

<u>INDEX</u>		
S.NO.	PARTICULARS	PAGES
1.	Office Report On Limitation	-A-
2.	Listing Performa	A1 - A2
3.	Synopsis and List of dates	B - U
4.	Impugned Judgment dated 23.09.2016 passed by the Hon'ble Delhi High Court in WP (C) No. 7663/2016	1 - 15
5.	Special Leave Petition with Affidavit	16 - 51
6.	<u>ANNEXURE- P1.</u> Copy of Writ Petition (C) No. 7663 of 2016.	52 - 83
7.	<u>ANNEXURE- P2</u> Copy of the Short Affidavit of WhatsApp filed before the Hon'ble High Court, along with all its annexures.	84 - 92
8.	<u>ANNEXURE- P3</u> Copy of the two Short Notes handed over by the Petitioner before the Hon'ble High Court.	93 - 95
9.	Application for appropriate directions	96 - 99

SYNOPSIS AND LIST OF DATES

The present Petition raises issues of grave concern for protecting the Privacy of users of "WhatsApp" which is an internet application/ internet messaging service. Users of WhatsApp can -

- Exchange text messages;
- Make audio calls;
- Make video calls;
- Share images;
- Share video and audio clips;
- Share all other types of data.

WhatsApp was originally launched as an application in 2010. Millions of users had signed up to WhatsApp. There are more than 160 million users of WhatsApp in India. The Privacy policy of WhatsApp at the time of its launch in 2010 did not allow sharing of the Users' data with any other party. In 2014, WhatsApp was bought over by Facebook and even at that stage it was publicly announced and acknowledged by WhatsApp that their privacy policy would not change.

In August 2016, suddenly WhatsApp announced a complete change in its privacy policy and Users were asked to AGREE to the new privacy policy by which WhatsApp announced sweeping changes. The key highlights of these

C

changes are contained in the Petition. In effect, the new Privacy policy sought to share the entire information including the Users' phone number, contacts and data with Facebook.

The Petitioners are users of WhatsApp and a PIL writ petition was filed by them, inter alia, challenging the new Privacy Policy and seeking various reliefs for protecting the rights of millions of Indian citizens who are also Users of the WhatsApp application. The said writ petition was disposed off vide the impugned judgment dt. 23.9.2016 wherein the writ petition was partially allowed. By the impugned judgment, the Ld. Division Bench of the Hon'ble Delhi High Court, inter alia, directed that all the past data collected by WhatsApp till 25th September 2016 would be deleted from its servers but no relief was granted for data shared by Users post-September 2016.

The Ld. Division Bench also directed the Union of India and the regulatory authorities to consider the issues regarding 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.

The present Special Leave Petition is being filed against the impugned judgment dated 23.09.2016 passed by the Ld. Division Bench of the Hon'ble Delhi High Court in Writ Petition

D

WP (C) No. 7663/2016 titled as Karmanya Singh Sareen & Anr. Vs. Union of India & Ors. It is the most respectful submission on behalf of the Petitioners that the impugned judgment is bad in law, in so far as the Hon'ble High Court has only granted partial relief to the Petitioners, and therefore the impugned judgment would deserve to be modified by orders of this Hon'ble Court.

There is nothing more private, personal and confidential for any person than the private conversations and messages exchanged with their family, friends or other acquaintances and people in general. Today, in the 21st century, there are various modes of communication which are used by people all over the world in order to engage in private conversations and correspondence with other persons. These modes of communication include voice calls, short-messaging-services (sms), internet chat etc.

Such services of various service providers in the communications industry are utilized by citizens to engage in private conversations and share private and confidential data & information – on the assurance that their private and personal conversations and their confidential data and information will neither be accessed by any other person [including the service provider itself] nor would such data or information be shared /

exploited or utilized by anyone in any manner whatsoever. Indeed, it is because of this assurance that their conversations, data and information shall remain protected and shall not be accessed or shared by anyone in any manner whatsoever – that the citizens are able to enjoy their fundamental right to free speech and expression in its letter and true spirit.

