

Delhi High Court

Avnish Bajaj vs State on 29 May, 2008

Author: S Muralidhar

Bench: S Muralidhar

JUDGMENT S. Muralidhar, J.

Introduction 1.1 Over three and a half years ago, an internet website carried a listing which offered for sale a video clip, shot on a mobile phone, of two children of a school in Delhi indulging in an explicitly sexual act. The petitioner, who was the Managing Director (MD) of the company that owned the website at the relevant point in time, asks this Court to annul his criminal prosecution for the offences of making available for sale and causing to be published an obscene product within the meaning of Section 292 Indian Penal Code (IPC) and Section 67 of the Information Technology Act 2000 (IT Act). This petition under Section 482 of the Code of Criminal Procedure 1973 ('CrPC') also raises questions concerning the criminal liability of directors for the offences attributable to a company, both under the IPC as well as the IT Act, particularly when such company is not arraigned as an accused.

1.2 Before discussing the background and the sequence of events leading to the filing of this petition, it is necessary to understand the context in which the issues arise for determination. The regulation of pornography on the internet has posed a serious challenge to governments and legislatures primarily on account of the nature of the medium. The easy availability, even to children, of pornographic material in digital form including video clips, its rapid transmission across the world wide web, and the absence of effective filters to screen out objectionable material from being accessed are factors that compound the challenge. It is said that "controlling pornography on the internet is problematic because we may not know from whom or from where the material originates, how many people are receiving the information, or if the material is crossing international boundaries." [See Robyn Forman Pollack, "Creating the Standards of a Global Community: Regulating Pornography on the Internet- an International Concern" 10 Temple International and Comparative Law Journal, (Fall, 1996) 467].

1.3 It is acknowledged that "the main concern of the legislators and parents in relation to the internet is child pornography, rather than other forms of sexually explicit content. This has been the case ever since paedophiles started to use the internet for circulating pornographic materials related to children." [See Yaman Akdeniz, "Cyber Rights, Protection and Markets: Article Governing Pornography and Child Pornography on the Internet: The UK Approach" 32 University of West Los Angeles Law Review 247 (2001)] Akdeniz points out that although in some countries there are arguments against proscription of pornography based on freedom of speech concerns, "there is general consensus that the line should be drawn with child pornography." These factors need to be borne in mind while examining the irreversible harm that can be caused by making available on the internet sexually explicit material that answers the description of child pornography.

Background facts 2.1 Baazee.com India Private Limited ('BIPL'), a wholly owned subsidiary of Ebay Inc. USA, and the owner of the website <http://www.baazee.com>, was during the relevant period in the process of being acquired by and consequently renamed as Ebay India Private Limited (EIPL).

BIPL had its main office at Mumbai and another office in Delhi. During November to December 2004 the petitioner Avnish Bajaj was the MD of BIPL (which later was renamed as EIPL).

2.2 The website baazee.com provided an online platform or market where a seller and a buyer could interact. To be either a seller or buyer a person had to first register himself with baazee.com by filling out an online form giving details including the name, email id, date of birth (the age had to be 18 and above). The person registering had to choose an appropriate 'baazee ID' and a password which would be used every time the person logged on to the website baazee.com to transact either as a seller or a buyer. While registering, the applicant had to make a declaration to the following effect:

I have read the User agreement carefully - I am above 18 years of age. I have read and agreed to abide by the baazee.com user agreement. " The next stage in the registering process was reached after the person clicked on "Accept Terms & Submit". Thereafter an email was sent to the person by baazee.com in which a link was provided for activating the account. A person who registered following the above online procedure could either sell or buy products on the electronic market that baazee.com offered by using the baazee.com ID and password.

2.3 To be a seller a two-step process was envisaged. The first step was to get registered following the procedure described hereinbefore. The second step was to "create a listing." Again several steps were to be followed. First the seller would select a category and sub-category that broadly classified the product proposed to be sold. Then the item details had to be specified. The website advised: "Enter the title that you would like to give your item in the text box provided. Give a title that describes your item best. Try to include specifications such as brand name, model number etc. The idea is to make your title most self explanatory and distinctive. Do not use web language (HTML)." The website also recommended that the seller should "always include an image that depicts your item correctly." The price and payment mode preferences were also to be indicated. Baazee.com also offered a mode of receiving payment under 'paisapay'. The user could also opt for other methods like cheques, demand drafts, cash on delivery etc. 2.4 When a user was listing an item for the first time on the site, a customer support representative had to verify his contact details (address and phone number) by calling up the user on the contact number given in the registration details. For an already registered user who wished to list some other item, there was an automated website filter which checked the item to identify whether it was a prohibited or restricted item. BIPL had a Safety and Trust Division which instituted word and text filters so that objectionable listings could be removed. A Community Watch Programme was also operational. If anyone brought to the notice of BIPL that any objectionable material was being listed, it would trigger a process by which the listing would be deactivated. Once the item was automatically screened by the filter, the listing was placed on the site with a unique computer generated item ID.

2.5 The buying process was fairly straightforward. The registered buyer had to find the item by using the Search box. He then had to browse the categories and sub-categories. After reading the item description, if the person intended to buy, he would click "buy now", select the payment method, specify the delivery details and confirm the order. This resulted in a purchase order being generated. Then came the question of payment through either the credit card or online bank transfer. If the buyer opted for a "paisapay" option and made an online payment, the normal banking payment

gateway got attracted. Once the payment gateway confirmed the receipt of the payment then an automated payment confirmation was sent to the buyer. Thereafter the buyer received the item, depending on the product, through email, hand delivery, courier or post.

2.6 When buyers opted for the "paisapay" method, the system would once in a week calculate the amount payable to the listed user and send a file to the HDFC bank to issue a printed demand draft (DD) in the name of bank account number provided by the seller on [www. baazee.com](http://www.baazee.com). The HDFC Bank would then dispatch the DD to the address provided by the seller. For facilitating this entire transaction BIPL received a commission which was usually a percentage of the selling price of the product.

The sequence of events 3.1 The sequence of events relevant to the present case unfolded thus. Ravi Raj, a fourth year student of the Indian Institute of Technology (IIT) Kharagpur, was registered as a seller with baazee.com since 21ST July 2004. He had already been using the site for listing products for sale. His email ID was psell@sify.com.

3.2 In the evening of Saturday 27TH November 2004, Ravi Raj placed on the baazee.com website a listing offering an MMS video clip for sale at Rs. 125 per piece. He adopted the seller's name as Alice Electronics and gave his address as 12-A/39, Roshpa Tower, Main Road, Malanche, Kharagpur. In order to avoid detection by the filters installed by baazee.com, Ravi Raj included the clip under the category Books and Magazines and sub-category 'e-books'. Although baazee.com did have a filter for some of the words which appear on the website, the listing nevertheless took place. For instance, the word "sex" at serial No. 23 of the list and word "sexual" at serial No. 70 of the list were definitely part of the suspected words.

3.3 The electronic website baazee.com when visited had the following item description on its site: "Item 27877408 - DPS Girls having fun!!! full video + Baazee points." The price was Rs. 125. Under the column "seller's details" the name indicated was: "alice elec" and Location: "Kharagpur". The seller was shown as a Member since 21ST July 2004. Upon clicking on the item description, the listing read as under:

DPS Girls having fun!!! Do you want to see that video clip which has rocked the whole DELHI and now has become a hot point of discussion in the entire Nation?

