

- 1 -

RCC No. 2095/2013
State Vs. Vishal Bhogade + 1

Presented on : 25/04/2013
Registered on : 25/04/2013
Decided on : 31/07/2015
Duration : 02 Years
03 Month
06 Days

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS,
(COURT NO. 3), PUNE
(Presided over by S. R. Nimse)

R C. C. No. 2095/2013

Exh. No.28

Complainant - **State of Maharashtra**
Through Police Station officer,
Bundgarden Police Station, Pune

V E R S U S

Accused -

1. Vishal Hiranman Bhogade.
Age- 25 yrs, Occ- Service & business
R/at. Kharpudi Budruk,
Retvadi, Tal. Khed, Pune.
2. Sandesh Sopan Dere
Age- 22 yrs, Occ- Service & business
R/at. Kharpudi budruk,
Shiroli, Tal. Khed, Pune.

**Offence Punishable Under Section 43 (g), 66, 67 C (2) of Information
Techonology Act, 2000 and section 188 of Indian Penal Code.**

Appearance : Ld. A.P.P. Sou. Narote --- for the State.
Ld. Adv. Shri. K.R. Subhedar --- for the accused.

- 2 -

J U D G M E N T

(Delivered on 31 th July 2015)

Accused are facing trial for the offence punishable under section 43 (g), 66, 67 C (2) of Information Technology Act, 2000 and section 188 of Indian Penal Code.

2. Prosecution case can be summarized as under -

Informant Dr. Sanjay Tungar was working in Cyber Crime Cell, Commissioner office, Pune. On 25/8/2012, one E-mail is received on mail-ID of Police Commissioner, Pune. Subject of that mail was " In Ganesh festival bomb blast" . Mail contains message as " Mission Ganesh attack. If you want to stop try but don't cry". As it was objectionable mail it was sent to Cyber Crime Cell, Pune for investigation. Informant Dr. Tungar conducted preliminary inquiry. He obtained information from Yahoo Company and BSNL. It revealed in investigation that said mail was sent from Raje Computers, Rajgurunagar, Pune. He visited the said Cyber Cafe. Internet connection was in the name of accused Vishal Bhogade. Cyber Cafe was being run by Sandesh Dere. That cyber cafe was not registered. Necessary records were not maintained. I.D proofs were not obtained from users. Hence, police could not reach to main culprit. Dr. Tungar lodged FIR against present accused. On basis of that FIR Cr. No. 191/2012 was registered.

3. Offence was investigated by PI. Alfonso. During investigation, She recorded statement of witnesses, seized hard-disk, conducted spot panchanama. After completion of investigation she has filed present charge-sheet.

4. Initially charge against accused was framed for offence punishable under section 43 (g), 66, of Information Technology Act, 2000 and section 188 of Indian Penal Code. At later stage, charge under section 67C(2) was also framed. Accused denied the charge and claimed to be tried. After framing charge under section 67C (2) of I.T.Act, accused filed pursis that they doesn't want to further cross-examine any witness.

5. Prosecution examined informant Dr. Sanjay Tungar to prove their case. After evidence of the prosecution, statements under section 313 of the Code of Criminal Procedure are recorded. Defence of the accused is of total denial. They have not adduced any evidence. Heard argument by both the sides.

6. Considering all above facts and circumstances points are arose for my determination alongwith their reasoned findings are as under.

<u>POINTS</u>	<u>FINDINGS</u>
1 Does the prosecution prove that, on 25/8/2012 at Raje Computers, Cyber Cafe, accused provides assistance to unknown person to facilitate access to computer network in contravention of the act, rules or regulations made thereunder ? (sec.43 g)	No
2 Does the prosecution prove that, on above date, time and place accused dishonestly or fraudulently provides assistance to unknown person to facilitate access to computer network in contravention of the act, rules or regulations made thereunder ? (sec.66)	No
3 Does the prosecution prove that, on above date, time and place accused disobeyed and order	No

- 4 -

promulgated by a public servant ? (sec.188)

- | | | |
|---|--|---------------------|
| 4 | Does the prosecution prove that, on above date, time and place accused contravene the information technology (guidelines for Cyber cafe) rules, 2011 ? (sec.67-C(2)) | Yes |
| 5 | What Order ? | As per final order. |

Reasons

AS TO POINT NOS. 1 to 4 -

7. Initially accused were charged for offences punishable under section 43(g),66 of I.T.Act and section 188 of IPC. Section 43 is in respect of penalty and compensation for damage to computer, computer system, etc. Section 43(g) is providing assistance to any person to facilitate access to computer system. Section 43 of the act provides only compensation. Section 66 of the act is penal section for section 43. Present case is not in respect of damage to computer or computer system. Hence, section 43 (g) as well as section 66 of I.T. Act is not applicable.

8. Section 188 of IPC is punishment for disobeying order promulgated by public servant. Information Technology Act is special Act. Specific rules are framed as guidelines for Cyber cafe. For breach of those rules section 67 C is provided. Hence, section 188 of IPC is not applicable when there is specific provision of section 67 C under Special Act.

9. To prove guilt of accused prosecution examined informant Dr. Sanjay Tungar. He has deposed as per FIR. No other witness is examined

by prosecution. But, Dr. Tungar deposed about offence of accused very specifically. As per section 134 of Indian Evidence Act there is no particular number of witnesses required for the proof of any fact. Section 134 of Indian Evidence Act is as follows.

"No particular number of witness shall in any case be required for the proof of any fact".

Hence, no other witness is examined except Dr. Tungar does not affect the prosecution case.

