

Analysis of Section 66E of the Information Technology Act, 2000

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Abstract- This paper includes the gender-neutral approach of Section 66E of the IT Act, 2000, the application of this section, the explanations, and the kind of situations this section would be applicable in, a similar provision in the Protection of Children from Sexual Offences (herein after referred to as POCSO) Act, 2012 and the shortcomings of this section.

Index Terms-Keywords: Section 66E, IT Act, 2000, Privacy, PocsO, cyber law , cybercrime, violation of privacy

INTRODUCTION

Section-66E vide the Information Technology Act, 2000 (herein after referred to as IT Act) was introduced through an amendment on 27 October 2009. There is no provision in the IPC that mirrors Section 66E of the IT Act, though sections 292 and 509 of the IPC do cover this offence partially. This section was added to ensure a gender-neutral approach to bodily privacy. Section 354C of the Indian Penal Code, 1860 (herein after referred to as IPC) talks about voyeurism. Voyeurism maybe defined as when a man watches or captures images of a woman performing a private act where in regular circumstances she does not expect to be observed. This section is gender specific and restricted which therefore, brought about the need for Section 66E of the IT Act. Further, there has been a rapid increase in electronic voyeurism over the past few years. Initially, the cost of cameras was very high and the thought of having a camera on a phone was completely unheard of. Now, owing to depreciation in the rates of cameras more and more people have it. This has in turn taken a toll on the increase of electronic voyeurism. Section 66E therefore, prohibits electronic voyeurism and penalises the capturing, publishing, and transmission of images of the “private area” of any person without their consent, “under circumstances violating the privacy” of that person. The punishment for such

publication, transmission or capturing is also defined in this section as imprisonment which may extend up to three years or with fine of up to two lakhs or both. This section sometimes confuses law and enforcement authorities with its title as if it is related to general privacy, but it should be clearly noted that, this section is only about bodily privacy and has nothing to with personal data, hence the Personal Data Protection Act is long due in India.

This document includes the gender-neutral approach of Section 66E, the application of this section, the explanations, and the kind of situations this section would be applicable in, similar provision in the Protection of Children from Sexual Offences (herein after referred to as POCSO) Act, 2012 and the shortcomings of this section.

GENDER NEUTRAL CHARACTERISTIC OF SECTION 66E

Section 66E does not specify the gender of the victim or the accused. Such a provision did not exist earlier, and this protection was only granted to women under Section 354C of the IPC. This provision displays a huge improvement in terms of gender-neutrality. In the definition of voyeurism as per Section 354C it is clear that, the section is gender-specific and also limited to capturing of images. To overcome such restrictions a more recent law was introduced. Section 66E of the IT Act, 2000 is neither gender specific nor limited to capturing of images. In fact, the section mentions words such as whoever, his or her which clearly makes its approach gender neutral. Further, the explanation (b) of this section explains the word capture which is with respect to an image, means to videotape, photograph, film or record by any means which makes it clear that the section is not limited to only the capturing of images but also extends to videography. The section recognizes a specific

punishment for infringement of bodily privacy irrespective of gender. This punishment extends to an imprisonment which may extend to three years or with a fine not exceeding two lakh rupees, or both. This clearly shows the deterrent effect this section has. Further, if a man is punished under Section 354C of the Indian Penal Code, 1860, (herein after referred to as IPC) the imprisonment may extend to three years up to seven years and liable to fine. The difference in the two sections exists owing to the already low position of women in society and to ensure that they are given equal status as according to Article 14 of the constitution. Nexus can be drawn to the case Vijay Lakshmi vs Punjab University and Others where the court mentioned, "The equality means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. To treat unequal differently according to their inequality is not only permitted but required." Hence, emphasising on a more severe punishment in case of infringement of Section 354C of the IPC as compared to Section 66E of the IT Act, 2000. Section 66E essentials include the following:

