IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.9792 OF 2023

Kunal Kamra,]
Indian Inhabitant aged 34 years,]
Residing at C-33 Kataria Colony,]
Caddel Road, Mahim, Mumbai 400016] ...Petitioner.

Versus

Union of India,]
Represented by the Secretary, Ministry]
of Electronics and Information]
Technology, having its office at]
Electronics Niketan, 6 CGO Complex,]
Pragati Vihar, Lodhi Road,]
New Delhi – 110 003] ...Respondent.

WITH
WRIT PETITION (L) NO.14955 OF 2023

Editors Guild of India,
Having their registered office B-62]
Gulmohur Park (first floor),]
New Delhi 100 049] ....Petitioner.

Versus

1] Union of India,]
Ministry of Electronics and Information]
Technology, having office at Electronics]
Niketan, 6 CGO Complex, Pragati Vihar,]
Lodhi Road, New Delhi 110 003]
]
2] Union of India,]
Ministry of Law and Justice, having]
office at 3rd floor, C Wing Lok Nayak]
Bhavan, Khan Market,]

New Delhi -110 003]

3] Union of India,]
Ministry of Information and]
Broadcasting, having office at Shastri]
Bhavan, New Delhi 110 003] …Respondents

WITH
INTERIM APPLICATION (L) NO.17704 OF 2023

IN

WRIT PETITION (L) NO.14955 OF 2023

1] News Broadcasters & Digital]
Association, Through its Secretary]
General, Mrs Annie Joseph, Age-67 years]
Registered Office at : FF-42, Omaxe]
Square, Commercial Centre, Jasola,]
New Delhi 110 025.]
]
2] Bennett, Coleman & Company]
Limited, Through its Authorized]
Signatory Mr Sanjay K. Agarwal,]
Age – 54 years, having office at Trade]
House, Ground Floor, Kamala Mills]
Compound, Sepnapati Bapat Marg,]
Lower Parel, West, Mumbai-400 013]
]
3] M/s TV 18 Broadcast Limited,]
Through its Authorized Signatory]
Mr. Satyajit Sahoo, Age – 39 years,]
having Office at Empire Complex, 414,]
Senapati Bapat Marg, Lower Parel]
West, Mumbai 400 013] ….Applicants.

In the matter between

Editors Guild of India]
having their registered office at B-62]
Gulmohur Park (first floor),]
New Delhi 100 049] .... Petitioner

Versus

1] Union of India,]
Ministry of Electronics and Information]
Technology, having office at Electronics]
Niketan, 6 CGO Complex, Pragati Vihar,]
Lodhi Road, New Delhi 110 003]
]
2] Union of India,]
Ministry of Law and Justice, having]
office at 3rd floor, C Wing Lok Nayak]
Bhavan, Khan Market,]
New Delhi -110 003]

3] Union of India,]
Ministry of Information and]
Broadcasting, having office at Shastri]
Bhavan, New Delhi 110 003] ...Respondents

WITH
(CIVIL APPELLATE JURISDICTION)
WRIT PETITION NO.7953 OF 2023

Association of India Magazines,]
Registered office at E-3 Jhadenwalan]
Estate, New Delhi 110 055.]
Through its President Srinivasan B, R/O]
Gemini House, Old No.58, new No.36,]
3rd Main Road, Gadhinagar, Adyar]
Chennai 600 020] .... Petitioner.

Versus

Union of India,]
Through the Secretary Ministry of]
Electronics and Information Technology]
having office at Electronics Niketan,]
6 CGO Complex, Pragati Vihar, Lodhi]
Road, New Delhi 110 003] ..... Respondent.

Mr. Navroz Seervai and Mr. Darius Khambata, Senior Advocates with Ms. Arti Raghavan, Advocate instructed by Ms. Meenaz Kakalia, Advocate for the Petitioner in WP(L) No.9792 of 2023.

Mr. Shahdan Farasat with Mr. Bimal Rajsekhar, Advocates for the Petitioner in WP(L) No.14955 of 2023.

Mr. Gautam Bhatia instructed by Ms. Aditi Saxena, Advocates for the Petitioner in Writ Petition No.7953 of 2023.

Mr. Tushar Mehta, Solicitor General with Mr. Devang Vyas, Additional Solicitor General, Mr. Rajat Nair, Mr. Gaurang Bhushan, Mr. Aman Mehta, Mr. Advait M. Sethana, Mr. D.P. Singh, Mr. Sheelang Shah, Ms. Savita Ganoo, Ms. Anusha Amin, Ms. Vaibhavi Choudhary, Mr. Devanshu Gupta, Advocates and Mr. Bhuvanesh Kumar, Additional Secretary, Mr. Prithul Kumar, Joint Secretary, Mr. Vikram Sahay, Director & Mr. Ritesh Kumar Sahu, Scientist D, Mr. Kshitij Aggarwal, Dy. Director, Mr. Chinna Swami, Scientist for the

Respondents-UOI in all the above matters (through V.C.)

Mr. Arvind Datar, Senior Advocate (through V.C.) alongwith Ms. Nisha Bhambani, Mr. Bharat Manghani, Rahul Unnikrishnan, Ms. Drushti Gala instructed by Mr. Gautam Jain, Advocates for the Applicants/Intervenors in Interim Application (L) No.17704/2023 in WPL/14955/2023.

CORAM : A.S. CHANDURKAR, J.

The arguments were concluded on: 08/08/2024
The Opinion is expressed on : 20/09/2024

OPINION:

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1] The present proceedings arise pursuant to the reference made under the provisions of Chapter-I Rule 7 of the Bombay High Court Appellate Side Rules, 1960 read with Section 98 of the Code of Civil Procedure, 1908 and Clause 36 of the amended Letters Patent of the Bombay High Court so as to render an opinion on the points of difference recorded by the learned Judges constituting the Division Bench that heard the present batch of writ petitions.

A] Facts leading to the reference:

2] The validity of Rule 3(1)(b)(v) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("the Rules of 2021", for short) as amended on 06/04/2023 is the subject matter of challenge in this batch of writ petitions. The proceedings were decided on 31/01/2024 by the Division Bench of G.S. Patel & Dr. Neela Gokhale, JJ. G. S. Patel, J (as his Lordship then was) struck down the amendment to Rule 3(1)(b)(v) of the Rules of 2021 as being ultra vires the provisions of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution of India, Section 79 of the

Information Technology Act, 2000 ("the Act of 2000", for short) and also being in violation of the principles of natural justice. Dr. Neela Gokhale, J. upheld the validity of the said Rule holding the same to be not violative of Articles 14 and 19(1)(a) of the Constitution of India. She held that the said Rule was not ultra vires the provisions of the Act of 2000 nor was it contrary to the judgment of the Supreme Court in *Shreya Singhal vs. Union of India*, 2015 INSC 257. It was also held that the exemption under Section 79 of the Act of 2000 would cease to operate only if the offensive information as provided in the said Rule affected any restriction under Article 19(2) of the Constitution of India.

B] <u>Judgments of the Division Bench:</u>

3] At the outset, it would be necessary to refer to the differing judgments of the learned judges constituting the Division Bench since the Reference Court has been called upon to hear the parties on the point/points of difference in the opinions rendered by the learned Judges. Broadly,

Patel J upheld the challenge raised on behalf of the petitioners and declared the impugned Rule to be ultra vires the provisions of Article 19(1)(a) read with Article 19(2), Article 19(1)(g) read with 19(6) and Article 14 of the Constitution. It was also violative of the principles of natural justice as well as ultra vires Section 79 of the Act of 2000. It also failed to satisfy the test set out in the decision in *Shreya Singhal* (supra) especially on the aspects of overbreadth and vagueness. Absence of the manner in which the Rule was to work itself out was also found relevant for striking down the said Rule. Thus, the amendment of 2023 to Rule 3(1)(b)(v) of the Rules of 2021 was struck down.

4] Dr. Gokhale J, on the other hand concluded that Section 79(3)(b) having been read down in *Shreya Singhal* (supra) to include those matters relatable to restrictions in Article 19(2), the exemption would cease to operate only if an offensive opinion affected any restriction under Article 19(2) of the Constitution of India. The words “reasonable effort” did not mean “take down” as the only option and the option of issuance of “disclaimer” was not pre-empted by the impugned

Rule. It was further held that the remedy of approaching the Grievance Redressal Mechanism as well as the Appellate Authority thereafter was a sufficient safeguard and the Rule was not violative of Article 14 on the ground that the FCU comprised of Government officials alone. The learned Judge held that a challenge to potential abuse by the FCU on the basis of apprehension was not maintainable and to that extent the challenge was premature. The words “fake” or “false” or “misleading” as found in the amended Rule were to be understood in the ordinary sense of their meaning and that the said Rule did not suffer from the vice of vagueness. It also met the test of proportionality and the measures adopted by the Government were consistent with the object of the law. The impact of encroachment on a fundamental right was not disproportionate to the benefit that was likely to ensue. On these counts, it was held that Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 was not liable to be struck down. Its validity was upheld.

5] In the present context, it would be necessary to note that after expressing its differing opinions, the Division Bench

in its order dated 06/02/2024 while considering the Interim Applications observed in paragraphs 3 and 4 that it was not necessary to note the points of disagreement or difference since the parties to the proceedings agreed that there was disagreement on every aspect of the matter. The question therefore was, whether the impugned Rule was or was not ultra vires and unconstitutional. From the aforesaid, it is clear that there is a difference of opinion on the principal question arising in the writ petitions as to whether the provisions of Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 are unconstitutional or not.

C] <u>Consideration of interim relief:</u>

6] In the light of the aforesaid differing opinions, the proceedings have been placed before this Court for rendering an opinion on the said differences so as to thereafter enable the Division Bench to decide the proceedings on the basis of the opinion of the majority of Judges. For the sake of completeness, it may be mentioned that the learned counsel for the parties were heard on the prayer for interim relief. According to the petitioners, the statement made by the

learned Solicitor General on 29/09/2023 that the Fact Check Unit ("the FCU", for short) contemplated by the impugned Rule would not be notified till the judgment in the writ petitions was delivered ought to have operated till the writ petitions were finally decided. It was thus prayed that the said statement be directed to be continued till the reference was answered. This prayer was opposed by the Union of India. By the order dated 11/03/2024, the Reference Court held that there was no case made out to direct that the statement made on behalf of the Union of India that the FCU would not be notified during the pendency of the present proceedings should be continued any further.

D] <u>Proceedings before the Supreme Court:</u>

7] The order dated 11/03/2024 was the subject matter of challenge before the Supreme Court in Civil Appeal Nos. 4509 to 4511 of 2024 [*Editors Guild of India vs. Union of India and Others*] that were decided on 21/03/2024. The Supreme Court noted that after the order dated 11/03/2024 was passed refusing to grant any interim relief, the Union Government on 20/03/2024 had issued a Notification

constituting the FCU. It observed that the challenge as raised involved core issues impinging on the freedom of speech as protected by Article 19(1)(a) of the Constitution. Without expressing an opinion on the merits of the challenge, the Supreme Court held that the Notification issued on behalf of the Union Government through Ministry of Electronics and Information Technology dated 20/03/2024 would remain stayed pending disposal of the proceedings before the High Court. Thus the said Notification dated 20/03/2024 constituting the FCU has not come into effect.