10. Dr. Tungar deposed in his evidence as follows-

On 25/8/2012 one objectionable E-mail was received by Commissioner of Police, Pune. That E-mail was in respect of proposed bomb blast during Ganesh festival. He was working in Cyber Crime Cell. That E-mail was forwarded to him for inquiry. Copy of that E-mail is at article 'A'. That E-mail was sent through Yahoo Company. Hence, Smt. Alfanso inquired with Yahoo Company. That letter was at Exh. 18. Yahoo Company sent letter giving I.P address as 117.195.89.35. That information was at article "B". Smt. Alfanso inquired of that I.P address to BSNL. BSNL informed that said I.P address is given to accused Vishal Bhogade. That letter is at article "C". Informant personally visited that address. Cyber Cafe named as " Raje Computers" was there. Net connection was in the name of accused Bhogade. Cyber Cafe was being run by accused Sandesh Dere. Cyber Cafe was not registered. I.D proofs from customers were not obtained. Register of customers was not maintained. Hence, he has lodged FIR which is at Exh. 20.

11. Person who has sent that objectionable E-mail was never traced

- 6 -

out. Allegations against accused are only for contravention of guidelines framed for Cyber Cafe. Letter at article "C" shows that IP address was allotted to accused Vishal Bhogade. Informant specifically stated that, he personally visited the Cyber Cafe. It was not registered and requirements as per rules were not complied. Cross-examination of this witness is conducted by defence. But, nothing helpful is came on record. Question about E-mail spoofing were asked to this witness. But, mere asking those questions is not sufficient. Accused has to show E-mail spoofing was done in present case. It is also to be considered here that, prosecution is mainly based for contravention of guidelines for Cyber Cafe. Informant specifically stated about non registration of Cyber Cafe, non obtaining of ID proofs and non maintained of information of users. Not a single question is asked in respect of contravention of these rules. When informant specifically stated about non compliance of rules then it was responsibility of accused to show they have fulfilled the rules. Burden was later on shifted on defence. But, they have not discharged that burden.

12. As per guidelines for Cyber Cafe rules intermediary and Cyber Cafe means as per definition in Act. In I.T. Act intermediary includes Cyber Cafe. Cyber Cafe means any facility from where access to the internate is occurred by any person in the ordinary course of business to the members of the public. As per rule 3 of the Information Technology (guidelines for Cyber Cafe) Rules 2011 registration of Cyber Cafe is compulsory. As per rule 4 taking ID proof of users is compulsory. As per rule 5 log register is compulsory. Preserving the information under rule 4 and 5 for 1 year is compulsory. In the present case Cyber Cafe was not registered. Requisite information was not obtained and preserved. As

per section 67 C (1) preserving and retaining the information by intermediary is compulsory. Breach of sub section 1 is punishable as per section 67 C (2) of I.T. Act. Internet connection was in the name of accused Vishal Bhogade. It was being run by accused Sandesh Dere. Hence, considering the Act and rules framed, both the accused are responsible for contravention of rules. As discussed above section 43 (g), section 66 of I.T. Act section 188 of IPC are not applicable. Hence, I answer the point No. 1 to 3 in the negative and point No.4 in the affirmative.

AS TO POINT NO.5 -

12. As supra dictus, offence punishable under section 67 C (2) of Information Technology Act, 2000 is proved against the accused. Offence is for non registration of Cyber Cafe and non maintenance of required information. Intention behind the rules needs to be considered. Cyber Crime or Cyber terrorism is big challenge/ threat before the world community and specially before India in 21 st century. To cope up with that challenge various rules are framed. With the help of Cyber Cafe anyone can commit Cyber Crime and if proper record is not maintained he may escape from clutches of police. In the present case objectionable E-mail received at Commissioner Office, Pune. But, due to non maintainance of record by accused main culprit is not traced out. Hence, it would not be proper to give benefit of section 360 of Cr.PC to accused. It is necessary to hear the accused on the point of sentence.

13. Accused when asked about quantum of sentence submitted that, they are law abiding persons, they don't have any criminal record. They are attending the court regularly. They requested further to impose

- 8 -

minimum punishment. Punishment prescribed for the said offence is imprisonment which may extend to 3 years and with fine. Accused attended the hearing regularly. Not on a single instance N.B.W was issued against them for securing their presence. But, while considering their regular presence court can not overlooked effect of their omission to keep and preserve the record. Hence, considering prescribed punishment, submission by accused and their behaviour during the trial, it would be proper to impose imprisonment of 15 days and fine of Rs. 10,000/-each upon the accused. Hence in an answer to this point I pass following order -

ORDER

1. Accused Vishal Hiranman Bhogade, Sandesh Sopan Dere are convicted for the offence punishable under section 67 C (2) of I.T. Act vide sec. 248(2) of the Code of Criminal Procedure and sentenced to suffer simple imprisonment for 15 days and to pay fine of Rs. 10,000/- each. In default of payment of fine to suffer simple imprisonment for 15 days.
2. Accused Vishal Hiranman Bhogade, Sandesh Sopan Dere are acquitted of the offence punishable under section 43 (g), 66, of Information Technology Act, 2000 and section 188 of Indian Penal Code vide sec.248(1) of the Code of Criminal Procedure .
3. Accused to surrender their bail bond.

4. Muddemal property be preserved as main culprit is not traced out till today. Concern PSO is directed to file charge-sheet against when unknown accused is traced out.
5. Copy of Judgment be supplied to the accused free of costs.

Date: 31/07/2015
Place : Pune

(S.R. Nimse)
J.M.F.C. (Court No.3) Pune
Court no. 3 Pune