nodal Agency. Needless to say, this is an interim arrangement pending the discussion which we have noted herein-before. The Nodal Agency shall put the ultimate action taken by the search

engine on its website.

Let the matter be listed for final disposal on
16th February, 2017.

(Chetan Kumar)
Court Master

(Indu Pokhriyal)
Court Master