

CYBER APPELLATE TRIBUNAL
(Ministry of Communications & Information Technology)
Jeevan Bharti (LIC) Building, Connaught Place,
New Delhi

APPEAL NO. 8/2009

Date of decision May 28,2010

Mascon Global LimitedAppellant
Through Mr.Pavan Duggal,Advo.
With Mrs.Renu Narula,Advocate

Versus

GMAIL.COM & anr. Respondents
Through Mr.Sajan Poovaya,Advo.
With Mr.Parveen Sherawat,Advo.
& Mr.Akhil Anand,Advocate

CORAM:

HON'BLE MR. JUSTICE RAJESH TANDON,
CHAIRPERSON

1. Whether the Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not YES
3. Whether the judgment should be Reported in the Digest. YES

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Mascon Global Limited,
B 8/10, Vasant Vihar,
New Delhi-110057

.....Appellant
Through Mr.Pavan Duggal,Advo.
With Mrs.Renu Narula,Advocate

Versus

GMAIL.COM
C/o Google Inc., California, USA
Email: removals@google.com

And

Google Inc.,California, USA
Email: removals@google.com

Respondents
Through Mr.Sajan Poovaya,Advo.
With Mr.Parveen Sherawat,Advo.
& Mr.Akhil Anand,Advocate

JUSTICE RAJESH TANDON, CHAIRPERSON

Heard Mr.Pavan Duggal,Advocate assisted by Mrs.Renu Narula,Advocate for the appellant and Mr.Sajan Poovaya, Advocate assisted by Mr.Parveen Sherawat,Advocate and Mr.Akhil Anand, Advocate for the respondents.

Present appeal has been filed praying following directions to respondents to

- (a) Immediately remove any content, which is defamatory, derogatory, abusive and humiliating of the applicant's

company and Managing Director Sandy K.Chandra and further to disable access to all such content including disabling the said email accounts kashinathuna@gmail.com and avinash.agnihotry@gmail.com.

- (b) Further deliver by return email, the identity details of the sender (s) of the aforesaid defamatory and insinuating emails from the email account kashinathuna@gmail.com and avinash.agnihotry@gmail.com including the contact number (cell number and email identity), address, telephone number, fax number and other identification details, if any.
- (c) Provide the complete details pertaining to the technicalities, headers and footers information and comprehensive identification parameters as also the complete computer logs of the entire electronic records and emails generated, sent, received and handled by or on behalf of the actual owner(s)/user(s) of the email account kashinathuna@gmail.com and [avinash. Agnihotry @ gmail.com](mailto:avinash.Agnihotry@gmail.com) in connection with the subject matter in the present application from the email account avinash.agnihotry@gmail.com, including all electronic records and emails and other electronic communications generated, processed, sent or received therein;
- (d) Further disclose all the details concerning the true identity and comprehensive identification of the actual owner(s)/user(s) of the email accounts kashinathuna@gmail.com and [avinash.agnihotry @ gmail.com](mailto:avinash.agnihotry@gmail.com) and all relevant registration information connected therewith and further furnish all traffic data connected with the email account avinash.agnihotry@gmail.com, apart from preserving the

same, without any tampering or alteration of any kind whatsoever.

- (e) Immediately retain and preserve in the electronic form all electronic evidence pertaining to all the activities of the sender(s) of the aforesaid defamatory and insinuating emails from the email accounts kashinathuna@gmail.com and avinash.agnihotry@gmail.com along with all electronic logs pertaining to, connected or associated with and relating to the aforesaid defamatory and insinuating emails and all activities of logins, postings, deletions and related activities thereon.
- (f) Preserve the said electronic evidence in a tamperproof manner, preserve its authenticity and veracity, without vitiating the evidence in any manner.
- (g) In case of the failure of the respondents to comply with sub paras (a) to (f), direct and require the respondents to produce before this Tribunal all concerned records, documents and all electronic records pertaining to the aforesaid contraventions and violations of the provisions of the Information Technology Act,2000 as amended using computers, computer systems, computer networks, computer resources and communication devices of the respondents as well as all data and information resident therein which has a connection, association, impact or relationship or nexus of any kind whatsoever pertaining to the aforesaid contraventions in violations of the provisions of the Information Technology Act 2000 as amended including identification details of the concerned person who has actually done the aforesaid contraventions or violations as per the records and electronic logs available on the computers, computer systems, computer networks,

computer resources and communication devices of the respondents.