8] I have heard Mr. Navroj Seervai and Mr. Darius Khambata, learned Senior Advocates for the petitioner in Writ Petition (L) No.9792 of 2023, Mr. Shahdan Farasat, learned Advocate for the petitioner in Writ Petition (L) No.14955 of 2023, Mr. Gautam Bhatia, learned Advocate for the petitioner in Writ Petition No.7953 of 2023 as well as Mr. Arvind Datar, learned Senior Advocate for the applicants/intervenors in Interim Application No.17704 of 2023 in Writ Petition (L) No.14955 of 2023 at considerable length.

I have also heard Mr. Tushar Mehta, learned Solicitor

General of India while opposing the submissions made on behalf of the petitioners and intervenors.

At the outset, it may be stated to the credit of all learned Counsel who addressed their submissions, be it for the petitioners, the intervenors and the respondents that strenuous efforts were put in by them to bring home their respective contentions. Reference was made to the voluminous documentary material relied upon by them before the Division Bench and the contentions then raised were reiterated followed by submissions in support of and opposing the views expressed by the learned Judges constituting the Division Bench. Though the focus was on the points of difference that required expressing an opinion under Clause 36 of the Letters Patent, it was reminded that jurisdiction under Article 226 of the Constitution was available for being exercised.

With a view to avoid repetition of the basic contentions, I have chosen to refer only to those urged with a view to opine on the points of difference within the scope permissible under Clause 36 of the Letters Patent. Reference to the case law cited has also been made in that context.

E] <u>Submissions on behalf of the petitioner in Writ Petition (L) No.9792 of 2023:</u>

9] Mr Navroj Seervai, the learned Senior Advocate for the petitioner at the outset referred to Clause 36 of the Letters Patent of the Bombay High Court ("the Letters Patent", for short) read with Rule 7 of Chapter-I of the Bombay High Court Appellate Side Rules, 1960 ("the BHCAS Rules", for short) to submit that as a Reference Court, the third Judge was required to express an opinion only on the point/points of difference that was/were recorded by the learned Judges constituting the Division Bench in their differing judgments. The third Judge was expected to indicate his/her opinion on the point/points of difference alone and that it was not permissible to venture into areas where there was no difference of opinion expressed or if an opinion had been expressed on a certain point/points by only one learned Judge constituting the Division Bench. Thus if on a particular point, an opinion had been expressed only by one learned Judge of the Division Bench and no opinion on that point was expressed by the other learned Judge of the

Division Bench, the Reference Judge would not be required to go into such point while expressing his opinion on the points of difference. In other words, the opinion expressed by one of the learned Judges of the Division Bench on such point would have to be accepted since no differing opinion on that point had been expressed by the other learned Judge. To buttress this submission, reliance was placed on the decision in *Firm Ladhuram Rameshwardayal vs. Krishi Upaj Mandi Samiti, Shivpuri and others,* 1977 MPLJ 641. Indicating the scope of exercise that was required to be undertaken under Clause 36 of the Letters Patent and Rule 7 of Chapter-I of the BHCAS Rules, the learned Senior Advocate referred to the note submitted on the split verdict on behalf of the petitioner.

10] In this regard it was submitted that insofar as the petitioners' challenge based on violation of the provisions of Article 14 of the Constitution was concerned, Patel J in his opinion was of the clear view that the Rule was in the nature of class legislation and was thus liable to be struck down on the aspect of discriminatory classification. On this issue, no opinion was expressed by Dr.Gokhale J and thus it would not

be necessary for the Reference Court to go into this aspect. Similarly, on the petitioners' challenge based on violation of principles of natural justice, Patel J had held that the impugned Rule did not satisfy the test of natural justice especially on the ground of failure to issue any notice to an intermediary before taking any steps under the Rules of 2021 or in providing any opportunity to an intermediary to respond as well as absence of any requirement on the part of the FCU to issue a reasoned speaking order. While considering the challenge based on breach of principles of natural justice, Dr.Gokhale J considered only the aspect of bias and held against the petitioners. Hence, on the facet of breach of principles of natural justice, other than the issue of bias, there was no differing opinion expressed by Dr.Gokhale J. These aspects were required to be borne in mind while expressing an opinion under Clause 36 of the Letters Patent.

11] It was submitted that while Patel J upheld the challenge raised to the invalidity of Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023, the said provision was found to be valid by Dr. Gokhale J subject to the rider recorded in

paragraph 61(i) of her judgment. According to the learned Senior Advocate, the view taken by Dr. Gokhale J resulted in re-writing of the impugned Rule. The requirement of "knowledge and intent" was read in the said Rule in a manner that was against the first principles of interpretation of statutes. The expression "knowingly and intentionally" did not qualify the amended Rule and hence it was not permissible to read the said expression in the impugned Rule. It was urged that the word "information" having been defined by Section 2(1)(v) of the Act of 2000 as an inclusive expression, it could not be given a restrictive meaning so as to encompass facts alone. In effect it amounted to reading out opinions, satire, political criticism etc which was, in fact, not contemplated by Section 2(1)(v) of the Act of 2000. Reliance was placed on the decision in *Minerva Mills Limited vs. Union of India*, 1980 INSC 142 to urge that the device of reading down could not be resorted to so as to imagine a law of one's liking.

The possibility of issuing a "disclaimer" so as to indicate "reasonable efforts" was a stand that was not pleaded by the Union of India in its submissions. In fact,

reading in the option of issuing a disclaimer instead of taking down the content was contrary to the terms of Rule 3(1)(b) of the Rules of 2021 which required an intermediary to make reasonable efforts not to host, display, upload, modify any offensive information. Thus appending a disclaimer would amount to modification which was clearly not permissible. The finding that there was no direct penal consequence for either an intermediary or user was not correct in view of Section 45 of the Act of 2000 which, in fact, provided for various consequences including imposition of penalty. In fact, reading in the possibility of a disclaimer in Rule 3(1)(b)(v) of the Rules of 2021 as amended was not permissible in the light of settled principles of statutory interpretation.

12] It was urged that despite finding the term, "business of the Central Government" to be vague, the validity of the impugned Rule was upheld by Dr. Gokhale J. The expression "business of the Central Government" was a term of widest import as held by Patel J. In absence of any indication whatsoever as to what would constitute "business of the Central Government", the same was vague thus rendering it

unconstitutional. It was further submitted that despite the petitioner's challenge based on the restrictions sought to be imposed by the impugned Rule not being in accordance with the requirements of Article 19(2) of the Constitution, its validity had been upheld on untenable grounds. The impugned Rule did not make any attempt to limit the restrictions to the eight heads under Article 19(2) of the Constitution of India and sought to impose restrictions beyond what was permissible under Article 19(2). In fact, a ninth restriction was sought to be introduced by the impugned Rule. A similar attempt had been made by the Union of India while defending the validity of Section 66-A of the Act of 2000 in *Shreya Singhal* (supra) which was unsuccessful. It was legally not permissible to expand the nature of restrictions prescribed under Article 19(2) through an interpretative process. Reference in that regard was made to the decision in *Secretary, Ministry of Information and Broadcasting, Government of India and others vs. Cricket Association of Bengal and others*, (1995) 2 SCC 161 to contend that no restriction could be placed on the right to freedom of speech and expression on grounds of other than

those specified under Article 19(2) of the Constitution.

Reference was also made to the observations in *Amish Devgan vs. Union of India and others,* 2020 INSC 682 that law and policies were not democratic unless subjected to democratic process including questioning and criticism. The Government should be left out from adjudicating what was true or false, good or bad, valid or invalid and these aspects ought to be left for open discussion in public domain.

13] The amended Rule was also violative of Article 14 of the Constitution inasmuch as it resulted in class legislation. It sought to counter a perceived ill of only one entity, namely the Central Government. There was no reason or rationale behind limiting its operation only to the "business of the Central Government" while excluding the State Governments. There was absence of any intelligible differentiation. The learned Senior Advocate relied upon the decision in *State of Rajasthan vs. Mukan Chand and others* 1964 INSC 45 in this regard as well on *Leelabai Gajanan Pansare and others vs. Oriental Insurance Company Limited and others* 2008 INSC

949 following the ratio laid down in the earlier decision.

The amended Rule was also violative of the principles of natural justice inasmuch as the Central Government itself was to constitute the FCU and was also to be a judge in its own cause for determining the content of information to be fake or false or misleading. This was contrary to the law laid down in *A.K. Kraipak and others vs. Union of India* 1969 INSC 129. Absence of an opportunity of hearing to the person likely to be affected, absence of knowing the basis on which the FCU was to determine the content of information to be fake or false or misleading as well as absence of a speaking order rendered the Rule vulnerable to a challenge based on violation of principles of natural justice. Reference was made to the decision in *State Bank of India and others vs. Rajesh Aggarwal and others,* 2023 INSC 303. It was also urged that the impugned Rule suffered from manifest arbitrariness on the tests laid down in *Association for Democratic Reforms and another vs. Union of India and others,* 2024 INSC 113. For all these reasons, it was urged that the view expressed by Patel J that Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 was invalid be accepted.

F] <u>Submissions on behalf of the Petitioner in Writ Petition No.14955 of 2023:</u>

14] Mr. Shahdan Farasat, the learned counsel appearing for the petitioner in Writ Petition (L) No.14955 of 2023 in support of the view taken by Patel J sought to supplement the submissions made by Mr Navroz Seervai, learned Senior Advocate. According to him, Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 was in violation of the provisions of Article 19(1)(a) and Article 19(1)(g) of the Constitution. The Rule permitted the Central Government to itself determine the truth or otherwise of its own business. There was no fundamental right restricted to true and correct information so as to enable the FCU to determine information that was fake or false or misleading with regard to business of the Central Government. Even if the operation of the impugned Rule was to be restricted in the manner suggested by the learned Solicitor General, the same would not save it from the vice of invalidity. Referring to the Constituent Assembly debates on freedom of speech and expression in the context of political speech dated 1/12/1948 and 2/12/1948, it was

submitted that a democratic Government ought to welcome criticism and that self Government was better than a good Government. The aspects of truth or falsehood about business of the Central Government could not be justified under any of the eight heads of Article 19(2) of the Constitution. The capture of the impugned Rule was of a wide nature and it sought to attack the core of the functioning of democracy. Reading down the impugned Rule so as to save it would be futile nor could any concession justify its operation in its present form. Since the term "information" had been defined under the Act of 2000, the operation of the Rule could not be restricted on the basis of the statement made on behalf of the Union of India by its Law Officer. If the validity of the Rule was upheld, it was likely that various States would also follow suit and constitute their FCU's.