It is also the responsibility of the State to guarantee and ensure the protection of the personal and private data and information of these millions of citizens, when they use such modes of communications to engage in conversations and exchange private and confidential data and information.

Various laws have been enacted in order to regulate these modes of communications in order to provide these guarantees and assurances to the citizen users – including the Telegraph Act, 1885, the Telecom Regulatory Authority of India Act, 1997, the Information Technology Act, 2000 and the various rules and regulations framed thereunder.

In the recent past, the form and structure of these modes of communications has rapidly changed and evolved with the evolution of technology and the growth and spreading of internet based services. What has further added to this exponential growth in both the form / types of services and the users thereof – is the mushroom growth in the number of

mobile telephone users and also the availability of telecommunication services all over the country. According to recent estimates, India's internet penetration has increased over the past few years and has grown from 238 million users [i.e. 23.8 crore users] in June 2015 to 306 million users [i.e. 30.6 crores users] in December 2015. By 2016, the number of internet users in India has been projected to reach 371 million users [i.e. 37.1 crore users] which would be almost 1/3rd of the entire population.

One of the various new modes of communications which have become available with the exponential growth of technology and internet – is internet messaging applications which allow users to exchange text messages, photos, videos, audio clips, other data and information, by way of personal messages sent over the internet. These applications also offer / provide several features like instant delivery of messages, creation of groups, seamless transmission of data (including text, images, audios, videos etc.). However, since such services are still relatively new, there is no statutory or regulatory framework / mechanism in place in order to ensure that these services comply with the scheme of regulations envisaged for other such telecommunication services – including the protective features thereof.

6

It is significant to note that an internet based messaging service provider – only provides a medium to operate that service. The details and data which travel on the medium provided by the internet messaging service provider – do not belong to the said service provider, but belong to the users of this internet based messaging service, constituting a class in itself. The details and data of users of an internet message service do not belong to the service provider and, therefore, any capital / monetary valuation of the details and data of users would also never belong to / can get owned by the service provider. Unlike any electricity producing company which has to necessarily involve in producing electricity for delivery to its consumers for consumption, an internet message service provider – except for providing a medium to its users, does not create / manufacture anything on its own. It only provides a medium for transmission of details / data / messages etc. It therefore does not get entitled to claim any right of any kind whatsoever with the details and data of the / belonging to users of any internet based messaging service and which should always remain under the ownership and belonging of the users themselves and users as a class.

One such internet messaging service, which is widely acknowledged to be the most used internet messaging

application – is “WhatsApp”. WhatsApp was launched as a service in the year 2010. India has the largest number of users of WhatsApp messaging service [being approx. 160 million, or 16 crores active Indian users]. This number is likely to rise with the availability of more affordable smart phones and the recent Digital India campaign run by the Government of India.

Initially, the number of people using the WhatsApp Messaging service was not very high. Slowly, the internet messaging services of WhatsApp gained popularity due to its recognition and respect for the Privacy of the user. It also gained popularity owing to the fact that for using the said services, there was no requirement of having an E-mail ID and it was sufficient to have a mobile number in order to use the said services. Thus, this service became popular not just among the educated urban class but also among the semi-urban and rural classes where citizens were already using mobile phones, but did not have email address, which are normally required to use other internet based platforms and services.

WhatsApp had a declared Privacy Policy and it is on that basis that the users / subscribers had started getting on to use of this application and had started putting their personal details / data on this internet based messaging service / application. The privacy policy of WhatsApp from the very beginning has

been of total / complete safety against any kind of sharing and it is only on that basis that more and more users / subscribers got linked with this application.

There was some modification in 2012, however, the privacy policy of WhatsApp had remained almost the same till August 2016. In other words, complete security and protection of privacy of the details and data belonging / relating to all the users of WhatsApp – had remained an extremely significant, essential and basic feature of this internet based messaging service. There is sufficient material to support the fact that WhatsApp as a messaging service attracted Users to its platform by virtue of assuring complete maintenance of Privacy.

