

1 CMET (2014) 6

Evolution of Political S.L.A.P.P. in India and Arbitrary Suppression of Freed of Speech

by
Justin Jos and Proteek Debnath*
SLAPP & the Indian Scenario

Strategic Lawsuits against Public Participation: Origin & Development

The concept of SLAPP or Strategic Lawsuits against Public Participation has developed in United States in the 1970s.¹ SLAPP suits are usually brought by governments and companies against citizens who have criticised or spoken against the entity in a public forum with an object to silent such dissent and criticism.² Usually the suit is filed for defamation and the damage claims are very high to intimidate the defendant.³ The purpose of filing a case on such baseless grounds is to make the defendant busy with the lawsuit, which effectively ends the original issue raised by the defendant against the government or the company involved.⁴ The problem with SLAPP is that a SLAPP tends to stifle legitimate political expression⁵ as the dispute which initiates a SLAPP is generally a political question.⁶ The abuse of the law through SLAPP became popular since the 1990s⁷ and the concept of SLAPP manifested with all the developed country internationally.⁸




Page: 7

The development of internet and various online social forums has played a part in creation of a new type of SLAPP suits in U.S., commonly known as 'cyber smear lawsuits' or 'Cyber-SLAPP'.⁹ Such cyber smear lawsuits have posed threat to individual privacy and freedom of speech online.¹⁰ These lawsuits generally involve a defamation suit brought by companies against an individual who have criticised the company on Internet discussion forums and social media websites.¹¹ This new development of SLAPP poses a threat to the freedom of speech of a citizen assign the recent years more and more public discussions have migrated to internet discussion forums and social media websites.¹² However the legislature in the U.S. and judiciary both have identified the SLAPP and its bad impact on public participation and exercise of free speech and took strict steps to curb such lawsuits either through state legislation or through legal precedents.¹³

SLAPP IN INDIA: MISAPPLICATION OF SEC. 66A OF THE IT ACT

In India the concept of SLAPP has evolved a step further. Apart from the SLAPP suits filed by the companies to stop criticism, Indian politicians are using SLAPP to intimidate individuals with the help of the police by arresting them for fulfilling political vendetta and goals. The introduction of Sec. 66A in the IT Act has increased the scope of such SLAPP especially 'Cyber smear Lawsuit' in India. The fact cannot be denied that there were instances of SLAPP in India also before the introduction of Sec. 66A. For instance, in 2007 four Bangalore based software engineers were prematurely arrested for posting an obscene picture of Shivaji on Orkut on the basis of wrong information.¹⁴ Another example can be drawn from the summoning of a 20 year old man in Kerala to Thane court based on a FIR filed u/s 506 and 295A of Penal Code,

1860 in Thane alleging that the person ran an anti Shiv Sena Orkut community.¹⁵ However the misapplication of Sec. 66A for settling political feud against an individual has increased in the last few years. A reference can be drawn from four recent cases in

 Page: 8

which Sec. 66A has been used to arrest an individual prematurely for a political criticism or sarcasm made by them.


1) **Mayank Mohan Sharma & K.V.J. Rao** (November 2012): These two Air India employees were arrested by Mumbai police for a Facebook post which joked about certain politicians. The Police arrested them under Sec 66A and Sec. 67 of the IT Act. Allegedly the post included derogatory comment against the Prime Minister and insulted the national flag. Whereas the accused in their defence stated that the post was a shared post which is commonly available on the social media website.

2) **Ravi Srinivasan** (November 2012): Ravi Srinivasan, a small scale businessman in Pondicherry used Twitter to make a remark on the wealth of Union Finance Minister P Chidambaram's son Karti Chidambaram.¹⁶ However the tweet was not taken in a good humor as it was meant to be; rather an FIR has been filed by K. Chidambaram to the Pondicherry police U/S 66A of the IT Act against Mr Srinivasan. He was arrested by the Pondicherry police promptly. However Mr Srinivasan in his defense has told that the post in twitter is a reflection of recent newspaper reports and thus there is nothing defamatory about it.¹⁷

3) **Professor Ambikesh Mahapatra** (April 2013): Ambikesh Mahapatra, a chemistry professor in a university in Kolkata, was arrested for circulating a sarcastic picture spoof of Trinamool Congress chief Mamata Banerjee and an artistic satire of Railway Minister Mukul Roy taking a political decision through electronic mail. He was charged under Sec. 66A of the IT Act and for defamation under S. 499 of the Penal Code, 1860. However Prof. Mahapatra has not tried to defend his action as he was not repentant for his act.¹⁸