Referring to the permissibility of a particular piece of information in the print media vis-a-vis impermissibility of the very same information in the digital media being identified by the FCU to be fake or false or misleading, it was submitted that this resulted in a contradictory position. In

view of the decisions of the Supreme Court in *Bennett Coleman and Co and others vs Union of India and others,* 1972 INSC 268 as well as *Kaushal Kishor vs State of Uttar Pradesh and Others,* 2023 INSC 4, similar principles would be applicable to information that could be circulated on the digital platform. The contention urged on behalf of Union of India of a disclaimer being provided by an intermediary was not provided under the impugned Rule. In fact, providing a disclaimer would amount to modifying such information which was not permissible under the Rule. The Press Information Bureau was already in place. The view expressed by it could be one of the views but not the only view. It was thus clear that the impugned Rule could not be read down in any manner so as to save it from being struck down. Since the Rule was violative of the provisions of Articles 19(1)(a) and 19(1)(g) of the Constitution, it was rightly struck down by Patel J. The learned counsel also referred to the observations made by the Supreme Court in *Editors Guild of India* (supra) while remanding the present proceedings to this Court and submitted that the view expressed by Patel J deserved acceptance.

G] <u>Submissions on behalf of the Petitioner in Writ Petition No.7953 of 2023:</u>

15] Mr. Gautam Bhatia, the learned counsel appearing for the petitioner in Writ Petition No.7953 of 2023 in addition to what was urged by the learned counsel for the other petitioners submitted that the impugned Rule was liable to be quashed as being unconstitutional and violative of Article 19(1)(a) of the Constitution. The freedom of speech and expression was subject to reasonable restrictions only in the manner as provided by Article 19(2) of the Constitution. It was not the case of the Union of India that restrictions permissible under Article 19(2) were applicable in the present case. The FCU appointed by the Central Government itself was made the arbiter of information which it found to be fake or false or misleading. The FCU, being the creature of the Government, it was made a judge in its own cause. There was a large area of information which could be dissected other than as being either true or false. Once the FCU determined a piece of information to be either fake or false or misleading, there was no option for the petitioners but to comply with its

directions. The internal mechanism sought to be provided under the Rules of 2021 could hardly be said to be sufficient. The remedy of approaching the Court for seeking redressal would not result in saving the validity of the said provision. Moreover, it was not shown as to why there was a requirement of constituting the FCU when the Press Information Bureau was already in existence. Even on the aspects of unreasonableness and proportionality, the impugned Rule was liable to be struck down. The threat of losing safe harbour was in fact the chilling effect and hence the view taken by Patel J was the correct view. Reference was made to the decision in *Shreya Singhal* (supra). In absence of any right to only the truth and the correct side of information under Article 19(1)(a) coupled with the fact that the Rule sought to prevent sharing of fake and false information as determined by the FCU, the restrictions imposed were not traceable to Article 19(2) of the Constitution. It was thus urged that the striking down of Rule 3(1)(b)(v) as amended ought to be upheld as was done by Patel J.

H] Submissions on behalf of the applicants in Interim Application (L) No.17704 of 2023:

16] Mr. Arvind Datar, learned Senior Advocate for the applicants in Interim Application (L) No.17704 of 2023 filed on behalf of the News Broadcasters and Digital Association and two others supported the challenge raised to Rule 3(1)(b)(v) of the Rules of 2021. He submitted that the impugned Rule had far reaching effect and its implementation would result in a form of media censorship. Since the expression "fake or false or misleading" had not been defined in the Rules of 2021, the basis on which the FCU would undertake identification of fake or false or misleading information was not known. On the ground of vagueness, the said provision was liable to be struck down. Referring to the judgment of the Madras High Court in *R. Thamaraiselvan vs Government of Tamil Nadu and Others,* 2015 1 LW 673, he submitted that the Government Order dated 28/07/2011 issued by the Home Department, Government of Tamil Nadu for dealing with land grabbing cases was under challenge. One of the grounds raised was the absence of a definition of the term "land grabbing". The

High Court found that in the absence of any specific guidelines or norms or yardstick, the possibility of misuse under the garb of the Government Order could not be ruled out. Registration of a case followed by consequences prescribed were sufficient to contemplate possibility of abuse and misuse of power. On that count, the said Government Order was quashed as being violative of Articles 14 and 21 of the Constitution. This judgment of the Madras High Court was challenged before the Supreme Court by the State Government which challenge was turned down in *Government of Tamil Nadu and Others vs R. Thamaraiselvan and Others*, 2023 INSC 490. Thus absence of any indication whatsoever in the Rules of 2021 as amended as to what would constitute "fake or false or misleading" information rendered the expression vague for it to be struck down on this ground. Reliance was also placed on the decision in *Kartar Singh vs. State of Punjab,* 1994 INSC 112.

17] The amendment of 2023 to the Rules of 2021 was ultra vires the provisions of the Act of 2000 inasmuch as there was no provision in the Act empowering the framing of

such Rules. Though reference was made to the provisions of Section 87(1) and (2) of the Act of 2000, the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 ("the Blocking Rules of 2009" for short) were already in place. The said Rules had been framed in exercise of powers under Section 69-A and hence the field was already occupied. The Rules of 2021 therefore could not be said to have been framed under Section 69-A. Referring to the Blocking Rules of 2009 it was submitted that the same provided for the mode and manner of undertaking blocking of offending information. The modalities prescribed therein were absent in the Rules of 2021 and hence it could not be said that Rule 3(1)(b)(v) had been amended in exercise of any power conferred by the Act of 2000.

Though it was urged on behalf of the Union of India that intermediaries had not approached the Court for challenging the amendment to the Rules of 2021, the individual parties as well as the applicants seeking intervention were affected parties. The apprehensions expressed by them could not be said to be unfounded. It was

clear from the decision of the Supreme Court in *Cricket Association of Bengal* (supra) that under the garb of public interest, restrictions beyond what were permissible under Article 19(2) of the Constitution could not be imposed. Reference was also made to the decision in *I.R. Coelho vs. State of Tamil Nadu,* 2007 INSC 28.

Referring to the provisions of Section 87 of the Act of 2000 it was submitted that the said provision conferred the power to make Rules. Referring to Rules framed in 2004 and 2008 under the Act of 2000, it was submitted that such exercise was undertaken in view of Section 87(2) of the Act of 2000. If at all the Central Government intended to set up a FCU, that exercise could have been undertaken by framing Rules in that regard. Merely by issuing the Intermediary Guidelines, the same could not be justified as an exercise carried out under Section 87(2) of the Act of 2000. Moreover, Section 87(3) required the placing of the Rules sought to be framed before both the Houses of Parliament. This in itself was a safeguard in the matter. Without undertaking this exercise, the Rules of 2021 were sought to be amended in 2023 by issuing a Notification in that regard. This exercise

therefore would not validate the amendment. More so, as regards delegated legislation, the tests laid down by the Supreme Court in the case of *Modern Dental College* (supra) had not been satisfied.

18] Coming to the aspect of proportionality it was submitted that the same had become a part of Indian jurisprudence. There were no safeguards whatsoever provided under the amended Rule so as to satisfy the doctrine of proportionality. To contend that an aggrieved party could invoke the jurisdiction under Article 226 of the Constitution as a last resort could not be treated as providing a sufficient safeguard. Reference was made to the five prongs constituting the doctrine of proportionality referred to in *Gujarat Mazdoor Sabha vs. Union of India*, 2020 INSC 572

The impugned Rule was violative of the provisions of Article 14 of the Constitution inasmuch as the aspect of restriction on any information being fake or false or misleading was not applicable to the print media but was made applicable to the digital media. A piece of information which could otherwise find place in the print media would be

subjected to examination as to whether the same information was fake or false or misleading if it was sought to be placed in digital media. Even on the ground of manifest arbitrariness the impugned Rule was liable to be set aside. The same by itself was also a ground for invalidating the same as recognised recently in *Association for Democratic Reforms* (supra) Referring to the distinction between the real purpose and ostensible purpose, it was submitted that the real object behind the amendment was to bring in censorship insofar as intermediaries were concerned.

19] It was then submitted that the impugned Rule sought to make the Central Government a judge in its own cause. For deciding which information was fake or false or misleading with regard to the business of the Central Government, the FCU constituted by the Central Government itself was to undertake such exercise. There was also absence of due process inasmuch as there was no provision of issuance of any show cause notice, grant of opportunity of hearing, requirement of passing of a reasoned order and remedy of an appeal against the decision. The FCU as a

creature of the Central Government was expected to decide disputes pertaining to the Central Government.

Reading the option of disclaimer in the impugned Rule was not permissible inasmuch as same was not contemplated under the Rules of 2021. An intermediary had no choice whatsoever but to take down that information/content that was identified by the FCU as fake or false or misleading failing which it was likely to lose its "safe harbour" under Section 79 of the Act of 2000 and be subjected to penalty under Rule 7 of the Rules of 2021.

It was urged that each expression namely, fake or false or misleading ought to be considered separately and it was not permissible to urge that the term "misleading" would take its colour from the terms "fake or false". Reference was made to the decision in *Devidayal Electronics & Wires Ltd and another vs. Union of India and another*, 1985 Mh.L.J. 120 where it was held that the words "factory" and "industrial unit" though used in the same Notification, the said words had been used to convey a different meaning for each word. On that analogy, the word "misleading" would have to be ascribed another meaning than "fake or false". Reference was

also made to the decision in *Collector of Central Excise and others vs. Himalayan Cooperative Milk Product Union Ltd and others,* 2000 INSC 507 wherein the aforesaid principle laid down in *Devidayal Electronics and Wires Ltd* (supra) was upheld.

20] The learned Senior Advocate referred to the provisions of Section 147 (1)(d) of the Bhartiya Nyaya Sanhita, 2024 to submit that on the FCU identifying any information to be fake or false or misleading under the impugned Rule, besides taking down such content/information, there would be threat of a First Information Report being registered under the provisions of Section 147(1)(d) resulting in a chilling effect on free speech. Since the Press and Information Bureau was already established by the Central Government there was no need whatsoever to establish the FCU for undertaking a similar task of identifying fake or false or misleading information. On the contrary, the State had a positive obligation to create and maintain conditions to ensure exercise of freedoms guaranteed by the Constitution as held in *Indibily Creative Private Limited and others vs. Government*

of West Bengal and others 2019 INSC 517. Reference was also made to the decision in *Mohammed Zubair vs. State of NCT of Delhi* 2022 INSC 736 to contend that a blanket restriction on the expression of opinion which one is entitled to express would have a chilling effect on the freedom of speech. It was thus submitted that the view taken by Patel J be accepted and Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 be struck down.

