

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: September 23, 2016

+ W.P.(C) 7663/2016 & C.M.No.31553/2016 (*directions*)

KARMANYA SINGH SAREEN AND ANR Petitioners
Through: Ms.Pratibha M.Singh, Mr.Sandeep
Sethi, Sr.Advs. with Mr.T.Singhdev, Mr.Prabhas
Bajaj, Mr.Tarun Verma, Advs.

Versus

UNION OF INDIA AND ORS Respondents
Through: Mr.Ruchir Mishra, CGSC with
Mr.Mukesh Kr.Tiwari, Adv. for UOI.
Mr.Siddharth Luthra, Sr.Adv. with Mr.Tejas Karia,
Mr.Akhil Anand, Mr.Vivek Reddy, Ms.Richa
Srivastava, Mr.Shashank Mishra, Ms.Tara Narula,
Mr.Gautam Khazanachi, Advs. for R-2.
Mr.Kirtiman Singh, Standing Counsel and
Mr.Prashant Bezboruah, Adv. for R-5/TRAI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

Ms. G. ROHINI, CHIEF JUSTICE

1. The petitioners claim to be the users of "WhatsApp", an Internet Messaging Application, provided by the respondent No.2/"WhatsApp Inc.", a company based in USA.
2. The present writ petition by way of Public Interest Litigation has been filed with the following prayer:

"(a) Issue a writ of prohibition or any other writ or direction in the nature thereof prohibiting respondents No. 2 to 4 from sharing, in any manner whatsoever, details and data of every kind of the subscribers / users of WhatsApp with any entity including Facebook or its family of companies;

(b) Issue a writ of mandamus or any other writ or direction in the nature thereof directing the respondent 1 and 5 or any other appropriate authority to discharge their executive, statutory and all other obligations in relation to protection and safety of privacy of details / data of every kind of the subscribers / users of WhatsApp all over the territory of India by taking all necessary steps / actions in discharge of their executive as well as statutory functions including by framing rules / regulations / guidelines for the protection of rights of citizens including the safeguarding and securing the privacy of citizens by ensuring that mobile application providers such as "WhatsApp" and other internet based messaging services do not compromise, share and/or exploit the information and data including messages, audio, video and other information of users in any manner whatsoever.

(c) Issue a writ in the nature of mandamus or any other writ or direction in the nature thereof, directing the Respondents No.1 and 5, to take all actions including steps towards making Rules under Section 87 of the Information Technology Act, 2000 so as to regulate the functioning of Respondents No.2 to 4 and other similarly placed internet based messaging services including their Privacy Policy for handling of or dealing in personal information including private messages / photos / conversations / audio messages / videos / documents & data so as to ensure that the privacy rights of the users are not compromised and are duly protected;

(d) Issue a writ in the nature of mandamus or any other writ or direction in the nature thereof, directing Respondents No.2 to 4 to obtain / secure the consent of only those Users who are willing to specifically write to WhatsApp [upon clearly

understanding / comprehending the import and extent of the sharing of data / details of the Users proposed in the new Policy of WhatsApp] and the complete / absolute privacy and not sharing details / data in any manner whatsoever - must remain continued for all other Users of WhatsApp;

(e) Issue a writ in the nature of mandamus or any other writ or direction in the nature thereof, directing the Respondents No.1 and 5, and any other authority, to formulate appropriate Guidelines so as to regulate the functioning of Respondents No.2 to 4 and other similarly placed internet based messaging services including their Privacy Policy for handling of or dealing in personal information including private messages / photos / conversations / audio messages / videos / documents & data so as to ensure that the privacy rights of the users are not compromised and duly protected;

(f) Issue a writ in the nature of mandamus or any other writ or direction in the nature thereof, directing the Respondents No.1 and 5, and any other authority, to formulate appropriate Rules / Guidelines so that it is made mandatory for Respondents No.2 to 4 and other similarly placed internet based messaging services to duly inform its users about the actual and true import of their Privacy Policy in respect of the information provided / shared by the users and further to safeguard the rights of minors;

(g) Issue a writ of prohibition or any other writ or direction in the nature thereof prohibiting and restraining Respondents no.2 to 4 from discontinuing availability of WhatsApp's service to all those users who do not respond to the so-called consent being sought by WhatsApp for changing the privacy policy and the WhatsApp service must continue for all such users till the adjudication of the present writ petition;

(h) Issue a writ of prohibition or any other writ or direction in the nature thereof prohibiting and restraining Respondents no.2 to 4 from utilizing the works transmitted through the

messaging service for any purpose including taking a presumptive licence for all the works and a further order restraining them from utilizing, reproducing and/or exploiting the said works in any manner whatsoever;

(i) Pass such other order(s) as may be deemed fit and proper in the facts and circumstances of the case."