- (h) Further to issue commission for the examination of all concerned documents, electronic logs as also electronic records residing in the computers, computer system, computer resources, computer networks and communication devices of the respondents in order to collect information about the various contravention and violations of the Information Technology Act 2000 as amended, as also rules, regulations, notifications, directions and orders made thereunder as detailed in the aforesaid paragraph.

In para-7 of the petition, appellant has stated that it has sent the legal notice by email to the respondents.

In para-7A of the petition, appellant declared that the matter regarding which this petition has been made is not pending before any court of law or any other authority and has not been rejected by any court of law or other authority.

Respondents have filed Statement of objections wherein it has been stated that the appellant has impleaded Gmail.com as respondent No.1 and that Gmail.com is a service offered by GoogleInc., and is not a legal entity by itself, as such the appellant has wrongly impleaded Gmail.com as a party to the proceedings. Respondents have also objected to the maintainability of the appeal on the ground that without exhausting the alternative remedy the present appeal is not maintainable.

It was further submitted that Section 57 of the Information Technology Act,2000 vests in this Tribunal's jurisdiction to hear appeals from the orders of the Controller or the Adjudicating

Officer and the Appellate Tribunal has been set up with the express and limited purpose of providing any party aggrieved from the order of the Controller, a forum to seek redress. The jurisdiction of this Tribunal cannot extend to hearing any other application or petition that is not an appeal from the order of the Controller or an adjudicating officer.

Heard counsels for both the parties at length. The present appeal raises the following points for consideration:-

In view of the submissions made by the parties following points arise for determination:-

- (i) Whether the present appeal is maintainable without exhausting the alternative remedy of approaching the Controller of Certifying Authorities or the Adjudicating Officer appointed under the IT Act,2000.?**
- (ii) Whether the ingredients made in the appeal amounted to an offence under the provisions of the Information Technology Act.?**
- (iii) Relief**

Point No.(i)

Coming to the first point i.e. with regard to the maintainability of the appeal, Act provides for adjudicating the offences i.e. Certifying Authority and Adjudicating Officer in respect of the different offences.

Clauses (g) and (m) of Section 2 of the IT Act define the “Certifying Authority” and the “Controller”. Clauses (g) and (m) of Section 2 of the IT Act read as under:-

(g) “Certifying Authority” means a person who has been granted a licence to issue a (Electronic Signature) Certificate under section 24;

(m) “Controller” means the Controller of Certifying Authorities appointed under sub-section (1) of section 17.

Clause (n) of Section 2 of the IT Act defines the Cyber Appellate Tribunal as under:-

(n) “Cyber Appellate Tribunal” means the Cyber Appellate Tribunal established under sub-section (1) of Section 48.

Section 48 of the IT Act reads as under:-

“48.Establishment of Cyber appellate Tribunal.- (1) The Central Government shall, by notification, establishes one or more appellate tribunals to be known as the Cyber Regulation Appellate Tribunal.

(1) The Central Government shall also specify, in the notification referred to in Sub-section (1), the matters and places in relation to which the Cyber Appellate Tribunal may exercise jurisdiction.”

Section 46 of the IT Act provides for the appointment of Adjudicating Officer. It reads as under:-

46. Power to adjudicate.-

(2) For the purpose of adjudging under this Chapter whether any person has committed a contravention of any of the provisions of this Act or of any rule, regulation, direction or order made hereunder the Central Government shall, subject to the provisions of Sub-section (3), appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer or holding an inquiry in the manner prescribed by the Central Government.

(2) The adjudicating officer shall, after giving the person referred to in Sub-section (1) a reasonable opportunity for making representation in the matter and if, on such inquiry, he is satisfied that the person that

the person has committed the contravention, he may impose such penalty or award such compensation as he thinks fit in accordance with the provisions of that section.