4) **Shaheen Dhada & Renu Srinivasan** (November 2012): On the event of political leader Bal Thackeray's death, Shaheen Dhada showed her dissent and expressed her opinion about the ongoing bandh in Maharashtra. Expressing the same view she posted on Facebook:

"With all respect, every day, thousands of people die, but still the world moves on; just because a politician died a natural death, everyone goes bonkers. They should know we are resilient by force, not by choice. When was the

 Page: 9


last time, did anyone showed some respect or even a two-minute silence for Shaheed Bhagat Singh, Azad, Sukhdev or any of the people because of whom we are free-living Indians? Respect is earned, given, and definitely not forced. Today, Mumbai shuts down due to fear, not due to respect".

However, the post created an upheaval among the Shiv Sena supporters and as a result police arrested Shaheen Dhada u/s 66A of IT Act read with Sec. 295A of Penal Code, 1860, i.e. hurting religious sentiment. However, at a later stage Police have substituted the charges U/S 295A with Sec. 505(2) of IPC i.e. statements which create or promote enmity, hatred or ill-will between classes.¹⁹

The Police have not stopped with arrest of Shaheen Dhada; they have also arrested another lady for liking the post of Shaheen Dhada. Renu Srinivasan has been arrested under the same charges for a mere activity on another's Facebook post.²⁰ In *Avnish Bajaj v. State*²¹ the court has clearly mentioned that the liability would primarily lie upon the person responsible for starting the transaction and the liability will not be attached to any other person due to another activity which connects to the previous one. Thus the arrest of Renu Srinivasan was *per se* incorrect on the part of police. The arrests of these two girls are not only an excessive police action rather it is also a slap on the face of freedom of speech and expression guaranteed by the Constitution. Nevertheless the lower court has rejected the baseless allegations and cleared all the charges against both of them.²² The aforementioned cases are just some examples out of the many in which government and the political parties through police action have used Sec. 66A of the IT Act as an instrument similar to SLAPP. Such misapplication of the provision is possible only because of the vagueness of the provision itself; it is a result of callousness of the legislature.²³

Extent of Permitted Expression

Article 19(1)(a) guarantee the citizens of India the freedom of speech and expression.²⁴ The freedoms given to the citizen are necessary to

 Page: 10

promote basic rights of people and along with that certain democratic value.²⁵ However the right to freedom of speech and expression are subject to reasonable restrictions as per Article 19(2) of the Constitution.²⁶ Any law which is made to curb the right to freedom of speech and expression has to impose such restriction by satisfying the conditions attached with Article 19(2).²⁷ Thus, Sec. 66A of the IT Act has to satisfy the test of reasonableness as given under Article 19(2). On failure of the State to fulfil the condition of "reasonable restriction" the law can be struck down with impunity.

The right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution definitely gives the citizens a right to criticize and the right to express dissent. H.M. Seervai in this regard has correctly stated that,

"The freedom of speech and expression, and the freedom of press, are not only valuable freedom in themselves, but are basic to a democratic form of Government which proceeds on the theory that problems of Government can be solved by the free exchange of thoughts and by public discussion".²⁸

In *S. Rangarajan v. P. Jagjivan Ram*²⁹ the Supreme Court has held that the State cannot prevent open discussion and open expression even if it is hateful to the policies. The court in the same case has observed,

"In a democracy it is not necessary that everyone should sing the same song. Freedom of expression is the rule and it is generally taken for granted. Everyone has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means. The democracy is a Government by the people via open discussion".³⁰

The freedom of speech and expression essentially includes the freedom to criticize freely. In *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*³¹ the Supreme Court has observed that in a democracy freedom of speech and expression is indispensable as every citizen has the right to participate in the process of formulation of common decisions.³² The

Supreme Court has also recognized the right to hold opinions as an integral part of freedom of speech and expression.³³

A reasonable restriction should strike a balance between the freedom guaranteed by the constitution and the social control to limit the freedom to an extent which is essential to protect the society at large.³⁴ Also the limitation imposed should not be arbitrary or excessive, or beyond the requirement in a particular situation.³⁵ The restriction imposed should show a direct nexus with the object it is sought to achieve.³⁶