YES, Then what are you waiting for!!!! Just order for this product and it will be delivered to you within few hours.

This video is of a girl of DPS RK PURAM which has been filmed by his boyfriend in very sexual explicit conditions.

Please note: This video clip of around 2:30 Minutes and will be send to you as an email attachment.

3.4 The buyer interested in getting a copy had to click on the 'buy now' option, make a payment through credit card or 'paisa pay' option. The buyer had to pay Rs. 128 per clip which included a

commission of Rs.3 that went to BIPL. This was deducted from the amount received from the buyer and the balance of Rs. 125 per clip was remitted to the seller by the HDFC bank. The seller, on receiving confirmation that payment had been made, would send the video clip by an email attachment by a zip file with the description 'dps_rkpuram-sex-scandle.zip'. Between around 8.30 pm in the evening of November 27TH 2004 when the listing went on line till around 10 am on 29TH November 2004 when the listing was de-activated, eight transactions of sale of the said video clip took place to buyers located in various parts of the country.

3.5 At around 8.20 pm on Saturday 27TH November 2004 information was received on email from Amit Vohra using emailed threadsincp@sify.com for Community Watch. The mail titled "fraud report about item ID 27877408" read as under:

User's Message The username of the party is alice-elec. This person is trying to sell a video which is illegal in India as it was shot on two people who are below the legal age of 18 & pornography is illegal in India. You need to sort this issue & you should even report it to the legal authorities as this can get your site in trouble.

3.6. This email was assigned to Namrata of BIPL at around 8.25PM on 27TH November 2004 itself. At around 6:25PM on the next date i.e. 28TH November 2004, which happened to be a Sunday, it was assigned to Swapna Sawant of the BIPL and the priority was shifted to the 'high alert' category.

3.7 On 29TH November 2004 at 10:10AM baazee.com wrote to Alice Electronics that it had noticed "that the listings put up on site by you are either obscene or pornographic in nature" and that the Baazee User Agreement prohibits trade in such items. It accordingly informed the seller "we have closed the item as it is against the User Agreement." Soon thereafter Swapna Sawant of BIPL addressed a letter next morning i.e. on Monday 29TH November at 10:38 am to Amit Vohra thanking him for "spotting this and reporting to us at Community Watch that the Item ID: 27877408 is pornographic in nature. We have closed the items and have taken this issue up with the seller." The video clip was removed on 29TH November 2004 Monday at around 10:38 am. Meanwhile eight persons with distinct IDs located in different parts of the country including Calcutta, Nellore, Pune, Delhi, Bangalore and Chennai had purchased it.

3.8 On 9th December 2004 two events took place. The Crime Branch of Delhi police, on receiving credible information that the said MMS clip was sold for Rs. 125 by a website, registered FIR No. 645 of 2004. On the same day a news item appeared in a Delhi the newspaper "Today" with the headlines "DPS sex video at baazee.com". The news item by Anupam Thapa had the byline "Outrage Exclusive" and stated "online website goes ahead with the sale of the infamous clip". The news item stated: "India's biggest online trading portal baazee.com had listed the said MMS clip under the title 'DPS girls having fun' with the member ID of 27877408. The police upon investigation learnt that one Alice Electronics of Kharagpur West Bengal had since 27TH November 2004 sold 8 copies of the said MMS clip."

3.9 The police sent notices under Section 91 CrPC to the petitioner and Sharat Digumarti, the Senior Manager, Trust and Safety, BIPL (who is Accused No. 3) and obtained information on the working

of the website. On 10TH December 2004 in response to a query addressed to baazee.com, Sharat Digumarti provided "the details of the seller (alice_elec) and the buyers who purchased this item." He stated that they had "already disabled the ability of the seller and the buyers in modifying their contact details and the attached file contains the contact details of these users which was taking from our database (File Name 'DPS Data') and also file (File Name: DPS Listing) which show the item that was listed on the site."

3.10 On 11TH December 2004 the police seized the printout of an email containing two pages regarding email ID vishwa777@yahoo.com dated 27TH November 2004 with the time as 17:58:26 which was the placement of the order and an email of the same date received at that very address from Ravi Raj the seller at with the time as 20:05:13 with the email attachment dps_rkpuram_sex_scandal.zip which is a zip file sent to the said email ID. The subject of the email was 'DPS Sex Scandal'. The third item seized was an Amkette floppy which had an email from the seller and confirmation email from baazee.com. Details of the email placement of the order and receipt of the product by each of the other buyers was also collected.

3.11 On 12 December 2004 Sharat Digumarti furnished the details of the payments received from the buyers and confirmed that a sum of Rs. 17,787.87 was disbursed to the seller 'alice_elec' through the HDFC Payment Services.

3.12 On 14TH December 2004, the petitioner wrote to the police about his role and responsibility. Inter alia he stated that: "I am responsible for the India operations of the Company and my charges, assigns, includes policy decisions, planning, control and overall supervision of day to day functioning of the organization."

3.13 In his letter dated 14TH December 2004 Sharat Digumarti explained the registration, buying and selling process and payment process at baazee.com. He enclosed a note on how the "list of the suspected and banned words" worked and the process of detection of leakage. He also gave details of the working of Community Watch. Thereafter a list of 120 words as on 14TH December was attached. Although in the said list at serial No. 106 the word "dps" and at serial No. 110 the word "RKP" were included, these were admittedly added after the sale of the objectionable video clip came to light. The contents of the clip itself were therefore not under screening in the automated process since the clip itself was not on the baazee. com.

3.14 The Manager, Finance and paisapay of baazee.com wrote a detailed letter to the police giving information on how the said system works and gave a complete list of the transactions involving the video clip. This letter confirmed that Rs. 128 was charged per piece from each of the buyers. Rs.3 rupees were paisapay charges and Rs. 125 went to the seller.

3.15 On 17TH December 2004, Ravi Raj was arrested at Kharagpur and certain recoveries were effected from him including the CPU containing the hard disk of the computer from where the email attachments of the offending video clip were despatched. The petitioner Avnish Bajaj was arrested in Mumbai on the same day. He was later released on bail by this Court on 21ST December 2004. At the conclusion of the investigations, a charge sheet was filed showing Ravi Raj, Avnish Bajaj and Sharat

Digumarti as Accused Nos. 1,2 and 3 respectively.

3.16 The learned Metropolitan Magistrate (MM) by an order dated 14TH February 2006 took cognizance of the offences under Sections 292 and 294 IPC and Section 67 IT Act. The three accused were summoned to face trial. Ravi Raj has since been absconding and his trial has been separated.

3.17 This petition was filed by Avnish Bajaj, the MD of BIPL (EIPL) seeking the quashing of the criminal proceedings on various grounds which will be discussed hereafter. During the pendency of this petition there has been a stay of the proceedings before the trial court.

Submissions of Counsel 4.1 Arguments on behalf of the petitioner were addressed by Mr. Arun Jaitley and Mr. Sidharth Luthra, Senior Advocates.

4.2 According to the petitioner, the case against BIPL is not, and cannot possibly be, in relation to the video clip since the clip itself was not made available on baazee. com. The video clip was transferred directly between the seller and buyer without the intervention of the website. While no submission was made in regard to the video clip being obscene, the submission of the petitioner was that at the highest BIPL was concerned only with the listing placed on the website which by itself was not obscene and did not attract the offence under Section 292/294 IPC or Section 67 IT Act.