(3) No person shall be appointed as an adjudicating officer unless he possesses such experience in the field of Information Technology and legal or judicial experience as may be prescribed by the Central Government.

(4) Where more than one adjudicating officer are appointed, the Central Government shall specify by order the matters and places with respect to which such officers shall exercise their jurisdiction.

(5) Every adjudicating officer shall have the powers of a civil court which are conferred on the Cyber Appellate Tribunal under Sub-Section (2) of Section 58, and-

(a) All proceedings before it shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860)

(b) Shall be deemed to be a civil court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)

(c) Shall be deemed to be a Civil Court for purposes of Order XXI of the Civil Procedure Code, 1908 (5 of 1908)

Section 57 of the IT Act, 2000 provides for filing the appeal before the Tribunal. It reads as under:-

57. Appeal to Cyber Appellate Tribunal.-

- (1) Save as provided in sub-section (2), any person aggrieved by an order made by Controller or an adjudicating officer under this Act may prefer an appeal to a Cyber Appellate Tribunal having jurisdiction in the matter.
- (2) No appeal shall lie to the Cyber Appellate Tribunal from an order made by an

adjudicating officer with the consent of the parties.

- (3) Every appeal under sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the Controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Cyber Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

- (4) On receipt of an appeal under sub-section (1), the Cyber Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
- (5) The Cyber Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Controller or adjudicating officer.
- (6) The appeal filed before the Cyber Appellate Tribunal under sub section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

A perusal of the aforesaid provision indicates that the appeal lies against the orders passed by the Controller of Certifying Authorities or the Adjudicating Officer appointed under Section 46 of the Information Technology Act.

However, counsel for the appellant has submitted that this Court has inherent jurisdiction to decide the appeal even without exhausting the alternative remedy. Counsel for the appellant has

referred the provisions of Section 58 of the Information Technology Act in order to support the argument.

A perusal of the aforesaid provision indicates that the appeal lies against the orders passed by the Controller of Certifying Authorities or the Adjudicating Officer.

However, counsel for the appellant has submitted that this Court has inherent jurisdiction to decide the appeal even without exhausting the alternative remedy. Counsel for the appellant has referred the provisions of Section 58 of the Information Technology Act in order to support the argument.

It will appear from the aforesaid definitions that the jurisdiction of the Certifying Authority is confined only to the digital signatures as contained under Chapter II and Chapter III, whereas Chapter IX relates to penalties, compensation and adjudication by the Adjudicating Officer and Chapter X relates to Cyber Appellate Tribunal

Counsel for the respondents have pointed out that present appeal is not maintainable in as much as neither there is any order passed by the Controller nor the matter pertains to Chapter II, III, IV and V relating to electronic signatures. The matter relates to the offences covered under Chapter IX and XI and as such the Controller gets no jurisdiction and the appeal, therefore, is also not maintainable.

Counsel for the appellant has submitted that this Tribunal has jurisdiction to decide the appeal even without exhausting the alternative remedy.

In support of the arguments, counsel for the appellant has referred the following judgments.

- (i) Raja Soap Factory & Ors. Vs. S.P.Shantharaj & Ors. Reported in AIR 1965 SC 1449.

- (ii) L.Mool Chand & Ors. Vs. Fatima Sultana Begum & Ors.
Reported in 1995(6) SCC 742.
- (iii) Jet Ply Wood Pvt.Ltd. & Ors.Vs. Madhukar Nowlakha & ors
and Biswarup Banerjee & Ors. Vs.Madhukar Nowlakha, reported
in AIR 2006, SCC 1260
- (iv) Vikas Agarwal Vs. Anubha reported in AIR 2002 SC 1796.
- (v) Shipping Corporation of India Ltd. Vs.Machado Brothers &
Ors. Reported in 2004 (11) SCC 168.
- (vi) Lakshmi Natesan Versus Periasamy & ors. Of Chennai High
Court in CMA No.9/2007
- (vii) Justice P.Venugopal Vs. Union of India & ors. Reported in
AIR 2003 SC 3887
- (viii) Assistant Collector of Central Excise Chandan Nagar Vs.
Dunlop India Ltd. & ors. Reported in AIR 1985 SC 330 and
- (ix) Hussainara Khatoon & Ors.Vs. Home Secretary, State of
Bihar, reported in AIR 1979 SC 1360.