I] <u>Submissions on behalf of Union of India:</u>

21] Mr. Tushar Mehta, learned Solicitor General for the Union of India supported the view taken by Dr.Gokhale J and opposed the submissions made on behalf of the petitioners. He referred to the written submissions that were placed on record before Division Bench and pointed out the relevant aspects to support the stand of the Union of India that Rule 3(1)(b)(v) as amended was valid. He referred to the statutory scheme of the Act of 2000 and especially various definitions in Section 2(1) alongwith Sections 69-A, 79 and 87 of the Act of 2000. He also referred to the Rules of 2021 as amended in 2023. The intention behind amending Rule 3(1)(b)(v) was to

prevent the spread and circulation of fake or false facts in relation to the business of the Central Government. It was with a view to apprise the general class of citizens of the true facts. According to him, the minimum intrusive test had been applied while framing the Rules of 2021 and amending them in 2023. The aspect of proportionality had been kept in mind while doing so and the least restrictive method available had been adopted. It was his submission that on any information that was found to be fake or false of misleading as regards the business of the Central Government, the option of putting up a disclaimer was available to enable intermediaries to continue to enjoy safe harbour. The tests of proportionality referred to in *Gujarat Mazdoor Sabha* (supra) were fully satisfied. It was urged that the right to have correct and filtered information was an integral part of the fundamental right guaranteed under Article 19(1)(a) of the Constitution. If speech or expression was untrue, there was no protection of the constitutional right as held in *Dr. D.C. Saxena vs. Hon'ble The Chief Justice of India,* 1996 INSC 753. The right of freedom of speech and expression as well as the right to know and have correct information were part of

Article 19(1)(a) of the Constitution. Correspondingly, a recipient of information also had a right to be informed under Article 19(1)(a) of the Constitution. The right guaranteed would include the right to get true information and not that which was either fake or false or misleading. Since a larger interest was involved as recognized by the Supreme Court in *Cricket Association, Bengal* (supra) which included the interest of the society, it was submitted that Rule 3(1)(b)(v) of the Rules of 2021 as amended was valid. The tests as applied with regard to the print media in *Sakal Papers* and *Bennet Coleman* (supra) could not be applied in the present case. Reliance was placed on the decisions in *State of U.P. vs Raj Narain and Others,* 1975 INSC 14, *S. P. Gupta vs Union of India and another,* 1981 INSC 209, *Indian Express Newspapers (Bombay) Private Ltd and others vs Union of India and others,* 1984 INSC 231, *Reliance Petrochemicals Ltd vs Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd and others,* 1988 INSC 297, *Dinesh Trivedi, M.P. and others vs. Union of India and others,* 1997 INSC 303, *Union of India vs Association for Democratic Reforms and another* 2002 INSC 253, *M. Nagaraj and others vs Union of India and others*,

2006 INSC 711 and *People's Union for Civil Liberties (PUCL) and another vs Union of India and another,* 2003 INSC 176

It could not be said that the Central Government through the FCU was the final arbiter of determining what information was fake or false or misleading and that it was only the court of law that was the final adjudicator. The remedy of approaching a court of law had not been taken away and hence that remedy could always be invoked in case of any grievance as to a direction issued by the FCU. In fact, various intermediaries and OTT platforms had been consulted before the Rules of 2021 were framed. As to what was "the business of the Central Government" was clear in view of the Government of India (Allocation of Business) Rules, 1961 which gave a fair idea regarding the business of the Central Government.

On the aspect of a chilling effect flowing from Rule 3(1)(b)(v) of the Rules of 2021 as amended it was submitted that this aspect did not require consideration as the amended Rule had not been brought into force. There was no evidence or material before the Court to indicate that after the amendment to Rule 3(1)(b)(v) of the Rules of 2021, a chilling

effect had set in. In that regard he referred to the observations of the Supreme Court in *Anuradha Bhasin vs Union of India and others,* 2020 INSC 31. Thus the contention based on the chilling effect of the aforesaid provision was far-fetched and based on mere apprehension. Since the amended Rule was not yet notified, the law laid down in *Kusum Ingots and Alloys Limited vs. Union of India,* 2004 INSC 319 and *Sant Lal Bharti vs. State of Punjab,* 1987 INSC 354 was attracted. It was urged that there was no right whatsoever in any person to spread fake or false or misleading information and the object behind the amendment was to prevent the same. There were sufficient safeguards provided even under Section 79 of the Act of 2000. It was thus urged that the view taken by Dr. Gokhale J ought to be upheld since all relevant aspects had been duly considered while holding the provisions of Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 to be valid.

On the aspect of maintaining a balance between competing fundamental rights, the learned Solicitor General referred to the decisions in *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj and others vs. State of*

Gujarat and others, (1975) 1 SCC 11, *Teri Oat Estates (P) Ltd. vs. U.T., Chandigarh and others,* 2003 INSC 746, *M. Nagaraj and others vs. Union of India and others,* 2006 INSC 711, *Avishek Goenka (1) vs. Union of India and another*, 2012 INSC 188 and *Subramanian Swamy vs. Union of India*, *Ministry of Law and others,* 2016 INSC 427.

The words "fake or false or misleading" were not hit by the vice of vagueness. A mere allegation of vagueness was no ground for declaring a provision unconstitutional. It was submitted that though in *Shreya Singhal* (supra) Section 66-A of the Act of 2000 had been set aside on the ground of vagueness, the same was a penal provision. The same test could not be applied in the present case as no aspect of personal liberty was involved. It was thus urged that the view taken by Dr. Gokhale J was the correct view and that Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 was not liable to be struck down.

J] Scope under Clause 36 of the Letters Patent:

22] At the outset, it would be necessary to refer to Clause 36 of the Letters Patent in view of the fact that the exercise

required to be undertaken in the present proceedings is governed by the aforesaid provisions. Under Clause 36 of the Letters Patent, on a difference of opinion between the Judges constituting a Division Bench, the point in issue is required to be decided according to the opinion of the majority of the Judges. However, if the Judges are equally divided, as in the present case, the point/points have to be heard by another Judge after which such point/points are to be decided according to the opinion of the majority of the Judges who have heard the case including those who had first heard it. It is thus clear that the jurisdiction conferred under Clause 36 is limited to expressing an opinion on the point/points on which the Judges of the Division Bench are not in a position to agree. The Reference Judge is not conferred with jurisdiction firstly, to decide a point on which there has been no difference of opinion, secondly, a point on which an opinion is expressed only by one Judge with the other Judge not expressing any opinion on such point and thirdly, a fresh point that was not the subject matter of consideration by the Division Bench.

23] Given the remit of Clause 36 of the Letters Patent read with Rule 7 of Chapter-I of the BHCAS Rules, I do not find any difficulty in accepting the proposition that on a reference made under the said provisions, it is only the point/points of difference that have arisen between the learned Judges of the Division Bench while deciding the proceedings that are required to be gone into by the Reference Judge for expressing an opinion on such point/points. This is for the reason that it is only the point/points of difference that are referred to the Reference Judge under the aforesaid provisions to enable an opinion to be expressed. Based on such opinion expressed by the Reference Judge, the point/points of difference are to be decided by the majority of the Judges who had heard the case which would include the Division Bench that had first heard the case. As a corollary, there would be no occasion for the Reference Judge to consider a point/those points on which either there is no difference between the learned Judges of the Division Bench or there is no opinion expressed on such point/points at all by one of the learned Judges of the Division Bench.

The Full Bench of the Madhya Pradesh High Court

in *Firm Ladhuram Rameshwardayal* (supra) has while considering the provisions of Clause 26 of the Letters Patent that was applicable to the said High Court, which is in pari materia to Clause 36 has held that on a reference being made under Clause 26 of the Letters Patent, the jurisdiction of the third Judge is limited to the point on which the Judges of the Division Bench are divided in opinion. The third Judge has no jurisdiction to decide any other point. It has been further held that even if the Division Bench directs that "the case must be referred to a third Judge", the jurisdiction of the third Judge cannot be enlarged by the Division Bench. Thus if the third Judge expresses an opinion on any other point on which the learned Judges of the Division Bench were not divided in opinion or the third Judge finally decides the case as a whole, such opinion would have to be ignored as being without jurisdiction.

The law in this regard is therefore clear and it is only the point/points of difference that would fall for consideration by the third Judge to express his opinion on the same. It thus follows that on a point/points on which one learned Judge of the Division Bench has not expressed any opinion

whatsoever, the opinion on such point/points as expressed by the other learned Judge would not be the subject matter of consideration by the Reference Judge under Clause 36 of the Letters Patent read with Rule 7 Chapter-I of the BHCAS Rules.

K] Points on which either there is no difference of opinion or an opinion is expressed only by one learned Judge of the Division Bench:

24] In the light of aforesaid, it would be necessary to first eschew consideration of those points on which either there has been no difference of opinion between the learned Judges of the Division Bench or an opinion has been expressed on a particular point only by one of the learned Judges without any opinion on that point being expressed by the other learned Judge.

a) Classification and discrimination:

The validity of the impugned Rule was challenged on the premise that the same was discriminatory in nature and that it amounted to class legislation. Patel J has considered this aspect in paragraphs 178 to 188 of his judgment. He has observed that though Article 14 of the Constitution permits

classification, it forbids class legislation. The Central Government by itself did not constitute a class of its own so as to justify preferential treatment to it. To satisfy the test of equality, the differentiation must be intelligible, distinguishing for some discernible reason those within the class from those left out. It has been held that there was no justification why business of the Central Government should stand on special footing to be distinct from other information. The argument of the petitioners that there was no intelligible differentiation in this regard was upheld. It was thus concluded that invidious class legislation flowing from the effect of the impugned Rule was not a permissible classification. The challenge raised by the petitioners to the amended Rule being discriminatory in nature thus falling foul of Article 14 of the Constitution was upheld by Patel J.

There is no opinion expressed by Dr. Gokhale J on this facet of challenge raised by the petitioners based on discrimination and classification. The challenge based on violation of Article 14 of the Constitution has been considered by the learned Judge while answering issue (b). It has been

held that the Central Government being an arbiter in its own cause did not result in the violation of the equality clause. The contention raised on behalf of the petitioners based on discriminatory classification does not appear to have been opined on while answering issue (b) vide paragraphs 24 to 27 of the judgment.

In that view of the matter, the opinion expressed by Patel J on the aspect of classification in paragraphs 179 to 188 of his opinion after referring to *Mukan Chand* (supra) being the only opinion expressed, the same does not call for any consideration as there is no point of difference expressed in that regard by Dr. Gokhale J.

b) Violation of principles of natural justice:

The petitioners have challenged the impugned Rule on the ground of procedural fairness that rendered its operation to be in violation of principles of natural justice. Patel J in paragraphs 189 to 191 of his opinion has found that in absence of any guidelines as regards the manner of operating the impugned Rule, absence of any procedure for hearing as well as absence of an opportunity to counter the

case set up that some information was fake or false or misleading rendered the impugned Rule bad. Subjective satisfaction was expected to be recorded on unknown material. Absence of an opportunity of hearing especially when serious civil consequences were to follow was also found to be in violation of the principles of natural justice. Similarly, there was no requirement of a reasoned order being passed by the FCU due to which it would not be possible to gather the material on the basis of which the FCU had acted.

In the judgment of Dr. Gokhale J, no opinion on these contentions has been expressed. As a result, it would not be necessary to express any opinion on what has been observed by Patel J in paragraphs 189 to 191 as regards operation of the Rule resulting in violation of the natural justice principles except on the aspect of bias on which differing opinions have been expressed.