Sec. 66A of the IT Act states that:

"Any person who sends, by means of a computer resource or a communication device - (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine".³⁷

The abovementioned section definitely points out the vagueness of the terms used in this provision as the terms used to define the offence are subjective in nature. In the first part the drafters used '*grossly offensive*' or '*menacing in nature*', which can be interpreted in different manner depending on the facts and the circumstances whereas, in the second part the drafters used words like '*causing annoyance*' or '*inconvenience*' or '*danger*' etc. These terms are also ambiguous in nature and greatly increase the scope of the misapplication of provision in any given case. As a matter of fact any comment or observation attached with witticism can be considered as an offence under this section. Another disturbing fact about this section is that in the second part there is no distinction being made between messages that cause '*annoyance*', '*inconvenience*', '*ill will*' or '*insult*' which are surely not necessarily criminal in nature with those that cause '*injury*', '*danger*', '*criminal intimidation*' or '*enmity*', which are listed in Penal

Code, 1860 as criminal offences.³⁸ In the third part of the section it does not make any exception for spam mails or auto-generated advertisement mails which also have the potential to '*causing annoyance or inconvenience*' and potentially can be of deceiving or misleading in character. It shows that the drafters have overlooked the problems posed by the real world in an attempt to increase the scope of the section. Also the punishment attached with the section i.e. maximum three years imprisonment along with fine is much higher than other similar offences under the act making it a draconian law. In application the scope of the Act's provisions is so broadly defined that they run afoul of the fundamental right to freedom of speech and expression.³⁹

Recently several public interest litigations have been filed in various High Courts and even in Supreme Court challenging the constitutionality of Sec 66A of the IT Act alleging that the impugned section is violative of fundamental rights conferred by the constitution in Articles 14, 19 & 21.⁴⁰ It is important to point out that the power

conferred to the police to interpret the section is leading to wanton abuse of the Act. By depriving an individual of his rightful liberty any further application of this section will be in contravention of Article 21 of the Constitution. Even if the court does not render Sec. 66A to be unconstitutional, it should prevent the police from exploiting the provision. The provision *prima facie* provides unbridled powers to the police to make arrest in anticipation of disruption of tranquillity of society through electronic media. The very assumption that through publicizing one's idea on social networking forum the likelihood of adverse effect on society increases is itself empty and unsustainable. Law has to progress with social realities and any deviation of law from social realities will only lead to creation of draconian and heinous laws. The current disputed provision of the IT Act is an example of the same as it clearly violates fundamental civil liberties guaranteed under Articles 19 and 21.

The Remedy, If Not Arrest


The premature arrests and police actions on individuals who have resisted the misuse of police power under Sec. 66A of the IT Act has made this provision very undesirable in the eyes of common people. It has created a sense of fear to express one's thought freely on virtual network as it creates an apprehension of arrest in the minds of an individual. The legislative intent behind introduction of this section through an amendment is not consistent with the current practice and the approach taken by the



police in application of the section. The legislature must have introduced the provision keeping in mind the recent activities in the cyberspace, i.e. MMS scandals, posting obscene, seditious material etc. and their intention was to stop such activities in a stricter manner. The intention of the legislature is of paramount importance while drafting any legislation but in the present case where there exists no strict boundary to the scope of the application of the section it is liable to be struck down. The section has given power in hands of the elites, ruling parties and other influencing personalities to settle their personal and political vendetta. The right to dissent is also within the domain of right to freedom of speech and expression. The Section has in the recent past worked as a SLAPP instrument to harass citizens. This misapplication of law can be prevented if a proper guideline is followed while applying Sec. 66A of the IT Act. Recently, the 'Department of Electronics and Information Technology' has introduced an advisory guideline on implementation of Sec. 66A of IT Act keeping in mind the recent incidents.⁴¹ In this aforementioned governmental order it was clearly mentioned that an arrest under Sec. 66A of the IT Act cannot be made without prior approval of senior officers at least holding the rank of the Inspector General of Police in metropolitan cities or a Deputy Commissioner of Police or Superintendent of Police in district level.⁴² However, these guidelines have also not been able to prevent the misapplication of Sec. 66A in practicality as the senior officers of the police are also not completely free from the influence of political parties and other powerful individuals. Rather to stop such misapplication a detailed regulation is required which will provide a detailed procedure for process of prosecution which would run in tandem with the Code of Criminal Procedure. We can import a cue from United Kingdom where a comprehensive guideline has been introduced which regulates the prosecution procedure in cases regarding social media communication.⁴³