3. It is pleaded in the petition that "WhatsApp" was acquired in the year 2014 by the respondent No.3/"Facebook Inc.", which is also a company based in USA (the respondent No.4 being its Indian Office) and that all services relating to the respondent No.2 are now controlled by the respondent Nos.3 and 4.

4. It is also pleaded in the petition that when "WhatsApp" was launched by the respondent No.2 in the year 2010, it had declared a privacy policy of total/complete safety against any kind of sharing of data/details of users and in view of the complete security and protection of privacy provided by the respondent No.2, the users/subscribers got linked with "WhatsApp" and started putting their personal details/data on the said Application. It is alleged that after "WhatsApp" was acquired by the respondent No.3, a drastic change has been proposed to be made in the privacy policy of "WhatsApp" and the users were put on notice in August, 2016 that the "WhatsApp" account information of users would be shared with "Facebook", a popular free social-networking website, and all its group companies to improve "Facebook" ads and products experiences. The users were asked to agree to the terms and privacy policy by 25.09.2016 to continue using "WhatsApp".

5. The said action of the respondent Nos.2 to 4 is assailed in this writ petition contending *inter alia* that the proposed change in the privacy policy of "WhatsApp" would result in altering/changing the most valuable, basic and essential feature of "WhatsApp" i.e. the complete protection provided to the privacy of details and data of its users. It is also contended that the unilateral action of the respondent Nos.2 to 4 in taking away the protection to privacy of details and data of users of "WhatsApp" and sharing the same with "Facebook" and all its group companies for the purpose of commercial advertising and marketing amounts to infringing the fundamental rights of the users guaranteed under Article 21 of the Constitution of India. The further contention is that the change in the privacy policy without informing its users is not a fair practice and hit by the principles of estoppel.

6. It is claimed by the petitioners that the present petition is filed in public interest on behalf of themselves and millions of users who are citizens of India using "WhatsApp" messaging service. It is sought to be contended that by the impugned action of the respondent No.2 a façade is being created as if a consent is being taken from the users before the change of the privacy policy which is the basic feature of the service, is carried out and that the manner in which the so called consent is sought to be taken is highly deceptive in as much as almost the entire community of users of "WhatsApp" in India are not equipped to even read, much less comprehend the consequences of the terms and conditions on the basis of which the consent of the users is sought to be obtained. It is contended that the proposed changes in the privacy policy would result in irreversible damage to the fundamental rights of all users of "WhatsApp" who were guaranteed protection of privacy of their information. It is thus pleaded that it is

necessary in the interest of justice to entertain the writ petition by PIL and to protect the personal and public rights of millions of citizens of this country who are using the service of respondent Nos. 2 to 4.

7. Apart from the respondent Nos.2 to 4, the Union of India, Department of Telecommunications and the Telecom Regulatory Authority of India Ltd. (TRAI) have also been arrayed as respondent Nos.1 and 5 respectively to the writ petition. When the petition was listed before us on 30.08.2016, Shri Kirtiman Singh, the learned Standing Counsel for Central Government appeared on advance notice on behalf of the respondent Nos.1 and 5 and sought time to get instructions as to whether the functioning of the Internet Messaging Applications is controlled/regulated by the respondent No.1 & 5. On the next date of hearing i.e. 14.09.2016, it was submitted by Shri Kirtiman Singh that though the respondent Nos.1 and 5 regulate the functioning of the Internet Service Providers in terms of the Telecom Regulatory Authority of India Act, 1997 and the Regulations made thereunder, the Internet Messaging Applications have not yet been brought within the purview of the statutory regulatory framework. It is also brought to our notice that the issues relating to Over-The-Top (OTT) services are being addressed by TRAI and a consultation paper on 'Regulatory Framework for OTT Services' has been issued on 27.03.2015 and the further steps are in progress.