4.3 It was then argued that in any event without BIPL (EIPL) being made an accused, no criminal liability attached to the petitioner for an IPC offence only because he happened to be the MD of BIPL (EIPL) at the relevant time. The revenue generated by the website was not profit as contemplated by Section 292 IPC and in any event such income was not generated by the petitioner but by BIPL which is not an accused in the case. Reasonable care was taken by the website to immediately remove the video clip once it was brought to its knowledge that it was objectionable. Therefore the website acted diligently and did not commit any illegality. The charge sheet when read as a whole does not make out even a prima facie case against the petitioner in his individual capacity for the offences under Sections 292/ 294 IPC.

4.4 In relation to Section 67 IT Act, it was argued that in the absence of the company BIPL (EIPL) itself being made an accused, no liability could attach to the petitioner with the aid of Section 85 IT Act. A reading of the charge sheet as a whole would show that although the petitioner as MD was in overall charge of the policy and planning of the business, he had no direct role in the placing of the listing or its filtering and subsequent removal. This was an automated process and the work of supervising the placing of listings on the website had been delegated to specific individuals like Accused No. 3 Sharat Digumarti. Criminal liability cannot be fastened lightly in the absence of a specific case being made out against the petitioner in his individual capacity, particularly since the company of which he was MD is not arraigned as an accused.

5.1 Appearing for the State, Ms. Mukta Gupta, learned Senior Standing Counsel submitted that the sequence of events, the listing, video clip and the role attributed to the petitioner, fully make out a case against the petitioner for the offences under Section 292 IPC and Section 67 IT Act. The offence under Section 292 IPC includes not only overt acts but illegal omissions within the meaning of

Sections 32, 35 and 36 IPC. The failure to have adequate filter in a system which is entirely automated, entails serious consequences and a website cannot escape such legal consequences.

5.2 It is further submitted by the learned Counsel for the State that the fact that website earned profits through the sale is evident from the bank statements which show that for each video clip it did earn a commission of Rs.3. The chain of events show that the website had a role to play in several of the stages before the video clip was sent by the seller to the buyer by an email attachment. The fact that payment was made to the seller even as on 27TH December 2004 shows that no attempt was made to prevent or stop the commission of the illegality by the website.

5.3 It was submitted by Ms. Gupta that the petitioner was the person in-charge of the affairs of the company that owned the website and was responsible for its policy and planning. There is adequate material set out in the charge sheet which shows that the petitioner had a direct role in the matter. Notwithstanding that the BIPL itself is not arraigned as an accused, the petitioner can nevertheless be proceeded against for the role played by him in the transaction.

5.4 For the offence under Section 67 IT Act, it is not necessary that the company BIPL itself should be an accused. As explained in the judgments of the Supreme Court, what is relevant is whether at the trial a case for convicting the company for the offences had been made out. The present stage was premature to come to a conclusion either way. Even at a subsequent stage in the proceedings, the court can summon the company if sufficient material emerges against it.

5.5 Finally it was submitted that the crime is of an extremely grave nature and cannot go unpunished on technicalities. Even if the charge sheet does not contain specific allegations, the matter can still proceed to the next stages. At this stage the court is only to examine if a prima facie case is made out and on that test no interference is called for.

Are the offences under Sections 292 and 294 IPC and Section 67 IT Act attracted? 6.1 The question that first requires to be addressed is whether in the facts and circumstances of the case, as disclosed in the charge sheet, a prima facie case for offences under Sections 292 and 294 IPC and Section 67 IT Act is made out. If the answer to this question is in the affirmative, the further question that arises is whether a prima facie case has been made out against the petitioner for those offences.

6.2 Section 292 IPC concerns the offence of sale of obscene materials and reads thus:

292. Sale, etc., of obscene books, etc. (1) For the purposes of Sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it].

(2) Whoever-

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

Exception.- ...

6.3 Section 292(1) is a deeming provision. If any "book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object" is "lascivious or appeals to the prurient interest" or "if taken as a whole is such as to tend to deprave or corrupt person, who are likely to read, see or hear the matter contained or embodied in it", then such object "shall be deemed to be obscene." The law in this regard has been explained by the Supreme Court in *Ranjit D. Udeshi v. State of Maharashtra*, *C.T. Prim v. State* and *Samaresh Bose v. Amal Mitra*.

6.4 In the present case, there are two pieces of material that call for scrutiny. One is the video clip and the other the listing on the website baazee.com. It was not argued by learned Counsel for the petitioner that the video clip in question did not even prima facie attract the definition of an obscene object within the meaning of Section 292 (1) IPC. Also, it is a matter of record that a separate case has been instituted before the Juvenile Justice Board against the child involved in the act. As will be noticed hereafter, the listing itself suggested that even according to the seller the clip answered the description of child pornographic material.

6.5 To recall, the petitioner's submission was that BIPL and not the petitioner was, if at all, concerned with the listing on the website which by itself was not obscene. According to the petitioner, the video clip was transferred directly from the seller to the buyer without the

intervention of the web site. The question then arises whether the listing even prima facie answers the definition of obscenity attracting Section 292(1) IPC.

6.6 The entire text of the listing has been set out earlier in para 3.3. Prima facie it appears that the listing itself answered the definition of obscenity since it contained words or writing that appealed "to the prurient interest" or if taken as a whole was "such as to tend to deprave or corrupt person, who are likely to read, see or hear the matter contained or embodied in it." The listing contained explicit words that left a person in no doubt that what was sought to be sold was lascivious. The words "This video is of a girl of DPS RK PURAM which has been filmed by his boyfriend in very sexual explicit conditions" are a prominent feature of the listing which invited a potential buyer to purchase the obscene object which was the video clip by projecting it as child pornography since the reference is to school children. Despite the arguments to the contrary of the learned Senior counsel for the petitioner, this Court is not able to agree with their submissions that the listing itself was not even prima facie an obscene material or text.

6.7 It was argued that even then, there was no overt act done by BIPL in relation to the video clip or listing, to even prima facie attract the offence under Section 292 (2) IPC. This Court is unable to agree. As far as the listing is concerned, its contents were in the knowledge of BIPL the moment the listing was placed on the website by Ravi Raj. The offence under Section 292 (2) (a) IPC gets attracted when the prosecution is able to prove that a person has "publicly exhibited or in any manner put into circulation" or "has in his possession" the obscene object. Even if Ravi Raj, and not BIPL, may have inserted the listing, the website of BIPL certainly "possessed" it. The website was easily accessible on the net and therefore the website also "publicly exhibited" the listing. It cannot be said therefore that in respect of the listing, Section 292 (2) (a) IPC is not even prima facie attracted as far as BIPL is concerned.

6.8 In relation to the video clip, the wording of Section 292(2) (d) IPC is wide enough to include an attempt at making known "by any means whatsoever" that "such obscene object can be procured." The placing of an advertisement on the website informing the viewer that an obscene material or object is available for sale, one click away, is enough to attract the offence under Section 292(2)(D). The advertisement might itself have been inserted by the seller but the website facilitated the sale by carrying the listing which informed the potential buyer that such a video clip that is pornographic can be procured for a price. For instance, there could be a notice board in the premises of a club or association, on which is pasted a listing by one of the members offering for sale a pornographic film. It would not be open to the club/association to say that it in providing space on its notice board it is not by itself "making known" that an obscene object "can be procured from or through any person." Section 292(D) would be attracted in such a situation to fasten criminal liability on the club itself. If it is proved that a particular member was aware of the placing of such listing on the notice board such member would also be liable. Baazee.com here was using a public space in the form of a website that could be accessed by any internet user.