1. Transmit implies the visual image has been sent electronically for the purpose of it being viewed by a person or multiple persons.
2. Capture as already mentioned can be capturing of an image, videotape, recording, film or photograph.
3. Private area as mentioned in Explanation (c) of Section 66E means:
 - a. Naked genitals
 - b. Undergarment clad genitals
 - c. Pubic area
 - d. Buttocks
 - e. Female Breasts
4. Publishes as mentioned in Explanation (d) of Section 66E would mean to make copies of the image taken in electronic or printed form in order to make it available to public.
5. Under circumstances violating privacy includes the following situations:
 - a. If the person irrespective of gender could disrobe in privacy without being worried about their private areas being captured.
 - b. Or any part of his or her private area would not be visible to the public irrespective of the fact that the person is in a public area or private.

The above essentials make the circumstances the section would be applied in easier to understand, but studies show a wider interpretation of the section's extent. A paper titled, "Psychological Effects of Workplace Surveillance on Employees, and the Legal Protection: An Analysis" mentions how a workplace bathroom or a workplace cabinet will also fall under explanation (e) of Section 66E of the IT Act. It also mentions that monitoring employees at workplaces must be reasonable enough to not infringe one's bodily privacy.

Another stark improvement brought about owing to this section would be, originally Section 292 of the IPC so far punished the person selling or distributing or circulating pornographic content However, Section 66E" of the Act in using the term 'transmit' seems to punish not just the person from whose server the data is sent but also the recipient who initiates the transmission. This holds not only the sender accountable but also the person receiving it equally accountable. This would help to curb the transmission by great amounts and help the person whose privacy has been violated get the justice they actually deserve. To elaborate on the improvements with respect to inclusion of videography in this section I would like to refer to a journal article titled, "Law relating to Electronic voyeurism in India: Eyes behind the mirror" which mentions that the Section recognizes the right of privacy as inviolable and makes the felony punishable with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both. The section recognizes the natural human desire of privacy. It deserves respect and particularly in our society and cultural ethos & values as we know, it deserves legal protection too. The Section 66E IT Act, 2008 recognizes the right to protect the human body from unreasonable and obscene intrusion by surreptitious video technology and adequately protects the individual privacy from the crime of video voyeurism which destroys personal privacy and dignity by secretly videotaping or photographing unsuspecting individuals. The insertion of the said section is a specific attempt to prohibit voyeuristic conduct and by corollary, to protect individual privacy. Video Voyeurism is one of the most portentous of the crime that confront us today. Security in the cyber world is one of the most sensitive issues in the gamut of cyber laws. As the internet rapidly enters the home of the common man, through

computers, television, cell phones, and so on, it emerges that violation of privacy is not a threat to doctors and experts, but also the internet community at large. While in many other countries, there are now a variety of statutes to deal with voyeuristic conduct in place that seeks to protect these inviolable rights, India is not lagging behind to implement protection against violation of privacy.

APPLICABILITY OF SECTION 66E

The applicability of the section can be best understood with the help of case laws and so in this portion of the document I have referred to various case laws that have come up after the Amendment to enforce the authority used to check applicability of Section 66E. Bollywood actress Ms. Kangana Raut had accused actor Mr. Hrithik Roshan of circulating personal information shared over private emails, this could be limelight case where Section 66E was used and talked about publicly. In Infamous case of 'Bois Locker Room' group on Instagram discussed techniques of "raping women", objectionable pictures of girls and young women were published and transmitted. In the case of Aarti Tiwari v. State of Chhattisgarh, the petitioner, a doctor, pleaded to quash the FIR filed against her. The petitioner submitted that from the plain reading of the entire case diary and also the charge-sheet it does not reflect that the petitioner had played any direct or indirect role in commission of the alleged offence of taking obscene videos and photographs of the private parts of the lady patients who had visited the present petitioner's Clinic for treatment. He submits that even on perusal of the entire enquiry report, it could not show that any sort of co-operation was extended by the petitioner to the accused persons in taking the said obscene videos nor is the mobile phone which is said to have been seized belongs to the petitioner. Under these circumstances, there is no material whatsoever against the petitioner and therefore she should not be forced to face the trial for no fault of her part and the FIR deserves to be quashed. The subject matter at hand was indecent photos taken of clients who came to the clinic for check-ups. The accused were not doctors but were still allowed in the petitioner's clinic with no reasonable explanation and so the court decided not to quash the FIR as there was a clear case of indecent photos captured in a place where the person meant to disrobe