8. It may be stated that W.P.(C) No.7643/2016 titled ***V.D. Moorthy v. Union of India & Anr.*** in which certain issues regarding the functioning of "Facebook" and "WhatsApp" providing Voice Over Internet Protocol/Internet Telephoning Services were raised, was disposed of by us by order dated 05.09.2016 recording the fact that a Pre Consultation Paper

has been issued by TRAI on 30.05.2016 and the consultation is under progress.

9. As could be seen, the calling feature of "WhatsApp" was the subject matter of *V.D. Moorthy v. Union of India* (supra) whereas the issue sought to be raised in the present petition relates to the protection of privacy of details and data of users of "WhatsApp".

10. Though no notice was issued to the respondent Nos.2 to 4, the respondent No.2 on its own had chosen to enter appearance and it was represented by Shri Siddharth Luthra, the learned Senior Counsel, during the course of the hearing on 14.09.2016 that the writ petition which is based on unfounded apprehensions of the petitioners is devoid of merit. We, therefore, directed the respondent No.2 to file an affidavit explaining the factual position.

11. Accordingly, a short affidavit dated 19.09.2016 has been filed on behalf of the respondent No.2. Relevant paragraphs of the said affidavit may be reproduced hereunder for ready reference:

“5. The following are relevant provisions from the "Key Updates" summary included with the Terms of Service dated 25 August 2016 ("**New Terms of Service**") and Privacy Policy dated 25 August 2016 ("**New Privacy Policy**"), which is presented to existing WhatsApp users when they opened their WhatsApp Messenger app after the launch date of the New Terms of Service and New Privacy Policy:

(a) Nothing users share on WhatsApp, including user messages, photos, and account information, will be shared onto Facebook or any of Facebook's other family of apps for others to see, and nothing users post on those apps will be shared on WhatsApp for others to see;

(b) WhatsApp has built privacy, end-to-end encryption, and other security features into WhatsApp. WhatsApp does not store user messages once they've been delivered. When user messages are end-to-end encrypted, WhatsApp and third parties can't read them;

(c) WhatsApp still does not allow third-party banner ads on WhatsApp;

(d) An existing user can choose not to have his/her WhatsApp account information shared with Facebook to improve his or her Facebook ads and products experiences;

(e) Existing users who accept WhatsApp's New Terms of Service and New Privacy Policy will have an additional 30 days to make this choice by going to Settings > Account.

6. xxx xxx xxx xxx

7. Below is a brief set of facts relevant to this Petition:

A. **RETENTION OF CONTENTS OF MESSAGES**

(i) WhatsApp does not retain messages in the ordinary course of providing its services to its users.

(ii) Once users' messages (including chats, photos, videos, voice messages, files, and share location information) are delivered, they are deleted from WhatsApp's servers.

(iii) Users' messages are stored on the users' own devices.

(iv) If a message cannot be delivered immediately (for example, if a user is offline), WhatsApp may keep it on its servers for up to 30 days as it tries to deliver it.

(v) If a message is still undelivered after 30 days, WhatsApp deletes it.

(vi) To improve performance and deliver media messages more efficiently, such as when many people are sharing a popular

photo or video, WhatsApp may retain that content on its servers for a longer period of time.

B. ENCRYPTION

(vii) WhatsApp also offers end-to-end encryption for its services, which is on by default, when users and the people with whom they message use versions of WhatsApp's app released after 2 April 2016. When user messages are end-to-end encrypted, WhatsApp and third parties can't read them.

(viii) WhatsApp's website blog dated 5, April 2016 available on <https://blog.whatsapp.com/10000618/end-to-end-encryption> states: "WhatsApp has always prioritized making your data and communication as secure as possible. And today, we're proud to announce that we've completed a technological development that makes WhatsApp a leader in protecting your private communication: full end-to-end encryption. From now on when you and your contacts use the latest version of the app, every call you make, and every message, photo, video, file, and voice message you send, is end-to-end encrypted by default, including group chats. The idea is simple: when you send a message, the only person who can read it is the person or group chat that you send that message to. No one can see inside that message. Not cybercriminals. Not hackers. Not oppressive regimes. Not even us. End-to-end encryption helps make communication via WhatsApp private — sort of like a face-to-face conversation."