6.9 In relation to the essential ingredients of the offence of sale of or offer for sale of obscene products, reference was made to paras 10 and 11 of the judgment in Ranjit D. Udeshi which read thus:

10. Before dealing with that problem we wish to dispose of Mr. Garg's third argument that the prosecution must prove that the person who sells or keeps for sale any obscene object knows that it is obscene, before he can be adjudged guilty. We do not accept this argument. The first sub-section of Section 292 (unlike some others which open with the words "whoever knowingly or negligently etc.") does not make knowledge of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. If knowledge were made a part of the guilty act (acts reus), and the law required the prosecution to prove it, it would place an almost impenetrable defence in the hands of offenders. Something much less than actual knowledge must therefore suffice. It is argued that the number of books these days is so large and their contents so varied that the question whether there is mens rea or not must be based on definite knowledge of the existence of obscenity. We can only interpret the law as we find it and if any exception is to be made it is for Parliament to enact a law. As we have pointed out, the difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the book etc., has made the liability strict. Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section.

11. Next to consider is the second part of the guilty act (actus reus), namely, the selling or keeping for sale of an object which is found to be obscene. Here, of course, the ordinary guilty intention (mens rea) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them. The argument that the prosecution must give positive evidence to establish a guilty intention involves a supposition that mens rea must always be established by the prosecution through positive evidence. In criminal prosecution mens rea must necessarily be proved by circumstantial evidence alone unless the accused confesses. The sub-section makes sale and possession for sale one of the elements of the offence. As sale has taken place and the appellant is a book-seller the necessary inference is readily drawn at least in this case. Difficulties may, however, arise in cases close to the border. To escape liability the appellant can prove his lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene unless he can establish that the sale was without his knowledge or consent. The law against obscenity has always imposed a strict responsibility. When Wilkes printed a dozen copies of his Essay on Woman for private circulation, the printer took an extra copy for himself. That copy was purchased from the printer and it brought Wilkes to grief before Lord Mansfield. The gist of the offence was taken to be publication-circulation and Wilkes was presumed to have circulated it. Of course, Wilkes published numerous other obscene and libellous writings in different ways and when Madame Pampadour asked him:

How far does the liberty of the Press extend in England?" he gave the characteristic answer: "I do not know. I am trying to find out !" (See 52 Harv. L. Rev. 40).

6.10 A reading of the above paragraphs shows that there are two elements to be satisfied in order to prove the offence under Section 292 IPC. The first is that the person accused of the offence had the knowledge that what was being offered for sale or exhibited or possessed was obscene. The second is that such person had the intention to commit any of the acts mentioned in Section 292 (2) IPC. In

Ranjit D. Udeshi it was held that the prosecution did not have to prove that the accused had knowledge that the contents of the books being offered for sale were in fact obscene since the deeming provision in Section 292 (1) IPC stood attracted. However the prosecution was required to prove that the accused did intend to sell such obscene object.

6.11 Turning to the case on hand, the listing here was carried by the website baazee.com. The text of the listing leaves no doubt that the object being offered for sale was obscene. By not having appropriate filters that could have detected the words in the listing or the pornographic content of what was being offered for sale, the website ran a risk of having imputed to it the knowledge that such an object was in fact obscene. These are the attendant risks that a website owner attracts when he exploits cyber space for profits. The proliferation of the internet and the possibility of a widespread use through instant transmission of pornographic material, calls for a strict standard having to be insisted upon. Owners or operators of websites that offer space for listings might have to employ content filters if they want to prove that they did not knowingly permit the use of their website for sale of pornographic material. Given the nature of the offence and the 'strict liability' envisaged by Section 292 (1) IPC, even if for some reason the filters fail, the presumption that the owner of the website had the knowledge that the product being offered for sale was obscene would get attracted. This of course would be a rebuttable presumption. It would be open to the owner of the website to show that it took reasonable precaution to filter the listing for obscene material, this it was nevertheless placed on the website listed without its knowledge and that it took prompt corrective once it knew that the listing or the product offered for sale was obscene. But that would be a matter for evidence at the trial.

6.12 For the purposes of the present petition it is enough to examine if the offence under Section 292 IPC is prima facie attracted. This Court finds that it does as far as BIPL (EIPL) is concerned. It is therefore not necessary at this stage for this Court to examine if there is a valid defence available to BIPL or, whether, as contended by the prosecution, the offence would get attracted even on account of the illegal omissions of BIPL.

7.1 Next, we turn to Section 67 of the IT Act which reads as under:

Section 67-Publishing of information which is obscene in electronic form Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

7.2 The plain words of the above provision unambiguously state that the offence stands attracted when there is publishing, transmitting or where anyone "causes to be published in the electronic form" any material that is "lascivious or appeals to the prurient interest" or "if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to

read, see or hear the matter contained or embodied in it." The remaining portion of the provision borrows the language of Section 292(2)(D) IPC. As far as the present case is concerned it has already been held that what was offered for sale through the listing and the listing itself were prima facie obscene.

7.4 Therefore, it cannot be said that baazee.com in this case did not even prima facie "cause" the publication of the obscene material. The ultimate transmission of the video clip might be through the seller to the buyer but in a fully automated system that limb of the transaction cannot take place unless all the previous steps of registration with the website and making payment take place. It is a continuous chain. When five to six links of the chain are under the direct control of the website and it is only on completion of each step that the final two steps which result in the actual publication of the obscene material ensue, it cannot be said that the website did not even prima facie cause publication of the obscene material.

8.1 As far as the offence under Section 294 is concerned, the learned Counsel for the prosecution did not dispute the contention of the learned Counsel for the petitioner that the said offence was not attracted in the facts of the case. A reference may nevertheless be made to the Section 294 IPC:

294. Obscene acts and songs Whoever, to the annoyance of others--

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

8.2 It appears that Section 294 IPC deals only with doing obscene acts and singing or reciting or uttering obscene songs in a public place. It cannot be said that the website itself did an obscene act or performed any obscene song. The offence under Section 294 is not even attracted prima facie in the facts and circumstances of the present case.

9. To summarise this part of the discussion, this Court finds that a prima facie case for the offence under Section 292 IPC and Section 67 IT Act is made out as far as the owner of the website baazee.com, i.e. the company BIPL (renamed as EIPL) is concerned. The offence under Section 294 IPC is not even prima facie attracted.

Is a prima facie case made out for the offences under Sections 292 IPC and 67 IT Act against the petitioner?

10. The question that arises next is whether a prima facie case for the offence under Section 292 IPC and Section 67 IT Act is made out against the petitioner. It has been argued by the learned Senior counsel for the petitioner that nowhere in the charge sheet is there any allegation that the petitioner himself facilitated the publishing of the obscene material or is in any way directly involved in the transaction.