In the current social and political scenario of India a higher threshold has to be set for application of Sec. 66A of the IT Act. Before taking an action under the provision police should consult with the judiciary to check the relevancy and seriousness of the

allegation. Unless and until such an advice has not been taken by the police any premature arrest should be held as illegal and arbitrary. After such consultation if it is found that the allegation demands urgent attention then only should the police intervene in the matter and make an arrest. But in any other case the police should not interfere. It suggested by the authors that in times of massive violations of human rights by the police such a provision will only act as a bludgeon in the hands of

 Page: 14

the so called protectors of law and order. A balance is to be sought between the restrictions imposed by Sec. 66A of the IT Act and the right to freedom of speech and expression as guaranteed by the Constitution.

Conclusion

With the emergence of internet and its offshoots, such as social networking portals and electronic media, avenues for displaying discontent with the state machinery has increased tremendously. Moreover, if we carefully analyse the section we can observe that there has been usage of terms such as *grossly offensive*, *menacing character* and *inconvenience* which are hugely misleading and vague. Such subjective terms ought not to be used as it blurs the scope and gamut of the provision. However, the State is also under a legal obligation to protect and secure the innocent citizens from any disruption of law and order. With the introduction of this provision, the exercise of excessive discretion by the police the State has transgressed into the territory of essential liberty of an individual. In *Life Insurance Corporation of India v. Manubhai D. Shah*⁴⁴ the Apex Court has stated that the "freedom of speech and expression" in Article 19(1)(a) means the right to express one's convictions and opinions freely, by word of mouth, writing, printing, pictures or electronic media or in any other manner. In *Romesh Thappar v. State of Madras*⁴⁵, while discussing the ambit of freedom it was held that freedom includes the freedom of ideas, their publication and circulation. It was stated in *Hamdard Dawakhana v. Union of India*⁴⁶, that the right includes the right to acquire and impart ideas and information about matters of common interest.

The disputed section clearly violates the rationale behind the fundamental right to freedom of speech as guaranteed under Article 19. Such a provision of law is draconian in nature and is against the very ethos of the democratic setup of India. Arbitrary and unwarranted arrests by police in apprehension of disruption of law and order are in contravention with the guarantees of freedom and liberty exercised by a citizen of this country under Article 21. The misuse of this provision is on the rise. It is compelling on the people of this country to realize that enactment of such provisions by the legislature is the reflection of the rise of State's power. Such provisions of law have to be struck down for re-establishment of democracy. If this is not done expeditiously then the day is not far that we will witness the demise of individual liberty which is the foundation of our modern constitutional democracy.

* 5th Year B.B.A LL.B (Hons.), National Law University Odisha, Cuttack.

¹ George W. Pring, 'SLAPPS: Strategic Lawsuits against Public Participation', (1989) 7 Pace Env'tl L Rev 3.

² Victor J. Cosentino, 'Strategic Lawsuits against Public Participation: An Analysis of the Solutions', (1991) 27 Cal W L Rev 399.

³ Sean P. Trende, 'Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem' (2005) 44 Duq L Rev 607.

⁴ George W. Pring & Penelope Canan, 'SLAPPS: Getting Sued for Speaking Out', (1st edn, 1996) 9.