Some of the judgments referred above are quoted below.

Relevant portion (para-8) of the judgment in the case of
Raja Soap Factory & ors. (supra) reads as under:

“Section 151 of the Code of Civil Procedure preserves the inherent power of the Court as may be necessary for the ends of justice or to prevent abuse of the process of the Court. That power may be exercised where there is a proceeding lawfully before the High Court. It does not however authorize the High Court to invest itself with jurisdiction where it is not conferred by law.”

Relevant portion of para-25 of the judgment in the case of
Jet Ply Wood Pvt.Ltd.(Supra) reads as under:-

“25.....There is no doubt in our minds that in the absence of a specific provision in the Code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the

provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito iustitiae for doing real and substantial justice between the parties.”

Relevant portion of para-11 of the judgment in the case of Vikas Agarwal (supra) reads as under:-

“11.....It is submitted that inherent powers of the Court under Section 151 CPC can always be exercised to advance interest of justice and the technicalities will have no place in such matters.....The contention that inherent powers under Section 151 CPC could not be exercised was repelled and it was held that there was nothing in Order XXXIX of the Code which expressly or by necessary implication precluded the exercise of inherent power of Court under Section 151 CPC and it was open for the Court to pass a suitable consequential order under Section 151 CPC as may be necessary for ends of justice or to prevent the abuse of process of Court.....”

Relevant portion of the judgment in the case of Shipping Corporation of India Ltd. (supra) reads as under:-

“The inherent power of a court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercise if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code.....Whatever limitations are imposed by construction on the provisions of S.151 of the Code, they do not control the undoubted power of the Court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the court.”

The aforesaid judgments have no application in the present case in view of the judgment delivered on 28th May,2010 in the

case of Dr.Avinash Agnihotry Vs. Controller of Certifying Authorities and another, Appeal No.4/2009

Further the matter is fully covered by the judgment of the Apex Court in State of Uttar Pradesh Vs. Singhara Singh, reported in AIR 1964 SC 358 where the Apex Court has relied upon the judgment of Taylor V.Taylor (1876) 1 Ch.D 426 and decision in Nazir Ahmed's case 63 Ind.App 372(AIR 1936 PC 253 (2)). Paras 8,12,13,17 and 19 of this judgment read as under:-

“8.The rule adopted in Taylor v. Taylor (1876) 1 Ch. D 426 is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in S. 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of S. 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him.”

12. A similar argument was advanced in Nazir Ahmed's case, 63 Ind App 372 : (AIR 1936 PC 253 (2)) and rejected by the Judicial Committee. We respectfully agree with that view. The section gives power to make a record of the confession made by an accused which may be used in evidence against him and at the same time it provides certain safeguards for his protection by laying down the procedure subject to which alone the record may be made and used in evidence. The record, if duly made may not doubt be admitted in evidence without further proof but if it had not been so made and other evidence was admissible to

prove that the statements recorded had been made, then the creation of the safeguards would have been futile. The safeguards were obviously not created for nothing and it could not have been intended that the safeguards might at the will of the prosecution be by passed. That is what would happen if oral evidence was admissible to prove a confession purported to have been recorded under S.164. Therefore it seems to us that the objection of s.164 was not to give the prosecution the advantage of Ss. 74 and 80 of the Evidence Act but to provide for evidence being made available to the prosecution subject to due protection of the interest of the accused.

13. We have to point out that the correctness of the decision of Nazir Ahmed's case 63, Ind App 372 : (AIR 1936 PC 253 (2) has been accepted by this Court in at least two cases, namely, Shiv Bahadur Singh v. State of Vindhya Pradesh, 1954 SCR 1098 : (AIR 1954 SC 322) and Deep Chand v. State of Rajasthan, 1962-1 SCR 662 : (AIR 1961 SC 1527). We have found no reason to take a different view.