11. It has been held that a prima facie case is indeed made out against BIPL. However, for some reason BIPL has not been arraigned as an accused. No satisfactory explanation has been offered by the prosecution except suggesting during the course of arguments that the law in regard to corporate criminal liability was not very clear. This is not an acceptable position in view of the clear position in the law as explained by the Supreme Court. The word 'person' is defined under Section 11 IPC to include "any Company or Association or body of persons, whether incorporated or not." Therefore for an offence under the IPC there is no immunity granted to a company as such from prosecution. Even if, like in Section 292 IPC, the offence is punishable with imprisonment and fine, a company can still be arraigned and tried as an accused. Section 305 CrPC deals with the procedure that is to be followed when the accused is a company. A person will be nominated by such company to represent it during the trial. It may ultimately be punished only with fine (since most offences are punishable with fine in addition to imprisonment). This position in law has now been settled by the Constitution Bench of five judges of the Supreme Court *Standard Chartered v. Directorate of Enforcement*. Overruling an earlier decision of a three Judge Bench in *Assistant Commissioner v. Velliappa Textiles*, the Constitution Bench by a 3:2 majority held that for an offence under the IPC or any other penal statute where the provision makes the offence punishable with imprisonment fine, a company can nevertheless be prosecuted. It was held (AIR, paras 7 and 8):

7. As in the case of torts, the general rule prevails that the corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorized powers, and without proof that his act was expressly authorized or approved by the corporation. In the statutes defining crimes, the prohibition is frequently directed against any "person" who commits the prohibited act, and in many statutes the term "person" is defined. Even if the person is not specifically defined, it necessarily includes a corporation. It is usually construed to include a corporation so as to bring it within the prohibition of the statute and subject it to punishment. In most of the statutes, the word "person" is defined to include a corporation. In Section 11 of the Indian Penal Code, the "person" is defined thus:

The word "person" includes any Company or Association or body of persons, whether incorporated or not.

8. Therefore, as regards corporate criminal liability, there is no doubt that a corporation or company could be prosecuted for any offence punishable under law, whether it is coming under the strict liability or under absolute liability.

12. Therefore, there was no legal bar in arraigning BIPL as an accused in the present case. It was then submitted by the State, on the strength of the decision of the Supreme Court in *SWIL Ltd. v. State of Delhi*, that at a later point in time, even before passing an order on charge, the trial court can summon the company as an accused. Even if this were to happen, that still does not obviate the requirement in law for the prosecution to show that a prima facie case has been made out against the petitioner in his individual capacity for the IPC offence. While, as will be discussed hereafter, the position is different with regard to the offence under Section 67 IT Act, as far as the offence under Section 292 IPC is concerned, the law as it presently stands does not envisage an automatic liability attaching to a Director for the offences committed by a company. Therefore even if at a subsequent

stage of the proceedings BIPL is summoned to face trial for the IPC offence, that would not, in the absence of a specific case being made out against the petitioner in his individual capacity, result in his being an accused.

13. It requires to be noted that, unlike some other statutes containing penal provisions, the IPC does not incorporate the concept of criminal liability of a Director or an employee where the principal accused is a company. In other words, there is no provision similar to Section 141 of the Negotiable Instruments Act, 1881 ('NI Act') or Section 140 of the Customs Act, 1962 or Section 85 of the IT Act. These are provisions that provide for a deemed criminal liability of a person who, at the time of commission of the offence by the company, was in charge of the affairs of the company or responsible to it for the conduct of its business. The proviso to such provision makes it possible for such person to escape liability by proving at the stage of trial that the offence was committed by the company without his or her knowledge. Therefore once the deemed criminal liability gets attracted under the substantive provision, the burden shifts to the accused under the proviso to rebut such presumption. However, there is no such provision in the IPC.

14. In *Maksud Saiyed v. State of Gujarat*, the Supreme Court explained that (SCALE p. 323):

13. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

15. Recently this position was reiterated in *S.K. Alagh v. State of U.P.* where the Supreme Court observed (SCALE p. 527):

16. Indian Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.

18. As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefore. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. (See *Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya*).

15. We may, in this regard, notice that the provisions of the Essential Commodities Act, Negotiable Instruments Act, Employees' Provident Fund (Miscellaneous Provision) Act, 1952 etc. have created

such vicarious liability. It is interesting to note that Section 14A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the explanations appended to Section 405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section 406 of the Indian Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company. (See *Maksud Saiyed v. State of Gujarat and Ors.*).

16.1 Although the Supreme Court has termed the liability of a Director, where the company is the accused, as being 'vicarious', the classical understanding of the concept of vicarious liability is invariably in the context of a "master and servant" relationship. For instance, a company can be made vicariously liable for the criminal acts of its employees or directors. In an article by V.S.Khanna titled "Corporate Liability Standards: When should Corporations be held Criminally Liable" 37 Am. Crim. L. Rev. 1239 (2000) the concept is explained thus:

Corporate liability is a form of vicarious liability wherein the corporation is held liable for the wrongs of its agents. Vicarious liability is imposed on corporations under the doctrine of respondeat superior when an agent (1) commits a crime (2) within the scope of employment (3) with the intent to benefit the corporation.

(See also Thomas J. Bernard, "The Historical Development of Corporate Criminal Liability", 22 Criminology 3 1984) 16.2 Here we have a converse situation where the director is sought to be made liable for the criminal acts of the company. Nevertheless, what the above two decisions of the Supreme Court show is that as far as the IPC is concerned there is no automatic criminal liability of a director where the company is arraigned as an accused.

17. The absence of such a provision in the IPC could be viewed as a lacuna but is not to be lightly presumed as there have been numerous statutes enacted by Parliament thereafter which have incorporated such provisions. For instance, Section 85 IT Act is similarly worded as Section 141 NI Act and incorporates a deemed criminal liability of the director. The IT Act amends certain provisions of the IPC as well. But Parliament has chosen not to make any amendment to incorporate such a provision in the IPC. The Court has therefore to proceed with the law as it exists, particularly since it is a penal statute which admits of strict construction.

18. Does this mean that a Director or employee of a company can never be made an accused? The answer has to be in the negative. What it means is that if the prosecution seeks to make a Director or an employee of a Company, which is the principal accused, liable for an IPC offence, then it will have to make out a case against such person in his or her individual capacity. The precise role of the person concerned in the actions of the company which led to the offence will have to be proved.

19.1 Turning to the case on hand, it is urged by the prosecution that there are enough averments in the charge sheet to establish a prima facie case against the petitioner even in his individual capacity

and not merely in his capacity as MD of BIPL. It is submitted that the charge sheet may not contain the precise words but when read as a whole does bring out the prima facie case against the petitioner not only in his designation as the MD of baazee.com but as an individual as well. In the written submission filed by the State it is asserted that there are "specific averments explicitly describing the role of the petitioner in commission of the offence under Section 292 & 294 IPC and Section 67 IT Act by his acts and illegal omissions. " It is further sought to be argued that the charge sheet cannot be complete or accurate thesis of the prosecution case. Reliance is placed on the decision of the Supreme Court in *R.K. Dalmia v. Delhi Administration* . It is further submitted that "it is wrong to say that the petitioner was charge sheeted and cognizance was taken simply owing to his designation. The offence by the petitioner have been committed by him individually though acting in his capacity as the Managing Director of the company." Elsewhere in the written submission of the State it is averred as under:

It is wrong to suggest that the company merely facilitated the sale between the parties to the transaction while in fact the company was an indispensable ally for the completion of the transaction as is demonstrable from the flow chart.

19.2 The reference here is to a flow chart that the Court had asked the parties to produce which would show the chain of transactions from the stage of the registration of a seller to the ultimate delivery of the product to the buyer. Reliance has been placed by the prosecution on the judgment in *Keshub Mahindra v. State of Madhya Pradesh and Sushil Ansal v. State* 2002 CrL LJ 1369 to contend that the liability for the IPC offences, where the company is the main accused would also be attached to the directors.