25] The aforesaid are the aspects on which there is no difference of opinion expressed by the learned Judges though the conclusions recorded by them are diverse. It would therefore not be necessary for me to go into the said aspects.

L] Relevant constitutional and statutory provisions:

26] Having noticed the contours of the exercise to be undertaken under Clause 36 of the Letters Patent, it would be necessary to first refer to the relevant constitutional and statutory provisions that fall for consideration.

a) Article 14. Equality before law-

> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

b) Article 19. Protection of certain rights regarding freedom of speech, etc.- (1) All citizens shall have the right-

> (a) to freedom of speech and expression;
>
> (g) to practice any profession, or to carry on any occupation, trade or business.

c) Article 19(2)

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

Act of 2000:

d) Section 2(1)(v)

"information" includes [data, message, text], images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche;

e) Section 79. Exemption from liability of intermediary in certain cases.-

1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

2) The provisions of sub-section (1) shall apply if -

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.–For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

f) Section 87(2)(z) and (zg)

87. Power of Central Government to make rules.–

(1) …….

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:–

(a)……. to (y)……

(z) the procedures and safeguards for blocking for access by the public under sub-section (2) of section 69-A;

(za)….. to (zf) ……

(zg) the guidelines to be observed by the intermediaries under sub-section (2) of section 79;

Rules of 2021:

g) Rule 3(1) - Due diligence by an intermediary: Any intermediary, including [a social media intermediary, a significant social media intermediary and an online gaming intermediary], shall observe the following due diligence while discharging its duties, namely:-

(a).....

(b) the intermediary shall inform its rules and regulations, privacy policy and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts [by itself, and to cause the users of its computer resource to not host], display, upload, modify, publish, transmit, store, update or share any information that,-

(i)..... to (iv).....

(v) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature [or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify];

M] Opinion on the points of difference:

27] Having noted the relevant constitutional and statutory provisions, it would be necessary to now consider the various points of difference for answering the reference.

(a) Article 19(1)(a) and Article 19(2) of the Constitution of India:

While considering the challenge to the impugned Rule as being violative of the provisions of Article 19(1)(a) of the Constitution of India, Patel J has held that what is provided

under Article 19(1)(a) is only the right to freedom of speech and expression and not some "right to the truth". Free speech on the internet being an integral part of Article 19(1)(a), any restriction on it must conform to Article 19(2). Such restriction must be reasonable. After referring to *Shreya Singhal, Anuradha Bhasin* (supra) and various other decisions, it was held that the right guaranteed under Article 19(1)(a) could be restricted only in the manner provided under Article 19(2). The primary requirement therefore was that the impugned Rule ought to be shown to be falling within the straitjacket of Article 19(2) of the Constitution. The rights conferred under Article 19(1)(a) could not be curtailed on the premise that such fundamental right was to ensure that every citizen received only "true" and "accurate" information as determined by the Government. It was not open for the State to coercively classify speech as true or false and compel non-publication of the latter. The impugned Rule sought to take up falsity *per se* and restrict content on that ground which was not identifiable to any specific part of Article 19(2). The same was impermissible. It is on this basis that the learned Judge held that the impugned Rule violated

the provisions of Article 19(1)(a) of the Constitution.

28] On the other hand, Dr. Gokhale, J has observed that the validity of Section 79 of the Act of 2000 was the subject matter of challenge in *Shreya Singhal* (supra). Section 79(3)(b) curtailed safe harbour in certain cases and was read down to include only those matters relatable to restrictions in Article 19(2) of the Constitution. Thus, loss of safe harbour would result only if any offensive information was beyond any restriction under Article 19(2) of the Constitution. The impugned Rule was framed to carry out provisions of Section 69A of the Act of 2000 and related to guidelines to be observed by an intermediary under Section 79(2) of the Act of 2000. It was therefore neither ultra vires the Act of 2000 nor contrary to the judgment in *Shreya Singhal* (supra). As the impugned Rule satisfied the test laid down in the case of *State of Tamil Nadu vs. P. Krishnamurty* (2006) 4 SCC 517, it was not in excess of the power conferred by the Act of 2000. There was no automatic deprivation of safe harbour on grounds beyond Article 19(2) of the Constitution and the Rule was in consonance with the judgment in *Shreya Singhal*

(supra). On this premise, the challenge to the impugned Rule based on Article 19(1)(a) of the Constitution of India was turned down.

Shreya Singhal:

29] In this regard it would be necessary to first refer to the decision in *Shreya Singhal* (supra). The provisions of Sections 66A and 69A of the Act of 2000 were challenged as being in violation of the fundamental right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. According to the petitioners therein, the constitutionality of Section 66A was not saved by any of the eight subjects covered in Article 19(2) of the Constitution. The provision also suffered from the vice of vagueness and it sought to enforce a form of censorship which impaired the core value contained in Article 19(1)(a). It also had chilling effect on the aspect of freedom of expression. The Union of India while defending the validity of the said provision had urged that mere possibility of abuse of a provision could not be a ground to declare such provision invalid. Vagueness could not be a ground to declare the statute unconstitutional

if it was otherwise legislatively competent and non-arbitrary. While considering the said challenge, reference was made to the definition of the expression "information" as defined under Section 2(1)(v) of the Act of 2000. It was held that the definition was an inclusive one and it did not refer to what the content of information could be. Section 66A was attracted in view of the right of people to know (also the market place of ideas) which the internet provided to persons of all kinds. The Supreme Court referred to its earlier decision in *Cricket Association of Bengal* (supra) wherein it was held that to contend that any restrictions to be imposed on the right under Article 19(1)(a) of the Constitution should be in addition to those permissible under Article 19(2) would be to misconceive both the content of freedom of speech and expression and the problem posed by the element of public property. Control could be exercised only within the framework of Article 19(2) and the dictates of public interest. The submission made on behalf of the Union of India to read into Section 66A, each of the subject matters contained in Article 19(2) of the Constitution to save the constitutionality of the provision was turned down as it would amount to

reading into Section 66A something that was never intended to be read into it. Referring to the decision in *Romesh Thappar vs. State of Madras*, 1950 INSC 14, it was held that the ratio of the said decision was applicable on all fours. It was observed that as long as the possibility of the provision being applied for the purposes not sanctioned by the Constitution could not be ruled out, it must be held to be wholly unconstitutional and void. Article 19(2) having allowed imposition of restrictions on the freedom of speech and expression only in cases where danger to the State was involved, an enactment that was capable of being applied to cases where no such danger could arise could not be held to be constitutional and valid to any extent. On that basis, the provisions of Section 66A of the Act of 2000 came to be struck down as being violative of Article 19(2) of the Constitution of India.

Sakal Papers Private Limited:

30] In the context of the challenge based on protection under Article 19(1)(a) of the Constitution of India, the petitioners relied upon the decision in *Sakal Papers Pvt. Ltd*

and others vs. Union of India, 1961 INSC 277. Therein constitutionality of the Newspaper (Price and Page) Act, 1956 as well as the Daily News Paper (Price and Page) Order, 1960 was under challenge. The said Act and Order sought to regulate the number of pages of newspapers according to the price charged, prescribe the number of supplements to be published and prohibit the publication of sale of newspapers in contravention of any order made under Section 3 of the said Act. Upholding the challenge, it was held that the right to freedom of speech and expression was an individual right granted to every citizen by Article 19(1)(a) of the Constitution. There was nothing in clause (2) of Article 19 which permitted the State to abridge this right on the ground of conferring benefits upon public in general or upon a section of the public. It noted that the impugned provision could not be justified on any of the grounds under Article 19(2) of the Constitution. The only restrictions that could be imposed on the rights of an individual under Article 19(1)(a) were those which clause (2) of Article 19 permitted and none other.

Cricket Association of Bengal:

31] In *Cricket Association of Bengal* (supra), the right to telecast through an agency of the choice of the organizer or the producer of an event was under consideration. While summarizing the law on the freedom of speech and expression under Article 19(1)(a) as restricted under Article 19(2), it was held that the right to communicate included the right to communicate through any media that is available, whether print or electronic or audio-visual. The said fundamental right could be limited only by reasonable restrictions under a law made for the purposes mentioned in Article 19(2) of the Constitution. No restrictions could be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2). It was not permissible to contend that restrictions to be imposed on the right under Article 19(1)(a) could be in addition to those permissible under Article 19(2) of the Constitution.

Anuradha Bhasin:

In *Anuradha Bhasin* (supra), the Supreme Court held

that in its earlier decisions it had recognized free speech as a fundamental right and as technology evolved, the freedom of speech and expression over different media of expression had also been recognized. The freedom of speech and expression through the medium of internet was an integral part of Article 19(1)(a) and any restriction on the same ought to be in accordance with Article 19(2) of the Constitution.

Kaushal Kishor:

The Constitution Bench in *Kaushal Kishor* (supra) reiterated the law that the restrictions under Article 19(2) were comprehensive in nature to cover all possible attacks on an individual, groups / classes of people, the society, the court, the country and the State. Any restriction that did not fall within the four corners of Article 19(2) would be unconstitutional. The Executive could not transgress its limit by imposing an additional restriction in the form of Executive or departmental instructions. Any reasonable restriction sought to be imposed must only be through "a law" having statutory force. The Court also could not impose additional restrictions by using tools of interpretation.

32] Having considered Rule 3(1)(b)(v) in the context of the areas it seeks to encompass in the backdrop of the law laid down in *Sakal Papers Pvt. Ltd.*, *Cricket Association of Bengal*, *Shreya Singhal, Anuradha Bhasin and Kaushal Kishor* (supra), in my view, the Rule seeks to restrict transmission of 'information' as defined by Section 2(1)(v) of the Act of 2000 based on its content on grounds that are not relatable to any of the eight subjects referred to in Article 19(2) of the Constitution. *Sakal Papers Pvt. Ltd.* (supra), in the context of freedom of press as forming part of Article 19(1)(a) has upheld the right of a citizen to propagate his views and reach any class and number of readers as he chooses subject to the limitations permissible under a law competent under Article 19(2) of the Constitution. Restrictions placed must be justifiable under a law competent under clause (2) of Article 19. *Cricket Association of Bengal* (supra) reiterates that restrictions to be imposed on the right conferred by Article 19(1)(a) cannot be in addition to those permissible under Article 19(2) of the Constitution. Control can be exercised only within the framework of Article 19(2). In *Shreya Singhal*

(supra) wherein the validity of Section 66-A of the Act of 2000 was under challenge, the Supreme Court referred to its decision in *Romesh Thappar* (supra) in the context of the challenge based on violation of Article 19(1)(a) and reiterated that "clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent". It was thus held that Section 66-A of the Act of 2000 purported to authorise the imposition of restrictions on the fundamental right under Article 19(1)(a) in language that was wide enough to cover even matters beyond constitutionally permissible limits. *Anuradha Bhasin* (supra) reinforces the position that freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible and that wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. It recognised the freedom of speech and expression through the medium of internet as an integral part of Article 19(1)(a) and

held that any restriction on the same must be in accordance with Article 19(2) of the Constitution.