17. The next case to which reference was made by Mr. Aggarwala was Ghulam Hussain v. The King, 77 Ind App 65 (PC). That case dealt with the question whether a statement recorded under S.164 which did not amount to a confession could be used against the maker as an admission by him within Ss. 18 to 21 of the Evidence Act and it was held, that it could. The Judicial Committee observed that "the fact that an admission is made to a Magistrate while he is functioning under S. 164 of the Code of Criminal Procedure cannot take it outside the scope of the Evidence Act." That case only held that the relevancy of a statement recorded under S.164 had to be decided by the provisions of the Evidence Act. We have nothing to do with any question as to relevancy of evidence. The question before us is whether a confession which is relevant can be proved by oral evidence in view of the provision of s. 164 of the Code. The question dealt with in Ghulam Hussain's case, 77 Ind App 65 (PC) was quite different and that case has no bearing on the question before us.

19. Another case cited was Emperor v. Ram Naresh. ILR (1939) All 377 : (AIR 1939 All 242). What had happened there was that two accused persons walked into the court of a magistrate and wanted to make a confession. The

magistrate called a petition writer and the accused persons dictated an application to him and that was taken down by the petition-writer and signed by them. That petition was admitted in evidence under S.21 of the Evidence Act. It was held, and we think rightly, that Nazir Ahmed's case, 63 Ind App 372 : (AIR 1936 PC 253 (2) did not prevent the petition being admitted in evidence because it only forbade certain oral evidence being given. This case turned on wholly different facts and is of no assistance."

In the case of Ajay Bansal Vs. Anup Mehta & ors, reported in 2007(Vol.II) SCC page 275, the Apex Court has held that,

"Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree under Section 96 of the Code. When an appeal could be filed, ordinarily, an application under Article 227 of the Constitution of India would not be entertained."

In the above judgment, it was also held,

"The defendant in such a case can also be left to appeal against the decree and therein challenge the order refusing leave to defend in terms of Section 105(1) of the Code."

In view of the aforesaid case law by the Apex Court, no appeal is maintainable without exhausting the alternative remedy before the Adjudicating Officer.

Further in view of the submissions made in para-7 of the appeal, the case is fully covered by the judgment in Appeal No.4/2009, Dr.Avinash Agnihotry Vs. Controller of Certifying Authorities and another decided on 28th May,2010, and no appeal is maintainable without exhausting the alternative remedy.

Point No.(ii)

Coming to the second point, since the appellant has not exhausted alternative remedy, therefore, I am not entering into the merits of the controversy and it will be open for the Adjudicating Officer to adjudicate the grievances in accordance with law.

Counsel for the appellant has also submitted alternatively that the matter may be sent to the Adjudicating Officer for disposal. I am not inclined to accept the submission as there is nothing on the record to indicate that any complaint has been filed before the Adjudicating Officer at any point of time as required under Section 46 of the Information Technology Act. On the other hand, any complaint filed before the Controller of Certifying Authorities will not serve the requirement of Section 46 of the Information Technology Act. The appellant is required to file a complaint before the Adjudicating Officer who has the jurisdiction for deciding the disputes. This point is decided in negative.

Point No.(iii) Relief

In view of the aforesaid, the appeal lacks merit and is dismissed at the admission stage.

However, liberty is given to the appellant to file the complaint within 30 days of this judgment. The Adjudicating Officer shall not debar the appellant from filing a complaint as regard to the pendency of the appeal shall be given automatically. At any stage if the Adjudicating Officer requires the record of the Appellate Authority in connection with the various orders passed from time to time, same may be called for the disposal of the complaint.

Parties are left to bear their own costs.

Registrar is directed to send a copy of this judgment to all the Adjudicating Officers of the States and the Union Territories for information and record.

May 28,2010

(Justice Rajesh Tandon)
Chairperson