19.3 In order to appreciate these submissions the relevant paragraphs of the charge sheet may be noticed:

The user agreement, downloaded from the site and details seized from, Sharat Digumarti, indicates that arrangements arrived at between buyers and sellers are bipartite agreements with no responsibility of Baazee.com whatsoever. However, in this case Baazee.com acted as an agent of the seller as it had taken a commission on the sale. The clip was priced at Rs 125/- each, but billed at Rs. 128/- each with Rs3/- as commission per sale. This commission was credited to PaisaPay, a division of Baazee.com. The website Baazee.com had installed a program which runs SQL cron jobs or checks the written words place by the sellers against a set of banned and suspect words. The web portal is a public domain and can be accessed and read by just anyone. The language of the advertisement placed on the website was quite explicit and left nothing for the reader to imagine. The website was committed to block off offending words through appropriate filters, as per Clause 1.12.4 Schedule 'C' Part II: Terms & Conditions of the ISP guidelines, issued by the Government of India, which clearly states therein that "The Licensee shall ensure that objectionable, obscene, unauthorized or any other content, messages or communications infringing copyright, Intellectual Property right and International and domestic Cyber Laws, in any form or inconsistent with the laws of India, are not carried in his network, the ISP should take all necessary measures to prevent it." However, in spite of the filters having the word 'sexual' in its list, the program of Baazee.com failed to block off the offending advertisement. Further, in spite of being categorically informed by one of the users'

thread sincp@sify.com on 27.11.2004 at 8.20 p.m. the company, Baazee.com a 24 x 7 platform, failed to act to stop the sale, immediately. All through the day on 28.11.2004 the sale was going on unabated and it was finally closed on 29.11.04.

The language of the advertisement written down and represented by accused Ravi Raj, on the website clearly conveyed the meaning that school children were involved in explicit sexual act. Further the portal has charged and received commission on the sale of the offending clip. The portal knew of the illegality of the fact, as the same was blocked on 29.11.04 but still chose to profit from it by appropriating the commission, 15 days later. The investigation proves that Avnish Bajaj as the MD of Baazee.com as well as Sharat Digumarti as Head Fraud and Risk Control, had knowledge of the contravention, through the Community Watch scheme. In spite of being informed, the item was not blocked for 38 hours. 75% of all sales took place after the web portal was informed about it. The filters that were put up by the website were also grossly inadequate. In spite of the word 'sexual' (at serial number 70) the word 'dps' (at serial number 106) and word 'RKP' (at serial number 110) existing in the suspect list, their program was not able to detect and block the advertisement which carried the same word. Likewise words like Avnish Bajaj was the domain administrator and all policy decisions were made through him. In spite of the hue and cry made in the media about the issue, the policy makers for the website did not put the names like DPS, RKPuram on their watch list till after the case was registered.

After having gathered enough evidences to establish that the porn video film was listed for sale, that it was actually purchased by at least 8 buyers, that the clipping was delivered to 8 buyers as email attachment through Baazee.com, that payments were passed on to the accused Ravi Raj col. No. 4., after deducting due commissions, that in spite of being categorically informed by one of the users thread sincp@sify.com on 27.11.04 at 8.20 P.M. Baazee.com failed to act to stop the sale, immediately, but closed it only after 38 hours, accused Avnish Bajaj, CEO of Baazee.com mentioned in Col. No. 4 was arrested on 17.12.04.

Avnish Bajaj at the time, when the said porn clip was sold and brought through Baazee.com. was the Managing Director of the Company, Baazee.com India Ltd. He was in charge for the Indian operations of the Company and was responsible for policy decisions, planning, control and overall supervision of day to day functioning of the organization. The profile on checkdomain.com also listed Avnish Bajaj as the administrative contact of Baazee.com. The issue of sale of pornographic CDs involving of two adolescents was widely in the media in the first week of Nov. 2004. However no operative or policy changes were affected by the Company. Baazee.com to prevent the listing/display/sale of the same on the portal. Although, the accused company claimed that filters existed to block such objectionable materials, investigations revealed that the claims made by the company were a mere eyewash. The filters were found to be rudimentary, grossly inadequate and perfunctory. Various other interactive web portals like jeevansaathi.com, naukri.com etc. adopt various measures like delayed insertion and regular online monitoring. This even the established industry norms, to prevent offensive content from coming up on websites were totally ignored. The accused company was even alerted by a customer on 27.11.04 itself, but the site was de-listed as "closed" only after 38 hours. Even after being closed it remained lodged in the closed item list for the general public to access and see. The payments received were routed through PaisaPay, another

division of Baazee.com facilitating online money transfer and a commission of Rs.3/- per sale transaction was charged. Although the site was closed on 29.11.04, payments received from the buyers were not blocked but sent to the seller on 3.12.04. Investigation proves that the MD of Baazee.com, who exercised control over the day to day functioning of the organization did not exercise due diligence to prevent the listing of the said obscene and lascivious clipping. The investigation reveals that the policies and conduct of Baazee.com its MD was designed to increase sale and maximize profits. Safeguard of prevailing moral values and prurient interests of any person in particular and the society at large was not a pressing agenda. The investigations found that the policy makers of the company were negligent in dealing with the matter and failed to exercise due diligence.

19.4 The other relevant portions in the charge sheet are: "Further, subsequent to the registration and arrest in this case, the domain and the network contact information for the website Baazee.com had been changed from Baazee.com to ebay.com, the principal company, who now own the domain name Baazee.com, primarily to insulate the other Directors of the Company from criminal responsibilities. The domain servers were also relocated by the company to xxx.EBAYDNS.COM, USA.

Sharat Digumarti was the Senior Manager, Trust and Safety who was responsible for maintaining the subject and banned key word list and ensuring that no lascivious item is listed for sale on the website. Sharat Digumarti was responsible for ensuring that no banned and illegal items are traded on the website. However, he did not take appropriate measures to ensure that the list of the banned and suspect words are updated keeping in mind the social and moral norms. Although the website runs a 24 x 7 operations, no person had been deputed by him from his unit to review the listings and to respond to alerts generated by the system. This allowed the item to remain listed for 38 hours after an alert was raised by the Community Watch program. The filters that have been claimed by the accused as a measure to block objectionable materials were found to be grossly inadequate during the investigations. Sharat Digumarti has been charge-sheeted on recognizance without arrest."

The investigation conducted till date have gathered enough evidences against accused persons Avnish Bajaj, Ravi Raj and Sharat Digumarti Col. No. 4. It has been clearly established that all the said three accused persons knowing fully well and having reasons to believe, have sold/transmitted a pornographic/obscene MMS clip causing lascivious impact on citizens by appealing to their prurient interest for their undue pecuniary gains. Hence the present charge sheet has been prepared u/s 292/294 IPC r/w 67 IT Act. It is therefore respectfully prayed that accused Accused Avnish Bajaj and Ravi Raj col. No. 4 on bail and Sharat Digumarti on recognizance, may kindly be called through notices and witness through summons for holding their trial in accordance with law. The list of witnesses, documents and materials exhibits have also been enclosed.

19.5 This Court is unable to agree with the submission of the prosecution that the above contents of the charge sheet make out a prima facie case against the petitioner for the IPC offence both in his capacity as MD of BIPL as well as in his individual capacity. When read as a whole, the charge sheet does not bring out the individual culpability of the petitioner at all. It brings out the culpability of

the company and the reference throughout to the petitioner is in his role as the MD of such company. A useful contrast can be made with the averments pertaining to Sharat Digumarti which have been extracted in the earlier paragraph. There the precise role of the person who was Senior Manager, Trust and Safety, BIPL has been described. As regards the petitioner, the averment is that he was in charge of policy and planning and was negligent in not putting in place sufficient filtering mechanisms. In light of the strict liability principle, this by itself cannot satisfy the requirement of there being sufficient material against the petitioner to attract even prima facie the offence against him under Section 292 IPC.