(ix) WhatsApp provides on its website a technical White Paper that explains its encryption system, entitled "WhatsApp Encryption Overview" dated 4 April 2016 ("White Paper"). The White Paper states that messages between WhatsApp users are protected with an end-to-end encryption protocol so that third parties and WhatsApp cannot read them and so that the messages can only be decrypted by the recipient. All types of WhatsApp messages (including chats, group chats, images, videos, voice messages and files) and WhatsApp calls are protected by end-to-end encryption. A copy of the White Paper is annexed to this Affidavit, and is marked as Annexure A-3. The White Paper is available on the WhatsApp website at <https://www.whatsapp.com/security/>.

(x) WhatsApp's FAQ page available on its website at <https://www.whatsapp.com/faq/en/general/28030015> states: "WhatsApp's end-to-end encryption ensures only you and the person you're communicating with can read what is sent, and nobody in between, not even WhatsApp. Your messages are secured with a lock, and only the recipient and you have the special key needed to unlock and read your message. For added protection, every message you send has a unique lock and key. All of this happens automatically: no need to turn on settings or set up special secret chats to secure your messages."

C. DELETION OF ACCOUNT

(xi) Users may delete their WhatsApp account at any time (including if users want to revoke their consent to WhatsApp's use of their information) using WhatsApp's in-app 'delete my account' feature.

(xii) When a user deletes his/her WhatsApp account, his/her undelivered messages are deleted from WhatsApp's servers as well as any of the user's other information WhatsApp no longer needs to operate and provide the WhatsApp services."

D. xxx xxx xxx xxx

E. xxx xxx xxx xxx"

12. However, it is sought to be contended by Ms. Pratibha M. Singh, the learned Senior Counsel appearing for the petitioners that the contents of the affidavit of the respondent No.2 dated 19.09.2016 are not in conformity with the Privacy Policy, 2016. To substantiate her plea, she has drawn the attention of this Court to the following excerpts from the Privacy Policy, 2016:

"Your Messages. We do not retain your messages in the ordinary course of providing our Services to you. Once your messages (including your chats, photos, videos, voice

messages, files, and share location information) are delivered, they are deleted from our servers. Your messages are stored on your own device. If a message cannot be delivered immediately (for example, if you are offline), we may keep it on our servers for up to 30 days as we try to deliver it. If a message is still undelivered after 30 days, we delete it. To improve performance and deliver media messages more efficiently, such as when many people are sharing a popular photo or video, we may retain that content on our servers for a longer period of time. We also offer end-to-end encryption for our Services, which is on by default, when you and the people with whom you message use a version of our app released after April 2, 2016. End-to-end encryption means that your messages are encrypted to protect against us and third parties from reading them.

Deleting Your WhatsApp Account. You may delete your WhatsApp account at any time (including if you want to revoke your consent to our use of your information) using our in-app delete my account feature. When you delete your WhatsApp account, your undelivered messages are deleted from our servers as well as any of your other information we no longer need to operate and provide our Services. Be mindful that if you only delete our Services from your device without using our in-app delete my account feature, your information may be stored with us for a longer period. Please remember that when you delete your account, it does not affect the information other users have relating to you, such as their copy of the messages you sent them."

13. It is also submitted by Ms. Pratibha M. Singh, the learned Senior Counsel that the following directions may be issued to the respondent Nos.2 to 4 to meet the ends of justice:

"a. A FULL OPT OUT option to Users from their information being shared with Facebook and its family of companies. This can be simply done by adding a button viz., "DON'T SHARE".

- b. For Users who completely delete WhatsApp, the information of such Users should be deleted completely from WhatsApp servers.
- c. For Users who opt to remain in WhatsApp and are willing to share data, past information should not be shareable.
- d. WhatsApp should not be allowed to use the information for any purpose without the User's consent."

14. It is relevant to note that "WhatsApp" is a software Application which facilitates sending and receiving variety of media, text, photos, videos, etc. by using the Internet. It is a free Application and anyone who has a working Internet connection can opt for the same. It is also pertinent to note that the Respondent No.2 which launched "WhatsApp" as well as Respondent No.3 which acquired the same subsequently are private entities. In fact, the users of "WhatsApp" and the Respondent No.2 are parties to a private contract and the users of "WhatsApp" having voluntarily opted to avail the services of the said Application, are bound by the terms of service offered by the Respondent No.2.