33] The decisions on which reliance was placed by the learned Solicitor General recognise the right to know as being a basic right to enable citizens to be part of participatory democracy. This right to know is in the context of the affairs of the Government, decisions taken by it and the basis thereof. *S.P. Gupta* (supra) refers to the citizens' right to know true facts about the administration of the country as being one of the pillars of a democratic State. *M. Nagaraj* (supra) holds that the concept of an open Government is the direct result from the right to know that is implicit in the right of free speech and expression guaranteed by Article 19(1)(a) of the Constitution.

In the present case however, the issue is with regard to the restrictions sought to be imposed on the content of "information" as defined by Section 2(1)(v) of the Act of 2000 in a manner that cannot be supported by falling back upon Article 19(2) of the Constitution. Hence, the ratio of the aforesaid decisions cannot further the efforts of the Union of

India in seeking to support the validity of Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023.

Similarly, the observations in *Dr. D.C. Saxena* (supra) that in case of speech or expression that was untrue and reckless as to its truth, the speaker or author would not get protection of the constitutional right have to be considered in the context of striking a balance between the freedom of speech and expression while seeking to maintain public confidence in the administration of justice.

34] *Kaushal Kishor* (supra) reiterates the position that any restriction not falling within the four corners of Article 19(2) of the Constitution would be unconstitutional. The Constitution Bench in *Association for Democratic Reforms and another* (supra) re-affirms this position. While dealing with the content of information being offensive, qualified by knowledge and intent of the user resulting in loss of safe harbour, Dr. Gokhale J has referred to paragraphs 14.1(d) and 25 in the opinion of Nagarathna J in *Kaushal Kishor* (supra). Perusal of paragraph 14 in its entirety reproduced hereinbelow indicates that the observations made are in the

context of hate speech, defamatory speech etc.

14. According to Wesley Hohfeld's analysis of the form of rights, every right has a complex internal structure, and such structure determines what the rights mean for those who hold them. Such rights are ordered arrangements of basic components. One of the components of a right, is a correlative duty. That is to say, if X has a right, he is legally protected from interference in respect of such right and such right carries with it the duty of the State, not to interfere with such right. If the State (or any other person) is under no corelative duty to abstain from interfering with the exercise of a right, then such a right is not a 'right' in the strict Hohfeldian sense. The boundaries of the protective perimeter within which a person can exercise their rights, depend on the degree to which the State is duty bound to protect the right.

14.1. What emerges from the Hohfeldian conception of rights and corelative duties, qua the right to freedom of speech and expression may be summed up as follows:

a) The Constitution of India confers under Article 19(1)(a), the right to freedom of speech and expression to all its citizens. The State has a corelative duty to abstain from interference with such right except as provided in Article 19(2) of the Constitution which are reasonable restrictions on the right conferred under Article 19(1)(a). The extent of such duty depends upon the content of speech. For instance, in respect of speech that is likely to be

adverse to the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality; or speech that constitutes contempt of court, defamation or is of such nature as would be likely to incite the commission of an offence, the duty of the State to abstain from interference, is nil. This principle is Constitutionally reflected under Article 19(2) which enables the State to enact law which would impose reasonable restrictions on such speech as described under the eight grounds listed hereinabove which are the basis for reasonable restrictions.

b) Per contra, in respect of speech and expression which constitutes an exchange of ideas, including dissent or disagreement, and such ideas are expressed in a manner compatible with the ethos cultivated in a civilised society, the duty of the State to abstain from interference, is high.

c) Similarly, in respect of commercial speech, the State is completely free to recall or curb commercial speech which is false, misleading, unfair or deceptive. Therefore, the threshold of tolerance towards commercial speech or advertisements depends on the content of such speech and the object of the material sought to be propagated/circulated. The duty of the State to abstain from interference would also depend upon the nature and effect of the commercial speech.

d) As is evident from the above illustrations, the extent of protection of speech would depend on whether, such speech would constitute a 'propagation of ideas' or would have any social value. If the answer to the said question is in the affirmative, such speech would be protected under Article 19(1)(a); if the answer is in the negative, such speech would not be protected under Article 19(1)(a). In respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference having regard to Article 19(2) of the Constitution and only the grounds mentioned therein.

e) Having noted that the protective perimeter within which a person can exercise his/her rights depends on the degree to which the State is duty bound to protect the right, it may also be said as a corollary that in respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference and therefore, speech such as hate speech, defamatory speech, etc. would lie outside the protective perimeter within which a person can exercise his right to freedom of speech. Such speech can be subjected to restrictions or restraints. While restrictions on the right to freedom of speech and expression are required to be made only under the grounds listed under Article 19(2), by the State, restraints on the said right, do not gather their strength from Article 19(2). Restraints on the right to freedom of speech and expression are governed by the content of Article 19(1)(a) itself; i.e.,

> any kind of speech, which does not conform to the content of the right under Article 19(1)(a), may be restrained. Questions pertaining to the voluntary or binding nature of such restraint, the force behind the same, the persons on whom such restraints are to be imposed, the manner in which compliance thereof could be achieved, etc., are aspects left to be deliberated upon and answered by the Parliament. However, the finding made hereinabove is only to the extent of clarifying that any kind of speech, which does not form the content of Article 19(1)(a), may be restrained as such speech does not constitute an exchange of ideas, in a manner compatible with the ethos cultivated in a civilised society. Such restraints need not be traceable only to Article 19(2), which exhaustively lists eight grounds on which restrictions may be imposed on the right to freedom of speech and expression by the state."

The said observations would have to be construed in the context in which they have been made. This is further clear from what has been held in the following portion of paragraph 25 which reads thus:

> "25. It is clarified that at this juncture that it is not necessary to engage in the exercise of balancing our concern for the free flow of ideas and the democratic process, with our desire to further equality and human dignity.

This is because no question would arise as to the conflict of two seemingly competing rights, being the right to freedom of speech and expression, vis-a-vis the right to human dignity and equality. The reason for the same is because, the restraint that is called for, is only in relation to unguided, derogatory, vitriolic speech, which in no way can be considered as an essential part of exposition of ideas, which has little social value. This discourse, in no way seeks to pose potential danger to peaceful dissenters, who exercise their right to freedom of speech and expression in a critical, but measured fashion. The present cases pertain specifically to derogatory, disparaging speech, which closely resembles hate speech. Such speech does not fall within the protective perimeter of Article 19(1)(a) and does not constitute the content of the free speech right. Therefore, when such speech has the effect of infringing the fundamental right under Article 21 of another individual, it would not constitute a case which requires balancing of conflicting rights, but one wherein abuse of the right to freedom of speech by a person has attacked the fundamental rights of another." (emphasis supplied)

35] In the present reference, the restraint sought to be imposed by the Union through the amendment of 2023 to Rule 3(1)(b)(v) of the Rules of 2021 is being examined. In my view, the conclusion recorded in *Kaushal Kishor* (supra) as against Question-1 is material for the present purpose. Be it noted that Question-1 has been answered unanimously by all the learned Judges of the Constitution Bench. The answer is as follows:

> "The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other fundamental rights or under the guise of two fundamental rights staking a competing claim against each other, additional restrictions not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual."

36] In the light of the aforesaid settled legal position, I would agree with the view of Patel, J that under the right to freedom of speech and expression, there is no further "right to the truth" nor is it the responsibility of the State to ensure

that the citizens are entitled only to "information" that was not fake or false or misleading as identified by the FCU. Rule 3(1)(b)(v) seeks to restrict the fundamental right guaranteed under Article 19(1)(a) by seeking to place restrictions that are not in consonance with Article 19(2) of the Constitution. The same is impermissible through the mode of delegated legislation. *P. Krishnamurthy* (supra) holds that on such ground, subordinate legislation can be struck down. I agree that the impugned amendment of 2023 to Rule 3(1)(b)(v) is ultra-vires Article 19(1)(a) and Article 19(2) of the Constitution.

(b) <u>Violation of Article 19(1)(g) read with Article 19(6):</u>

37] The challenge raised by the petitioners based on the fundamental right guaranteed under Article 19(1)(g) of the Constitution has been considered by Patel J in paragraphs 167 to 177 of his judgment. It has been held that a piece of information relating to the business of the Central Government that could find place in print media was not subjected to the same level of scrutiny as is expected under the impugned Rule when that very information is shared on

digital platforms. There is no such "censorship" when such material is in print while it is liable to be suppressed as fake or false or misleading in its digital form. It has thus been held that the impugned Rule resulted in direct infringement of Article 19(1)(g) of the Constitution.

Dr. Gokhale J in paragraph 30 of her judgment has referred to aforesaid challenge and has observed that the apprehension of the petitioner in Writ Petition (L) No.9792 of 2023 that his ability to engage in political satire would be unreasonably and excessively curtailed if his content was subjected to a manifestly arbitrary fact check was sufficiently taken care of under the scheme of the impugned Rule. The impugned Rule was not violative of the right guaranteed under Article 19(1)(g) of the Constitution.

38] I am in agreement with what has been observed in paragraphs 167 to 177 by Patel J wherein the challenge based on violation of the right guaranteed under Article 19(1)(g) of the Constitution has been upheld. A piece of information that is not subjected to the rigors of Rule 3(1)(b)(v) of the Rules of 2021 when in the print media being

subjected to those rigors when in the digital form is a relevant aspect. There is no basis or rationale for undertaking the exercise of determining whether any information in relation to the business of the Central Government is either fake or false or misleading when in the digital form and not undertaking a similar exercise when that very information is in the print form. The Editors Guild of India is justified in its grievance that it is concerned with both, the print media as well as digital platforms. There is thus an infringement of the right guaranteed under Article 19(1)(g) of the Constitution of India.

(c) <u>Violation of Article 14 as the Government itself is the final arbiter in its own cause:</u>

39] This is another issue on which the learned Judges have disagreed. Patel J while considering the challenge to Rule 3(1)(b)(v) of the Rules of 2021 as amended has held that by constituting the FCU, the Government itself became the final arbiter in its own cause inasmuch as it was to decide which information was fake or false or misleading. He held that the Central Government could not be a judge in its own cause and relied upon the decision in *A. K. Kraipak & others*

(supra). In paragraphs 189 to 191 of his judgment this issue has been considered under the head “Natural Justice”.

Dr.Gokhale J in her judgment has dealt with the same in issue (b). She has held in paragraphs 24 to 27 of her judgment that as a redressal mechanism is available for the intermediary as well as for the user, it is the court of law which is the final arbiter of a grievance in that regard. There was no basis whatsoever to attribute bias of predisposition to the members of the FCU on the ground that they were Government appointees. Since a jurisdictionally competent Court was the ultimate arbiter the impugned Rule was not violative of Article 14 of the Constitution and was not liable to be struck down on that count. In this context however it would also be necessary to note that Dr.Gokhale J in paragraph 58 of her opinion has observed that the apprehensions expressed by the petitioners behind the intent of the Government in introducing the impugned Rule were justified and such apprehensions could not be swept away as frivolous or motivated.