19.6 A director does not automatically become criminally liable for the criminal acts of the company. If one carefully reads the judgment in Keshub Mahindra it would be clear that UCIL, the company was itself an accused. It is in that context that the Supreme Court made observations about the individual liability of the directors. There were specific allegations in the charge sheet that each of the directors was party to the decision taken by the UCIL concerning the safety of the Union Carbide Plant. There are no such averments here as to the precise direct role of the petitioner. Even in the case of Sushil Ansal no such argument appears to have been advanced that in the absence of the company the directors could still be made accused. It is not possible to equate the said two decisions with the case on hand because here the company has not been made an accused at all. In the absence of the company being made an accused and in the absence of specific allegations concerning the MD of the company, it is not possible to accept that the submission that the MD can be proceeded against for the IPC offence.

19.7 It was then sought to be argued that even illegal omissions i.e. the failure to do an act would attract Section 292 IPC. Sections 32 and 35 IPC were referred to for this purpose. The law in India as regards illegal omissions has been explained in *Ambika Prasad v. Emperor* and *Anna v. State of Hyderabad* AIR 1956 Hyd 99. There must be a legal compulsion to do an act and the failure to perform such an act would result in illegal omission. Not any and every omission to perform an act would result in a criminal liability. A reference may be made to the decisions in *Queen v. Anthony Udyan* (1883) ILR 6 Mad 280 and *Basharat v. Emperor* AIR 1934 Lahore 813. These provisions will have to be strictly construed. Otherwise each and every omission can attract criminal liability. The charge sheet when read as a whole can at best be said to bring out a prima facie case of omission by BIPL which owned the website and not by the petitioner in his individual capacity.

19.8 The charge sheet discloses that at various stages, in an automated system, roles were assigned to individual employees of BIPL. There was a separate Manager for Trust and Safety. When the Community Watch group alerted the website, the matter was first marked to an employee Namrata then to another employee Swapna Sawant. Even with reference to the flow chart, the prosecution was unable to show at what stages the petitioner as MD was himself directly involved in the screening of the listing or its subsequent removal. In the circumstances, it would be a mere surmise that the petitioner was himself responsible for the offence. There must be a specific allegation in the charge sheet that, despite knowing the failure of the filters, he nevertheless did nothing about it. There is no such averment in the charge sheet. In fact the liability sought to be attached to the petitioner is only in his capacity as MD of the company and not in his individual capacity. Therefore it is not possible to accept the argument of the prosecution that the doctrine of illegal omission

results in a criminal liability being attached to the petitioner here.

20.1 Next, we turn to the offence under Section 67 of the IT Act vis-à-vis the petitioner here. For this it is necessary to reproduce Section 85 of the IT Act which reads as under:

Section 85 - Offences by companies (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in Sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.-For the purposes of this section,-

- (i) "company" means any body corporate and includes a firm or other association of individuals; and
- (ii) "director", in relation to a firm, means a partner in the firm.

20.2 There are two parts to Section 85 IT Act. The first part says "where a person committing a contravention of any of the provision of this Act or of any rule, direction or order made thereunder is a company." On a plain reading of the provision, therefore, the company has to necessarily be found to be in contravention of a provision of the IT Act. In such event, the deeming provision in the second part gets attracted. This attaches a deemed criminal liability on a person who, at the time of commission of the offence, was in "charge of, and was responsible to, the company". This deemed liability shifts the burden of proof to the individual who is in charge of the affairs of the company.

20.3 The question whether in the absence of arraigning the company as an accused, such a deemed criminal liability can attach to the directors was first addressed in the judgment of a Bench of the three Judges of Supreme Court in State of Madras v. C.V. Parekh . There the Manager and Managing Director of Microtec Castings (P) Ltd. were made the accused along with two other accused who were a godown clerk and the representative to another company G.Ranji and Co. The company itself i.e. the Microtec Castings (P) Ltd. was not made an accused. They were charged with having committed a contravention of Clause 5 of the Iron and Steel Control Order, 1956 which is framed under the Essential Commodities Act, 1955. The Supreme Court acquitted the accused and in para 3

of the judgment it was observed as under (SCC, p. 493):

3. Learned Counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956) is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the Company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. It was urged that the two respondents were in charge of, and were responsible to, the company for the conduct of the business of the company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of Clause 5 of the Iron and Steel (Control) Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of Clause 5 of the Iron & Steel (Control) Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened Clause 5 of the Iron & Steel (Control) Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Villabhadas Thacker and any contravention by them would not fasten responsibility on the respondents. The acquittal of the respondents is, therefore, fully justified. The appeal fails and is dismissed.

20.4. Later, a two-Judge Bench of the Supreme Court in Sheo Ratan Agarwal v. State of Madhya Pradesh while dealing with the same provision held as under (SCC, p.354):

5. The Section appears to our mind to be plain enough. If the contravention of the order made Under Section 3 is by a Company, the persons who may be held guilty and punished are (1) the Company itself (2) every person who, at the time the contravention was committed, was in charge of, and was responsible to, the Company for the conduct of the business of the Company whom for short we shall describe as the person-in-charge of the Company, and (3) any director, manager, secretary or other officer of the Company with whose consent or connivance or because of neglect attributable to whom the offence has been committed, whom for short we shall describe as an officer of the Company. Any one or more or all of them may be prosecuted and punished. The Company alone may be prosecuted. The person-in-charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person-in-charge or an officer of the Company may not be prosecuted unless he be ranged alongside the Company itself. Section 10 indicates the persons who may be prosecuted where the contravention is made by the Company. It does not lay down any condition that the person-in-charge or an officer of the Company may not be separately prosecuted if the Company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the Company. Section 10 lists the person who may be held guilty and punished when it is a Company that contravenes an order made Under Section 3 of the Essential Commodities Act. Naturally, before the person-in-charge or an officer of the Company is held guilty in that capacity it must be

established that there has been a contravention of the Order by the Company.

20.5 In the same paragraph of Sheo Ratan Agarwal, the above highlighted portions of the judgment in C.V. Parekh were explained thus (SCC, p.355):

That should be axiomatic and that is all that the Court laid down in *State of Madras v. C.V. Parekh* (supra) as a careful reading of that case will show and not that the person-in-charge or an officer of the Company must be arraigned simultaneously along with the Company if he is to be found guilty and punished. The following observations made by the Court clearly bring out the view of the Court:

It was urged that the two respondents were in charge of, and were responsible to, the company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of Clause 5 of the Iron and Steel (Control) Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate Or by the High Court that the sale in convention of Clause 5 of the Iron & Steel (Control) Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened Clause 5 of the Iron & Steel (Control), Order the two respondents could not be held responsible. The actual contravention was by Kamdar and Villabhadas Thacker and any contravention by them would not fasten responsibility on the respondents.

The sentences underscored by us clearly show that what sought to be emphasised was that there should be a finding that the contravention was by the Company before the accused could be convicted and not that the Company itself should have been prosecuted along with the accused. We are therefore clearly of the view that the prosecutions are maintainable and that there is nothing in Section 10 of the Essential Commodities Act which bars such prosecutions.