- ⁵ Robert Abrams, 'Strategic Lawsuits against Public Participation (SLAPP)', (1989) 7 Pace Envtl L Rev 33.
- ⁶ James A. Wells, 'Exporting SLAPPs: International Use of the U.S. 'SLAPP' to Suppress Dissent and Critical Speech', (1998) 12 Temp Int'l & Comp L J 457.
- ⁷ Donna Demac, 'Cybersmears and Consumer Revenge Dot Corn: Corporate Threats to Online Free Speech', <http://www.ncac.org/internet/20000801~USA~Cybersmears_and_Consumer_Revenge_Dot_Com.cfm> accessed 26 May 2014.
- ⁸ Joshua R. Furman, 'Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation', (2001) 25 Seattle U L Rev 213.
- ⁹ *ibid.*
- ¹⁰ *Dernac*, *ibid* (n 8).
- ¹¹ Bruce P. Smith, 'Cybersmearing and The Problem of Anonymous Online Speech, Forum on Communications Law', <<http://apps.americanbar.org/forums/communication/comlawyer/fall00/smith.html>> accessed 16 May 2014.
- ¹² Robert D. Richards, 'A SLAPP in The Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites', (2010) 21 DePaul J Art Tech &Intell P L 221.
- ¹³ Shannon Hartzler, 'Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant', (2006) 41 Val U L Rev 1235.
- ¹⁴ Shivam Vij, 'In the Supreme Court of the Indian Blogosphere', (2009) <<http://kafila.org/2009/03/19/in-the-supreme-court-of-the-indian-blogosphere/>> accessed 5 June 2014.
- ¹⁵ *ibid.*
- ¹⁶ Prasanto K Roy, 'Why was an Indian man held for sending a tweet?', (BBC News, 6th Nov 2012) <<http://www.bbc.co.uk/news/world-asia-india-20202275>> accessed 7 Jun 2014.
- ¹⁷ Priscilla Jebaraj, 'IAC volunteer tweets himself into trouble, faces three years in jail', (The Hindu, 1st November 2012) <<http://www.thehindu.com/news/national/iac-volunteer-tweets-himself-into-trouble-faces-three-years-in-jail/article4051769.ece>> accessed 21 May 2014.
- ¹⁸ HT Correspondent, 'Professor arrested for poking fun at Mamata' (Hindustan Times, 13th April 2012) <<http://www.hindustantimes.com/India-news/WestBengal/Professor-arrested-for-poking-fun-at-Mamata/Article1-839847.aspx>> accessed 24 May 2014.
- ¹⁹ Staff Reporter, 'Mumbai shuts down due to fear, not respect' *The Hindu* (19th November 2012) <<http://www.thehindu.com/news/national/other-states/facebook-row-court-scrap-charges-against-palghar-girls/article4365469.ece>> accessed 25 May 2014.
- ²⁰ *ibid.*
- ²¹ [2008] 150 DLT 769.
- ²² Staff Reporter, 'Facebook row: Court scraps charges against Palghar girls', *The Hindu* (13th January 2013) <<http://www.thehindu.com/news/national/other-states/facebook-row-court-scrap-charges-against-palghar-girls/article4365469.ece>> accessed 25 May 2014.
- ²³ Amlam Mohanty, 'New Crimes under the Information Technology (Amendment) Act', (2011) 7 Indian J L & Tech 103.
- ²⁴ The Constitution of India, Article 19(1)(a).
- ²⁵ M.P. Jain, *Indian Constitution Law* (6th edn, 2010) 1071.
- ²⁶ The Constitution of India, Article 19(2).
- ²⁷ T.K. Tope, *Constitutional Law of India* (3rd edn, 2010) 147.
- ²⁸ H.M. Seervai, *Constitutional Law of India* (1st Supp 4th ed, Rep. 2013) 711.
- ²⁹ [1989] 2 SCC 574.
- ³⁰ *ibid.*

³¹ [1985] 1 SCC 641.

³² *ibid.*

³³ *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*, (1992) 3 SCC 637.

³⁴ *Om Kumar v. Union of India*, [2001] 2 SCC 386.

³⁵ *M.R.F. Ltd v. Inspector Kerala Govt*, (1998) 8 SCC 227 : (1999) AIR SC 188.

³⁶ *Papnasam Labour Union v. Madura Coats Ltd*, [1995] 1 SCC 501.

³⁷ The Information Technology Act (2000), S 66A.

³⁸ Editorials, 'We Do Not Like' (2012) 47 (49) E.P.W 8.

³⁹ *ibid.*

⁴⁰ Aparna Viswanathan, 'An unreasonable restriction' (The Hindu, 20th February 2013) <<http://www.thehindu.com/opinion/lead/an-unreasonable-restriction/article4432360.ece>.> accessed 1 June 2014.

⁴¹ Department of Electronics and Information Technology, *Advisory on implementation of Section 66A of the Information Technology Act, 2000* (G.O. No. 11(6)2012-CLFE).

⁴² *ibid.*

⁴³ The Crown Prosecution Service, 'Guidelines on Prosecuting cases Involving Communications sent via Social Media', <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/.> accessed 1 June 2014.

⁴⁴ (1992) 3 SCC 637.

⁴⁵ (1950) SCR 594.

⁴⁶ [1960] 2 SCR 671.

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.