40] The constitution of the FCU has been indicated in Rule 3(1)(b)(v) of the Rules of 2021 as a Unit to be constituted by the Central Government by issuing a Notification. The FCU is to decide as to whether any information with regard to the business of the Central Government is either fake or false or misleading. The Central Government being the aggrieved party, the FCU constituted by it is required to decide which piece of information with regard to the business of the Central Government is either fake or false or misleading. The exercise would result in an unilateral determination by the executive itself. That the charter of the FCU, the extent of its authority, the manner of its functioning in ascertaining fake or false or misleading information being unknown has been noticed by Dr.Gokhale J too in paragraph 25 of her judgment. This aspect in my view supports the petitioner's challenge to the amended Rule on the ground of vagueness in the context of Article 14 of the Constitution. Taking into consideration all aspects including that the basis on which the information with regard to the business of the Central Government is to be identified for being categorized either to be fake or false or misleading, the FCU in a sense is the arbiter in its own

cause. By contending that the decision of the FCU can be subjected to challenge before a constitutional Court, the same cannot be treated as an adequate safeguard and it would not be of much consequence in the light of the decision in *A. K. Kraipak & others* (supra). I am therefore inclined to agree with the view of Patel J that as the Central Government itself would constitute the FCU, it is an arbiter in its own cause.

In addition, another facet of challenge based on violation of Article 14 that has been upheld by Patel J is that what is permissible in the print media is proscribed in the digital form. In other words, the test of any information being fake or false or misleading as regards business of the Central Government though applicable for the digital version is inapplicable for the very same information when published in the print media. I thus agree with Patel J that this distinction results in violation of Article 14 of the Constitution.

(d) <u>Knowingly and intentionally:</u>

41] A difference has cropped up in the views expressed by the learned Judges in the context of the expression

"knowingly and intentionally communicates" appearing in Rule 3(1)(b)(v) of the Rules of 2021 as amended. Patel, J has held that the words "knowingly and intentionally communicates" apply to and qualify the immediately following clause "any misinformation or information which is patently false and untrue or misleading in nature". They do not control the amended portion which is "or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit". Emphasis has been placed on the disjunctive use of "or" and it has thus been concluded that the amendment to the Rule in 2023 is independent of any user knowledge or intent. It has been explained that with regard to any non-Central Government business related content, there is no FCU and there is no arbiter of what is "patently false and untrue or misleading". In the said category, the focus is on the user's awareness of falsity and untruth or misleading nature of information while in the latter, the focus is on the intermediary permitting continuance of what the FCU has determined to be fake or false or misleading.

On the other hand, Dr. Gokhale J has held that the application of the words “knowingly and intentionally” cannot be severed and that the interpretation put-forth by the petitioners that the said words would apply only to the unamended portion of Rule 3(1)(b)(v) and not to the amended portion of the said Rule was not correct. The said words were applicable even to the amended Rule in relation to the business of the Central Government. Knowledge and intent would result in loss of safe harbour and hence reading Rule 3(1)(b)(v) dehors the application of the words “knowledge and intent” was not a correct interpretation. It has been further observed that the question whether any content is fake or otherwise, whether it was knowingly and intentionally shared were questions that would be required to be determined by adducing evidence by following the procedure established by law before a jurisdictionally competent Court.

42] A perusal of Rule 3(1)(b)(v) prior to its amendment indicates that “knowingly and intentionally” communicating any misinformation or information that was patently false and untrue or misleading in nature required the intermediary

to make reasonable efforts not to host, display, upload, modify, publish, transmit, store, update or share such information. The amendment of 2023 seeks to insert "or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify" in Rule 3(1)(b)(v). I am inclined to agree with the view of Patel, J that insertion of the word "or" before the amended portion of Rule 3(1)(b)(v) makes all the difference inasmuch as an independent clause which is not related to any content that has been knowingly and intentionally communicated has now been inserted "in respect of any business of the Central Government". The marked difference in the existing Rule prior to its amendment is the absence of any FCU for non-Central Government business which is evident from Rule 3(1)(b)(v). If any piece of information is patently false and untrue or misleading in nature, there is no provision for any identification by the FCU. On the other hand, the amendment requires the FCU to decide what is fake or false or misleading in respect of any business of the Central

Government. If after identification by the FCU such content continues to be hosted, irrespective of knowledge and intent of the user, that would result in automatic loss of safe harbour.

In my view, it has been rightly observed that with regard to non-Central Government business, the focus is on the user's awareness of falsity and untruth or misleading nature of information while with regard to Central Government business, the focus is on the intermediary permitting continuance of what the FCU has determined to be fake or false or misleading. Applying the expression "knowingly and intentionally" even to the amended portion of Rule 3(1)(b)(v) in relation to business of the Central Government would result in rendering the disjunctive word "or" that follows the unamended Rule and precedes the amended portion of the Rule otiose. The amended Rule intends to create two different areas, one relating to non-Central Government business and the other specifically to the business of the Central Government. For these reasons, the finding recorded by Patel, J that the amendment of 2023 as regards "business

of the Central Government" is independent of knowledge and intent of the user commends acceptance.

(e) <u>Expression "fake or false or misleading":</u>

43] Another point of difference is based on the absence of the exact meaning of the expression "fake or false or misleading" appearing in Rule 3(1)(b)(v) of the Rules of 2021 as amended. While considering this aspect, Patel J has referred to the provisions of the Indian Evidence Act, 1872 and especially Section 3 thereof. He has also referred to various scholarly works in that context and has thereafter found that in absence of any guidelines to indicate the manner in which fake or false or misleading information could be identified by the FCU, Rule 3(1)(b)(v) was vague and overbroad. What was therefore left was merely an "illusion of choice" with regard to the business of the Central Government. It was also emphasized that all the three words in the aforesaid expression had been used disjunctively since they were separated by the word "or". The three words were not interchangeable which was another reason to hold the said expression to be vague. It is on this premise that the

invalidity of Rule 3(1)(b)(v) has been recorded.

Dr.Gokhale J in her judgment has referred to the dictionary meaning of the said words and has observed that they were to be understood in the context of their use in a sentence or phrase. The words “fake or false or misleading” had been used specifically in the context of deceptive, deceitful and patently untrue information. On this premise, it was held that Rule 3(1)(b)(v) did not suffer from the vice of vagueness and its validity could not be refuted on that ground. It was however noted in paragraph 45 that though the aforesaid words had not been defined in Rule 3(1)(b)(v), it was required to be seen whether the said words would find their definition in the FCU Notification that would be issued.

44] In my view, absence of any indication as regards the manner of identifying fake or false or misleading information and there being no guidelines whatsoever in that regard renders the expression “vague or false or misleading” to be vague and overbroad. It is material to note that each word is used in a disjunctive manner being separated by the word

"or". The word "misleading" can be subjected to various dimensions without any idea being given as to what it would connote. Since the amended Rule attempts to identify "information" in respect of any business of the Central Government as fake or false or misleading by the FCU, it is all the more necessary that the said expressions are either defined or explained to broadly give an idea of what could be termed to be fake or false or misleading. The matter would be left entirely at the unguided discretion of the FCU in absence of any guiding principle in that regard. The ratio of the decision of the Madras High Court in *R. Thamaraiselvan* (supra) is thus clearly attracted.

I would therefore endorse the view expressed by Patel J that in absence of any guidelines under the Rules of 2021 as amended to indicate the scope and applicability of the expression "fake or false or misleading", the impugned Rule is vague and overbroad rendering it liable to be struck down.

(f) <u>The impugned Rule being ultra vires the Act of 2000:</u>

45] One of the challenges raised to the impugned Rule is

that it travels beyond the rule making power conferred under the Act of 2000. Patel J held that Section 87(2)(z) of the Act of 2000 contemplates Rules for providing the procedure and safeguards for blocking for access by the public under Section 69A(2). He has held that under Section 87(2)(zg) the Central Government could not create a FCU to identify any information relating to the Government's business as fake or false or misleading. What was intended to be provided was in the nature of substantive law and not any rule making exercise. The impugned Rule thus created a substantive law beyond the parent statute. No such rule making power could be exercised beyond the frame of Article 19(2) of the Constitution. He thus held that the Rule as amended was ultra vires the Act of 2000.

Dr. Gokhale J, on the other hand has held that if an intermediary chooses to block content, it could be done only after following the due procedure prescribed under the Blocking Rules of 2009 and the Ethics Code Rules. The impugned Rule therefore was not ultra vires the provisions of the Act of 2000 nor was it contrary to the judgment in *Shreya Singhal* (supra). The challenge as raised by the petitioners in

that regard was turned down.

In my view, Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 is ultra vires the Act of 2000. Firstly, the amendment of 2023 has not been effected as required by Section 87(3) of the Act of 2000. It has not been shown that the proposed amendment was laid before each House of Parliament in the manner prescribed by Section 87(3) of the Act of 2000. Secondly, the amended Rule is not referable to Section 87(2)(z) as the said provision relates to the procedure and safeguards for blocking for access by the public under Section 69A(3). Section 87(2)(zg) refers to guidelines to be observed by intermediaries under Section 79(2) of the Act of 2000. I am in agreement with the finding of Patel J that the impugned Rule creates substantive law beyond the Act of 2000 and that it does not relate to anything permissible either under Section 69A or Section 79 of the Act of 2000. The amended Rule seeks to impose restrictions beyond those permissible under Article 19(2) of the Constitution. It also suffers from manifest arbitrariness for not being in conformity with the Act of 2000 on the principles laid down

by the Constitution Bench in *Association for Democratic Reforms and another* (supra).

(g) <u>Chilling effect of the amended Rule:</u>

46] Another area of difference that has arisen in the views expressed by the learned Judges is on the "chilling effect" flowing from the impugned Rule. Patel J in this regard has observed that the chilling effect connotes various factors that lead inevitably to self-censorship. This self-censorship may either be direct (by the author) or indirect (by another who has control over the author's content). He has held that where the author is dependent on some other agency on whom the burden of content – control is cast, knowledge that the other agency would almost certainly act to forbid that content would prevent the author from exercising the right to free speech. Reference has been made to the market place of ideas which is a forum for exchange of ideas that are traded, exchanged, debated and commented upon. It is a term of art that means space and opportunity for discussion, dissent and debate. The market place of ideas is essentially a forum for disagreement. Vagueness and overbreadth have also been

linked to the concept of the chilling effect. It has thus been concluded that the Supreme Court in *Shreya Singhal* (supra) had observed that the concept of the chilling effect militates against the acceptance of the submission that a mere possibility of abuse cannot be a ground for invalidation. The words "chilling effect" in fact indicate the anticipated future impact of the Rule. This is one of the reasons for not upholding the validity of the said Rule.