20.6 Although it was urged by learned Senior Counsel for the petitioner that the above observations of the two-Judge Bench of the Supreme Court are contrary to what was held by the larger bench of three judges in C.V. Parekh, on a careful reflection this Court is of the view that the judgment in Sheo Rattan Agarwal is a possible view to take of what was in fact held by the Supreme Court in C.V. Parekh.

20.7 The next important decision in this regard is *U.P. Pollution Control Board v. Messers Modi Distillery and Ors.* . There the question that arose was whether without making the company an accused in a case involving the offences under Sections 47 of the Water (Prevention and Control of Pollution) Act 1974, the directors of that company could be made liable. The said provision was one that provided for a deemed criminal liability of the director. The Single Judge of the Allahabad High Court had discharged the directors on the ground that the company being an accused was a pre-requisite to proceeding against the directors. Reversing the decision of the High Court, the Supreme Court held (SCC, p.689-690)

6. The learned Single Judge has focussed his attention only on the technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in para 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery. Although as a pure proposition of law in the abstract the learned Single Judge's view that there can be no vicarious liability of the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under Sub-section (1) or (2) of Section 47 of the Act unless there was a prosecution against Modi Industries Limited, the company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the Board. Furthermore, the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned Single Judge is his failure to appreciate the fact that the averment in para 2 has to be construed in the light of the averments contained in paras 17, 18 and 19 which are to the effect that the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors were also liable for the alleged offence committed by the Company.

20.8 The decision in Sheo Ratan Agarwal was reiterated in Anil Hada v. Indian Acrylic Ltd. where the Supreme Court was interpreting Sections 138 and 141 of the NI Act. That was a case where the company itself had not been made an accused but its directors were sought to be made as an accused. The Court noticed C.V. Parekh (but mistakenly to referred to it as a decision of a two Judge Bench) and proceeded to hold: "But if a company is not proceeded due to any illegal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability through the legal fiction envisaged in Section 141 of the Act." The Court in Anil Hada also took note of the observations in Modi Distillery and explained that they "were obiter. That apart, the law on the point was specifically discussed and dealt with in Sheoratan Aggarwal with which we are in respectful agreement."

20.9 Therefore, in light of the law explained in the decisions of the Supreme Court after C.V. Parekh, it appears that without the company being made an accused, its directors can be proceeded against under Section 67 read with Section 85 IT Act. There is another factor which weighs with this Court. At the present stage, it is too early to conclude that the company will never be made an accused. It is possible, following the dictum in SWIL that the trial court may at any stage hereafter summon the company to face trial for the offence under Section 67 IT Act. In SWIL the Supreme Court relied on the earlier decision in Raghubans Dubey v. State of Bihar and held (SCC, p. 689):

6...After taking cognizance of the offence, the Magistrate under Section 204 CrPC is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide

whether process should be issued against particular person/persons named in the charge-sheet and also not named therein. For that purpose, he is required to consider the FIR and the statements recorded by the police officer and other documents tendered along with charge-sheet. Further, upon receipt of police report under Section 173(2) CrPC, the Magistrate is entitled to take cognizance of an offence under Section 190(1)(B) even if the police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the investigating officer and independently applying his mind to the facts emerging from the investigation by taking into account the statement of the witnesses examined by the police. At this stage, there is no question of application of Section 319 CrPC.

20.10 In that event, the difficulty in the petitioner being proceeded against may not arise at all. Prima facie there appears to be sufficient material to summon the company. In fact the Supreme Court in *Modi Distillery* observed that the trial court could overcome such technical objection by directing the arraigning of the company as an accused as otherwise it would be "a travesty of justice." For the above reasons it is not possible to hold that not even a prima facie is made out against the petitioner for the offence under Section 67 read with Section 85 IT Act.

End Note

21. An end note before summarizing the conclusions. As this case reveals, the law in our country is not adequate to meet the challenge of regulating the use of the internet to prevent dissemination of pornographic material. It may be useful to look at the legislative response in other common law jurisdictions. In the United States, there have been three legislations that have dealt with censorship of pornographic material on the internet: the Communications Decency Act (CDA), which was enacted as a part of the Telecommunications Act of 1996, the Child Online Protection Act 1998 (COPA) and the Children Internet Protection Act 2003 (CIPA). The CDA sought to prohibit the use of an interactive computer service to send or display in any manner to those under the age of 18, any communication that depicts or displays sexual or excretory activities in a manner that is patently offensive. This was which was however struck down as unconstitutional by the U.S. Supreme Court in *Reno v. ACLU* 521 U.S. 844 (1997). The COPA narrowed the range of the material prohibited but was also held to be unconstitutional. The CIPA, which casts a duty on public libraries and schools to install software to block obscene or pornographic images, was upheld as constitutionally valid by the U.S. Supreme Court in *United States v. American Library Association* 539 U.S. 194 (2003). There are nevertheless serious concerns expressed about the effectiveness of such laws and the challenges that exist in enforcing prohibition of child pornography on the internet. [For instance, see Heidi Wachs, "Permissive Pornography: the Selective Censorship of the Internet under CIPA", 11 *Cardozo Women's L.J.* 441] In the United Kingdom, the Obscene Publications Act, 1959 was amended by the Criminal Justice and Public Order Act of 1994 (CJPOA) to deal with the specific problem of internet pornography by extending the Act to cover the transmission of electronically stored data. It makes service providers liable for material placed on the internet by a third party thus requiring them to monitor material for obscene matter. Further the Protection of Children Act, 1978 was amended by CJPOA, 1994 to include photographs in electronic data format. India may want to develop a different legislative model to regulate the use of the internet with a view to prohibiting its use for disseminating child pornographic materials. Nevertheless, the task deserves the utmost priority.

Summary of conclusions

22. This Court accordingly holds as follows:

(a) The charge sheet when read as a whole brings out a prima facie case attracting the offences under Section 292(1) (a) and 292 (2) (d) IPC and Section 67 IT Act. However, not even a prima facie case for the offence under Section 294 IPC is made out.

(b) A prima facie case for the offence under Section 292 (2) (a) and 292 (2) (d) IPC is made out against BIPL now named as EIPL both in respect of the listing and the video clip respectively.

(c) However, as far as the petitioner Avnish Bajaj is concerned, since the IPC does not recognise the concept of an automatic criminal liability attaching to the director where the company is an accused, not even a prima facie case for the offence under Section 292 IPC is made out even when the charge sheet is read as a whole; it only seeks to implicate him in his designation as MD of BIPL and not in his individual capacity.

(d) Therefore, the petitioner will stand discharged as far as the offences under Sections 292 and 294 IPC are concerned. This will however not affect the case against the other accused.

(e) A prima facie case for the offence under Section 67 read with Section 85 IT Act is made out against the petitioner since the law as explained by the decisions of the Supreme Court recognises the deemed criminal liability of the directors even where the company is not arraigned as an accused and particularly since it is possible that BIPL (EIPL) may be hereafter summoned to face trial.

(f) Consequently, while the case against the petitioner of the offences under Sections 292 and 294 IPC is quashed, the prosecution of the petitioner for the offence under Section 67 read with Section 85 IT Act will continue.

23. It is clarified that the learned trial court will proceed to the next stage of passing an order on charge uninfluenced by the observations in regard to the offences in respect of which it has been held by this Court that a prima facie case has been made out against the petitioner. The petition and the application are accordingly disposed of. The interim stay is vacated.