

Scapegoat of an unjust law

By Latha R. Nair

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It is said that law is an ass and that the kick of an ass is a nasty affair. The turnout of events for the CEO of bazee.com is probably a fitting illustration of this. Although he has been granted bail, the trauma and social embarrassment that he was subjected to are something that could have been well avoided. Was he on the wrong side of law? Or was the Information Technology Act (IT Act) the real culprit?

We are living in a digital era where technology is advancing at break-neck speed and contracts are concluded with the mere click of a mouse. The confusion raised by the bazee.com case raises the very crucial issue whether Indian laws have kept pace with technology. Further, it starkly reminds us of our ugly and unworkable legal frameworks. Clearly, the bazee.com case is a classic example of an innocent person bearing the brunt of the IT Act.

The IT Act makes it criminal to cause the publication of obscene information in electronic form. A person may be absolved of such criminal liability only if he can prove that such publication was without his knowledge and that he had exercised all due diligence to prevent the commission of such offence. This is a tricky situation for any dotcom entrepreneur. Any legislation governing e-commerce must take it for granted that e-commerce transactions are fundamentally different from conventional commercial transactions. The contracting parties are not acting in a physical space and hence, the extent and scope of control that may be exercised by the owner of an e-auction site such as bazee.com is incomparable to that of a real auction site.

For instance, assume that there are two auction sites, physical and cyber, and that auction is taking place in both on the same day. While the physical one has limitations of time and space, the cyber one would be opened for auction for all from anywhere in the world and at any time during that day. Naturally, the number of transactions in the cyber site would be several thousand folds more than that in the physical site. Further, while the transactions in the physical site would be within the knowledge and control of its owner, the owner of the cyber site would not be able to monitor the thousands of transactions that take place from all corners of the world. If an illegal transaction took place on the cyber site, it would be difficult to prove that the owner exercised all due diligence to prevent it.

Such practical difficulties borne out of the very nature of e-commerce transactions explain the detailed and extensive user agreements on such cyber auction sites or similar e-commerce sites. When a user registers to use such a site dealing in e-commerce transactions, he is deemed to have agreed to the terms of use for the same. Even bazee.com has its own user agreement binding the contracting parties. One of the terms of use is that the user agrees to sell, list or display any 'mature audience item' that are restricted to adult use only after (i) informing bazee.com of the nature of such items, (ii) providing the documentary evidence of legal ownership of such material and (iii)

receiving approval from baze.com to list such item. Was this aspect investigated at all? Wouldn't these terms and conditions be construed as acts exercising due diligence? Did the sender have any legal ownership of the clipping? There are even reports that the actual clipping was not put for sale, but merely information of the sender was provided; if so, where was the CEO's liability?

Placing the onus of proving lack of knowledge on the intermediary is highly impractical if not illogical leading to unpleasant and unfortunate situations like the current one. Corresponding laws of other jurisdictions have provided for this difficulty. For instance, in the Electronic Commerce (EC Directive) Regulations 2002 by the European Parliament, mere conduits or intermediaries such as baze.com are exempt from criminal liability when the transaction was not initiated by such conduits. Specifically, their liability in such circumstances is exempt where there was no actual knowledge of any unlawful activity or upon obtaining such knowledge, they acted expeditiously to remove or disable access to such information. Ironically, baze.com officials removed the infringing material and even helped trace the person who placed the same on the website!

If the IT Act is not creatively and logically amended on a war footing, companies may not wish to invest in the e-commerce sector rendering India the ultimate loser. After all, who wants to be in jail for a crime which he did not even commit?

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