

Lecture- 31



Conflict between the IPC and the IT Act: Case Law

In the case of *Sharat Babu Digumarti v. Government of NCT of Delhi*³, the conflict between provisions of the IPC and the IT Act came to the fore. In this case, on November 27, 2004, an obscene video had been listed for sale on baazee.com ("Bazee"). The listing was intentionally made under the category 'Books and Magazines' and sub-category 'ebooks' in order to avoid its detection by the filters installed by Baazee. A few copies were sold before the listing was deactivated. Later Delhi police's crime branch charge-sheeted Avinash Bajaj, Bazee's managing director and Sharat Digumarti, Bazee's manager. The company Bazee was not arraigned as an accused and this helped Avinash Bajaj get off the hook since it was held that, vicarious liability could not be fastened on Avinash Bajaj under either section 292 of the IPC or section 67 of the IT Act when Avinash's employer Bazee itself was not an accused. Later changes under section 67 of the IT Act and section 294 of IPC against Sharat Digumarti were also dropped, but the charges under section 292 of the IPC were retained. The Supreme Court then considered if, after the charges under section 67 of the IT Act was dropped, a charge under section 292 of the IPC could be sustained. The Supreme Court quashed the proceedings against Sarat Digumarti and ruled that if an offence involves an electronic record, the IT Act alone would apply since such was the legislative intent. It is a settled principle of interpretation that special laws would prevail over general laws and latter laws would prevail over prior legislation. Further, section 81 of the IT Act states that the provisions of the IT Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

In the case of *Gagan Harsh Sharma v. The State of Maharashtra*⁴, certain individuals were accused of theft of data and software from their employer and charged under sections 408 and 420 of the IPC and also under sections 43, 65 and 66 of the IT Act. All of these sections, other than section 408 of the IPC, have been discussed above. Section 408 of the IPC deals with criminal breach of trust by clerk or servant and states that "*whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine*".

Offences under sections 408 and 420 of the IPC are non-bailable and cannot be compounded other than with the permission of the court. Offences under sections 43, 65 and 66 of the IT Act are bailable and compoundable. Therefore, the petitioners pleaded that the charges against them under the IPC be dropped and the charges against them under the IT Act be investigated and pursued. It was further argued that if the Supreme Court's ruling in *Sharat Babu Digumarti* were to be followed, the petitioners could only be charged under the IT Act and not under the IPC, for offences arising out of the same actions.

The Bombay High Court upheld the contentions of the petitioners and ruled that the charges against them under the IPC be dropped.

A Suitable Home for Cyber Offences

We currently have a situation where a number of offences are penalised by both the IPC and the IT Act, even though the ingredients of both offences are the same. There are subtle differences in punishments under these statutes, especially in aspects like whether the offence is bailable or compoundable or cognizable. An offence such as obscenity may take place through different types of media, both online or offline. However, it could result in unfairness if 2 (two) different statutes apply to the same offence on the basis of the media used.

The sum and substance of the Supreme Court's ruling in the *Sharat Babu Digumarti* case is that no individual may be charged under the IPC for an offence arising out of certain acts or omissions if the IT Act could also be applied to the same acts or omissions. Though we are in full agreement with the Supreme Court's ruling, it is our contention that all cyber offences ought to be housed in the IPC and not in the IT Act. The "cyber" component of an offence is not sufficient reason for differential treatment of sub-categories of the offence. Even though the supreme court's ruling in the *Sharat Babu Digumarti* case has ensured that no individual may be charged under the IPC for an offence arising out of certain acts or omissions if the IT Act could also be applied to the same acts or omissions, it is a fact that offences such as theft and obscenity will be punished differently if they involve a 'cyber' element. Currently, an individual who distributes a hard copy book containing obscene materials will be punished under the IPC whilst an individual who distributes obscene materials through the internet will be punished under the IT Act, though the underlying offence is the same. A person who steals a car will be punished

under the IPC whilst an individual who indulges in theft of online data will be punished under the IT Act.

Theft is theft, irrespective of whether the stolen property is digital or physical. Obscenity transmitted through the internet should be treated at par with obscenity which is transmitted offline.

IPC's treatment of stalking

The legislature's treatment of the offence of "stalking", accomplished through the insertion of new section 354D in the IPC through the Criminal Law (Amendment) Act, 2013⁵, is a case in point. Section 354D penalises the offence of "stalking" whether it has a cyber component or not. If a man follows a woman and contacts, or attempts to contact, such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman, it amounts to stalking. If a man monitors the use by a woman of the internet, email or any other form of electronic communication, it will also result in the offence of stalking. There are a few exemptions to this offence of stalking, and all the defences apply irrespective of whether the stalking is cyber stalking or not. The punishment prescribed for stalking by Section 354D of the IPC does not discriminate on the basis of the presence or absence of the "cyber" component.