Dr. Gokhale J has held that there was no intermediary before the Court complaining of a "chilling effect". On the contrary, the Central Government had engaged with intermediaries before notifying the said Rule. On the premise that the qualification to offensive information was knowledge and intent coupled with the fact that political satire, political parody, political criticism, opinions, views etc. would not form part of offensive information, it was held that these were relevant aspects that could not be ignored. The impugned Rule was a forum for exchange of ideas, debates, dissent, discussions as a market place but based on real and existing facts which rendered discussions and debates effective and

meaningful. The impugned Rule encouraged debates and discussions on facts bereft of fakery. It was thus held that the apprehension expressed by the petitioners that an intermediary would be compelled to refuse to continue to post content of user flagged by the FCU for the fear of loss of safe harbour was unfounded and premature. It was further held that as long as content of the information shared on a platform of any intermediary did not offend restrictions under Article 19(2), the intermediary would continue to enjoy safe harbour and right of speech of the user would not be impinged even indirectly by any State action against the intermediary. It was thus concluded that the impugned Rule did not bring a chilling effect on the rights of a user.

47] The principle of chilling effect has been referred to in *Anuradha Bhasin* (supra) by the Supreme Court. It was noted that the said principle had been utilized in Indian jurisprudence as a fairly recent concept. The said principle was adopted for impugning action of the State which though constitutional, imposed a greater burden on free speech. The question of law as to the appropriate standards in

establishing a casual link in a challenge based on chilling effect was left open by the Supreme Court. It was however noted that a possible test of chilling effect was comparative harm. Since there was no sufficient material placed on record, the Supreme Court observed that in such a situation it was impossible to distinguish a legitimate claim of chilling effect from a mere emotive argument for a self-serving purpose.

In *Shreya Singhal* (supra), while considering the challenge to the validity of Section 66-A of the Act of 2000, it was held that the said provision was cast widely so that any opinion on any subject would be covered by it. The reading of the said provision was such that to withstand the test of constitutionality, the chilling effect on free speech would be total. Patel J has linked the aspects of vagueness and overbreadth with the concept of chilling effect in the light of absence of any reasonable standards to define guilt in the provision that creates an offence and where there is no clear guidance given either to law abiding citizens or to authorities and Courts. A provision that created an offence which was vague was liable to be struck down as being arbitrary and

unreasonable. The chilling effect therefore was an aspect that had material bearing as a facet of challenge to the validity of such provision. If it was found that the impugned Rule was also vague and broad without any guiding principle to indicate the areas it sought to encompass, possibility of such chilling effect being felt would be an additional ground to hold it invalid.

In *Mohammed Zubair* (supra) while considering the request made by the State of Uttar Pradesh to prohibit the petitioner therein from tweeting while on bail, it was observed that imposition of such a condition would tantamount to a gag order which would have a chilling effect on the freedom of speech.

48] In the present case the impugned Rule requires an intermediary not to host information that is patently fake or false or misleading which terms are undefined and doing so could result in deprivation of safe harbour. That there could be a "chilling effect" in view of an anticipated future impact of a provision has been considered in *Shreya Singhal* (supra).

Thus when the totality of the challenge is considered and all grounds of attack are taken together, the fact that the impugned Rule also results in a chilling effect qua an intermediary would render it invalid. On this count, the ratio of the decisions in *Kusum Ingots and Alloys Limited* as well as *Sant Lal Bharti* (supra) would not be attracted. In that context, I thus agree with Patel J and opine that the impugned Rule being vague and broad, it has the potential of causing a "chilling effect" on that premise.

(h) <u>Saving the impugned Rule by reading it down as well as on the basis of concession of the law officer:</u>

49] It was urged before the Division Bench that the Court ought to make an attempt to read down the Rule so as to save it from being struck down. In this regard, it was held by Patel J that the submission that the operation of the Rule ought to be limited to information that was fake or false would result in ignoring the expression "misleading". This was found to be impermissible as the words "fake or false or misleading" occurring in Rule 3(1)(b)(v) of the Rules of 2021 as amended had been used disjunctively. Excluding

consideration of the expression “misleading” would therefore amount to reading out that expression and not reading it down. Similarly, excluding any opinion, view, commentary, satire or criticism from the expression “information” was also held to be impermissible given the definition of the said term by Section 2(1)(v) of the Act of 2000. Putting out a disclaimer as suggested was also not accepted in view of use of the words “not to host”. The submission to restrict the operation of the term “information” only to facts was also not accepted given its definition in the Act of 2000. On this basis it was held that the Rule could not be saved by reading it down in the manner suggested by the Union of India.

50] Dr. Gokhale J in her judgment has observed that as the impugned Rule when read in its entirety merely required an intermediary to make a “reasonable effort” to prevent it from losing safe harbour, the option of issuance of a disclaimer rather than “take down” would amount to making a reasonable effort as contemplated by the Rule. By interpreting the Rule in such manner, the procedure for deprivation of exemption would be fair, just and reasonable.

The provision therefore did not suffer from any manifest arbitrariness. The insistence of the petitioners of denying availability of the option of "disclaimer" that was inherent in the Rule was incomprehensible. It was thus held that the impugned Rule did not pre-empt the option of issuance of disclaimer. Since political satire, political parody, political criticism, opinions, views etc. did not form part of offensive information, it was held that the Rule was valid.

51] In my view, limiting the operation of the impugned Rule only to fake or false information, thereby ignoring the expression "misleading" which appears in Rule 3(1)(b)(v) would not be an exercise of reading down but would amount to "reading out" the said expression which has been held to be impermissible by the Supreme Court while dealing with a similar submission in *Shreya Singhal* (supra). The words "fake or false or misleading" having been used in Rule 3(1)(b)(v) disjunctively, each word would have to be given its due meaning and effect. This is for the reason that these expressions have been used in the context of hosting such information by a platform of the intermediary. Further, the

word “information” having been defined as an inclusive term by Section 2(1)(v) of the Act of 2000, its operation cannot be restricted by urging that the impugned Rule was not intended to affect political views, satire, opinions etc. and was to be applied only to facts. As held by the Supreme Court in *Minerva Mills Limited* (supra), the principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. Giving a restrictive meaning to an inclusive definition would not be permissible by resorting to the doctrine of reading down. I do not therefore find that by undertaking an exercise of “reading down”, the invalidity of the Rule can be saved. The Rule as amended definitely suffers from vagueness and overbreadth.

52] As regards the effort of the learned Solicitor General in urging for the exclusion of political comments, opinions, debates, satire etc. from the realm of the impugned Rule is concerned, suffice it to observe that a similar exercise was also sought to be undertaken before the Supreme Court in *Shreya Singhal* (supra). Turning down such stand, it was held that the provision under challenge ought to be judged on

its own merits without any reference as to how well it would be administered. This is for the reason that any assurance from one Government even if carried out faithfully would not bind a succeeding Government. In my view therefore the impugned Rule cannot be saved by undertaking the exercise of "reading down" as suggested or by accepting the stand of the Union of India of the limited manner of its operation in the context only of "fake or false" information or for that matter putting up a disclaimer being sufficient in itself so as not to deprive the intermediary of any safe harbour.

(i) <u>Aspect of proportionality:</u>

53] While dealing with this aspect of challenge, Patel J has referred to the five-fold test laid down by the Supreme Court in *Gujarat Mazdoor Sabha* (supra). He has held that the impugned Rule as amended failed all the five tests laid down by the Supreme Court. The challenge to the impugned Rule on the ground of proportionality was upheld.

54] Dr.Gokhale J has considered this aspect while answering questions (e) and (f). It has been held that the

impugned Rule was not disproportionate inasmuch as loss of safe harbour would be in terms of Section 79(3)(b) of the Act of 2000 that had been read down by the Supreme Court in *Shreya Singhal* (supra) so as to apply only in matters relatable to Article 19(2) of the Constitution. The due diligence expected of an intermediary through the impugned Rule was reasonable and not arbitrary. There was no right to share misinformation or fake content without being met with a resistance by administration on behalf of and in the interest of the rest of its citizens. The Rule was not liable to be struck down as invalid merely on the concerns of its potential abuse. It was limited to sharing of "offensive information" and hence there was nothing unconstitutional in the same. The qualification to the offensive information was knowledge and intent. Since political satire, political parody, political criticism, opinions, views etc. did not form part of offensive information, the Rule was not liable to be struck down.

55] In my view, the challenge raised to the impugned Rule as not satisfying the proportionality test has to be upheld especially when it seeks to abridge fundamental rights

guaranteed under Article 19(1)(a) and 19(1)(g) of the Constitution of India. Absence of sufficient safeguards against the abuse of the Rules that tend to interfere with the aforesaid fundamental rights are shown to be absent. Having found that the validity of the impugned Rule cannot be saved by reading it down as urged, the contention raised on behalf of the Union of India of having adopted the least restrictive mode to prevent the spread of "fake or false or misleading information" by relying upon the decisions in that regard cannot be accepted. I therefore find that even on the ground of proportionality, the impugned Rule cannot be sustained as observed by Patel J.

N] <u>Conclusions:</u>

56] Having considered the matter extensively on the points of difference, I would conclude by opining that I am in agreement with the view expressed by Patel J that -

> **(a)** Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 is violative of the provisions of Article 14, Article 19(1)(a) and Article 19(1)(g) of the Constitution.

(b) The said Rule as amended is ultra vires the Act of 2000.

(c) The expression "knowingly and intentionally" does not apply to the amended portion of Rule 3(1)(b)(v) in relation to the business of the Central Government.

(d) The expression "fake or false or misleading" in absence of it being defined is vague and overbroad.

(e) The impugned Rule cannot be saved either by reading it down or on the basis of any concession made in that regard of limiting its operation.

(f) The test of proportionality as laid down in *Gujarat Mazdoor Sabha* (supra) is not satisfied by the impugned Rule.

(g) Given the totality of the above, the impugned Rule also results in a chilling effect qua an intermediary.

In my opinion therefore Rule 3(1)(b)(v) of the Rules of 2021 as amended in 2023 is liable to be struck down.

57] Before parting, I must place on record the very able assistance rendered by Mr. Navroz Seervai, Mr. Darius Khambatta and Mr. Arvind Datar, learned Senior Advocates who were ably assisted by Ms. Arti Raghavan, Ms. Meenaz Kakalia and Mr. Rahul Unnikrishnan instructing them respectively, Mr. Shahdan Farasat, Advocate with Mr. Bimal Rajshekhar, Advocate and Mr. Gautam Bhatia, Advocate with Ms. Aditi Saxena, Advocate for the petitioners/intervenors as well as Mr. Tushar Mehta, learned Solicitor General with Mr. Rajat Nair, Mr. D.P. Singh and Ms. Savita Ganoo, Advocates for the Union of India. Without their erudite representation and persuasive skills, it would not have been possible to render this opinion.

58] All the writ petitions be now placed before the Division Bench for being decided in accordance with the provisions of Chapter-I, Rule 7 of the BHCAS Rules and Clause 36 of the Letters Patent.

[A. S. CHANDURKAR, J.]