15. It may be true that "WhatsApp" initially had set up a unique profile of providing complete protection of privacy policy. However, Privacy Policy, 2012 itself contained the following specific clauses which are accessible to the users on the website of "WhatsApp";

“Special Note to International Users

The WhatsApp Site and Service are hosted in the United States and are intended for and directed to users in the United States. If you are a user accessing the WhatsApp Site and Service from the European Union, Asia, or any other region with laws or regulations governing personal data collection, use, and disclosure, that differ from United States laws, please be advised that through your continued use of the WhatsApp Site and Service, which are governed by California law, this Privacy

Policy, and our Terms of Service, you are transferring your personal information to the United States and you expressly consent to that transfer and consent to be governed by California law for these purposes.

In the Event of Merger, Sale, or Bankruptcy

In the event that WhatsApp is acquired by or merged with a third party entity, we reserve the right to transfer or assign the information we have collected from our users as part of such merger, acquisition, sale, or other change of control. In the (hopefully) unlikely event of our bankruptcy, insolvency, reorganization, receivership, or assignment for the benefit of creditors, or the application of laws or equitable principles affecting creditors' rights generally, we may not be able to control how your personal information is treated, transferred, or used.

Changes And Updates to This Privacy Notice

This Privacy Policy may be revised periodically and this will be reflected by the "effective date" below. Please revisit this page to stay aware of any changes. Your continued use of the WhatsApp Site and WhatsApp Service constitutes your agreement to this Privacy Policy and any amendments.”

16. In the light of the above clauses, it appears to us that it is not open to the users now to contend that "WhatsApp" shall be compelled to continue the same terms of service.

17. However, the contention of the Petitioners is that the proposed change in the Privacy Policy of “WhatsApp” amounts to infringement of the Right to Privacy guaranteed under Article 21 of the Constitution of India. Even this cannot be a valid ground to grant the reliefs as prayed for since the legal position regarding the existence of the fundamental right to privacy is yet to be authoritatively decided {Vide: *K.S. Puttaswamy (Retired) and Anr. v.*

Union of India & Ors., (2015) 8 SCC 735}. Having taken note of the inconsistency in the decisions on the issue as to whether there is any “right to privacy” guaranteed under our Constitution, a three-Judge Bench in *K.S. Puttaswamy* (supra) referred the matter to a larger Bench and the same is still pending.

18. Be that as it may, since the terms of service of “WhatsApp” are not traceable to any statute or statutory provisions, it appears to us that the issue sought to be espoused in the present petition is not amenable to the writ jurisdiction under Article 226 of the Constitution of India.

19. However, we have taken note of the fact that under the Privacy Policy of “WhatsApp”, the users are given an option to delete their “WhatsApp” account at any time, in which event, the information of the users would be deleted from the servers of "WhatsApp". We are, therefore, of the view that it is always open to the existing users of "WhatsApp" who do not want their information to be shared with "Facebook", to opt for deletion of their account.

20. Having regard to the complete security and protection of privacy provided by the Respondent No.2 initially while launching "WhatsApp" and keeping in view that the issue relating to the existence of an individual's right of privacy as a distinct basis of a cause of action is yet to be decided by a larger Bench of the Supreme Court [vide *K.S. Puttaswamy* (supra)], we consider it appropriate to issue the following directions to protect the interest of the users of "WhatsApp":

- i) If the users opt for completely deleting "WhatsApp" account before 25.09.2016, the information/data/details of such users should be

deleted completely from "WhatsApp" servers and the same shall not be shared with the "Facebook" or any one of its group companies.

- ii) So far as the users who opt to remain in "WhatsApp" are concerned, the existing information/data/details of such users upto 25.09.2016 shall not be shared with "Facebook" or any one of its group companies.
 - iii) The respondent Nos.1 and 5 shall consider the issues regarding the functioning of the Internet Messaging Applications like "WhatsApp" and take an appropriate decision at the earliest as to whether it is feasible to bring the same under the statutory regulatory framework.
21. The Writ Petition is accordingly disposed of.

CHIEF JUSTICE

SANGITA DHINGRA SEHGAL, J

SEPTEMBER 23, 2016

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