without worrying about their private parts being captured. Hence, the court ordered the FIR must not be quashed as the involvement of the petitioner could only be determined by trial and further, the court established that a doctor's chamber where clients were asked to change will encompass a safe space where the client must not worry about being filmed and hence, would amount to a "circumstance violating privacy". Hence, it is clear that a doctor's chamber where in the normal course of business patients are asked to change will fall under the ambit of a circumstance where privacy can be violated and Section 66E can be applied.

Further, in the case of P. Gopalkrishnan v. State of Kerala & Ors. a woman was abducted and raped and further her video was recorded while she was being raped to blackmail her and extort money. Section 66E as per explanation (b) clearly states that capture can refer to an image, means to videotape, photograph or film. Since, it has already been established that Section 354C of the IPC only covers image voyeurism and Section 66E covers violation of privacy even in the case of video voyeurism. The court held that the accused must be punished as per Section 66E of the IT Act, 2000. Hence, establishing applicability of Section 66E in case of video voyeurism.

In the next case of Kedarnath Kashyap and Ors. v. State of C.G., Jamunabai stated that when she went to the applicant Nitesh to download songs in her phone, Nitesh also downloaded some obscene photos into her phone. Further, he asked her to see the photos. On seeing them, Jamunabai noticed that it was her friend Terasbhai in the photos. As soon as she saw the same, she went to Terasbhai and showed them to her after which she told her how she had got them. When Nitesh was questioned during trial he did not rebut Jamunabai's story which clearly indicates that the story was true. Since Nitesh had download the photos onto Jamunabai's phone he has checked the essential of "transmit" and "publish" as mentioned in Explanations (a) and (d) of Section 66E. The court however, established that in the case at hand there was no circumstance violating privacy and so the punishment must be granted under Section 67A and not Section 66E of the Information Technology Act, 2000. Hence, establishing that "circumstances violation privacy" as per Explanation (e) under Section 66E is an important essential and the Section

will not be applicable without the fulfilment of this clause.

Hence, this chapter clearly establishes the applicability of this section.

SIMILAR PROVISION IN POCSO, 2012

The POCSO, 2012 is an act that was enacted in 2012 to protect children from sexual offences. The nexus of Section 66E of the IT Act, 2000 has been drawn to the POCSO as 66E also more or less covers a sexual offence and it is important to know if there is a special law covering the same aspects as 66E for children in particular. What one must keep in mind while reading this section is that 66E of the IT Act has the words “without consent” written in it and the POCSO as I already mentioned is an Act specifically meant for children. As established in many different acts such as Section 10 of the Indian Contract Act, 1872, the IPC, etc. all make it clear that minors lack the capability or even the right to consent. Hence, establishing that even though nexus can be drawn between the POCSO and Section 66E of the IT Act, 2000, there are still some stark differences. The nexus can be drawn to Section 11 of the POCSO.

Section 11 states that, a person with sexual intent is one who:

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
- (iii) shows any object to a child in any form or media for pornographic purposes; or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- (vi) entices a child for pornographic purposes or gives gratification therefor.

Explanation. -Any question which involves “sexual intent” shall be a question of fact.

The (v) clause is most similar to Section 66E of the IT act. In this clause it mentions the threat to use images captured which may be morphed or real of any part of the body of the child in a digital form which involves the child in a sexual act. This section has a wider ambit than Section 66E as children are in need of more protection. The ambit is wider as it not only involves an image captured but also one that is morphed, it also mentions any part of the body of the child whereas, Section 66E mentions only the private areas. I would want to highlight the fact that even though the ambit maybe different but the essence of both Sections-Section 66E of the IT Act, 2000 and Section 11(v) of the POCSO is the same. The IT Act forms a special law to govern electronic voyeurism and the POCSO further narrows it down for the applicability in case the victim is a minor. As it is a well-established fact that special law prevails over general, in cases of electronic voyeurism Section 66E of the IT Act, 2000 would prevail over Section 354C of the IPC and further Section 11(v) of the POCSO would prevail in case the victim involved is a minor. Hence, this chapter establishes the nexus between Section 66E of the IT Act, 2000 and Section 11(v) of the POCSO, 2012.

SHORTCOMINGS OF SECTION 66E

Section 66E is a rather huge improvement from the earlier existing provision for voyeurism Section 354C of the IPC but it still has its own shortcomings. These shortcomings can be only understood if a plain meaning of the Section is taken.

They include:

1. Victim compensation

The Section does not mention anything about specific victim compensation as was mentioned in the earlier provision Section 354D. Further, the Expert Committee Report, that was published before amending the act mentioned that violation of bodily privacy must include a punishment directed to compensation of the victim to the tune of rupees twenty-five lakhs.

Even though it was recommended by the Expert Committee no implementation has been seen of the same in Section 66E. Owing to the capturing of his or her private part the victim is not only humiliated but

also has to undergo societal embarrassment for no fault of their own in case the image is transmitted or published.

2. Non-inclusion of “observation” of private part

On plain reading of this section one can notice that the Section does not mention an inclusion of “observation” of private part. This in its one way causes the defender an out to take defense that it was an act that is not mentioned in Section 66E.

3. Non-inclusion of private acts

On plain reading of the section, it can be observed that private acts are not mentioned in the section but only capturing of “private parts” is.

With this I would like to conclude this document with a thought- Even though Section 66E is gender neutral why is it only mostly women who report crimes under this Section?

To end with the biggest shortcoming is not with respect to the section but the Indian patriarchal systems and common beliefs at large.

[10]Equivalent Citation & S C Ale, Manu /sc/1652/2019, 2019 1–29 (2020)

[11]Manu/cg/0762/2018, 2019

[12]Section 10 of The Indian Contract Act, 1872.

[13]MINISTRY OF INFORMATION TECHNOLOGY, REPORT OF THE EXPERT COMMITTEE, <http://www.mit.gov.in/download/ITAct.doc> (last visited 20th Jan 2021)

[14]AMLAN MOHANTY, New Crimes under the Information Technology (Amendment) Act, 7 INDIAN J. L. & TECH. 103 (2011)

[15]Law relating to Electronic voyeurism in India: Eyes behind the mirrors

REFERENCE

- [1] THE IT ACT,2000 <HTTPS://WWW.MEITY.GOV.IN/CONTENT/INFORMATION-TECHNOLOGY-ACT-2000> (last accessed on 12th Jan 2021)
- [2] SECTION 354C INDIAN PENAL CODE, 1860, <https://devgan.in/ipc/section/354C/>
- [3] ARTICLE 14 OF THE INDIAN CONSTITUTION (1949), <https://indiankanoon.org/doc/367586/>
- [4] Manu/sc/0755/2003, 2003
- [5] Vidushi Jaswal, Psychological Effects of Workplace Surveillance on Employees, and the Legal Protection: An Analysis, 33–39 (2017)
- [6] Section 292 Indian Penal Code, 1860.
- [7] Pranesh Prakash, Comments on the Draft Rules under the Information Technology Act, The Centre for Internet and Society. <http://www.cis-India.org/advocacyfgov/comments-drafrules>. (last accessed on 23rd Jan 2021).64.
- [8] Atin Kumar DLaw relating to Electronic voyeurism in India: Eyes behind the mirrors, Law relating to Electronic voyeurism in India: Eyes behind the mirror, 3 154–157 (2017)
- [9] Manu/cg/0285/2014, 2014