On 26th August 2016, the Petitioners, to their surprise, realized that Respondent No. 2 has sought to suddenly change its Privacy Policy proposing to make drastic changes which severely compromises with the rights of the users of WhatsApp service. It has sought to alter / change the most valuable, basic and essential feature of this internet based messaging service, by unilaterally threatening to take away the protection to privacy of details and data of its Users and sharing the same with Facebook and all its group companies including for the purpose of commercial advertising and marketing.

In summary, the new Privacy Policy of the WhatsApp service seeks to –

- a. Collect all information relating to every WhatsApp account.
- b. Collect all phone numbers, names and other details from the users' contact list.
- c. Collect the messages shared by all users.
- d. Collect user connections and create a favourites list from the contact list of the user.
- e. Automatically collection information relating to usage and log, transactions, status, device and connection information.
- f. Collect third party information i.e. information provided by third parties about the users.
- g. Collect information from companies with whom WhatsApp will work.
- h. Collect information from third party services.
- i. Use all the information that it has to help in operating, providing, improving, understanding, customising, supporting and marketing of its services. Such services would include communications about WhatsApp Services and the Facebook Family of Companies.

K

- j. Allow commercial messaging on WhatsApp.
- k. Receive information and share information with Facebook Family of Companies.
- l. Facebook and other Companies in the Facebook Family may also use information from WhatsApp to improve user experiences such as product suggestions, relevant offers and advertisements.
- m. Facebook could use the WhatsApp messages of users in order to assist WhatsApp in operating its services and also for providing the services which would include commercial marketing of Facebook products and other advertising.
- n. The new Privacy Policy also takes a worldwide, non-exclusive, royalty-free, sub-licensable, and transferable license to use, reproduce, distribute, create derivative works of, display, and perform the information (including the content) of the user including uploads, messages etc. which are sent, stored or received through WhatsApp.
- o. WhatsApp can retain popular photos and videos shared by WhatsApp users on their server for a long period of time.

L

p. Even if a person deletes the WhatsApp application from his/her mobile device, the past information can still be retained for an undefined period, unless the user consciously deletes the entire account itself.

q. The user is giving WhatsApp the right to transfer the data and information to the United States of America and WhatsApp can collect, use, process, share information in the US and all other countries where it has facilities regardless of where the user is located.

The above Privacy Policy is in stark contrast to the Privacy Policy existing from 7th July 2012. In its first revised modification on 25th August 2016, Respondents No. 2 to 4 have introduced this Policy which severely compromises the rights of its users and makes the Privacy rights of users completely vulnerable.

As explained hereinafter, a facade was being created as if a consent is being taken from the Users before the alteration / change of the essential and basic feature of this service is carried out. This facade was completely misleading in as much as this basic and essential feature of non-sharing of data / details of Users, in any manner whatsoever, cannot at all be

M

changed. Further, the manner in which so-called consent was sought to be taken was 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 whereupon, WhatsApp is pretending to obtain consent of the Users.

Without prejudice to the submissions of the Petitioners and users of WhatsApp in India that this basic and essential feature of complete protection of privacy of the details and contents of all the Users of WhatsApp cannot at all be changed, it is submitted that for any bonafide exercise of obtaining consent for sharing of details / data of Users by compromising the basic and essential feature of complete privacy – can also be achieved by laying down a methodology whereby and whereunder all those Users of WhatsApp who, upon comprehending the terms and conditions in relation to new Privacy Policy sought to be adopted by WhatsApp – extend / give their consent for that purpose [sharing of data], then it is only in relation to such Users of WhatsApp that the alteration could be made by WhatsApp, while remaining obliged to continue to extend absolute privacy to all other Users of WhatsApp. In other words, the consent should be sought only

from 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.

Such an approach would be an absolute imperative, having regard to the level of education, the level of comprehending the effect and extent of the proposed changes in the privacy policy and such an approach would also be in the larger interest of all the users who constitute one class, and all of them belong thereto.

Keeping in view the urgent need and necessity to ensure protection of the rights of millions of citizens who utilize the services of internet messaging applications such as WhatsApp, a Writ Petition had been filed by the Petitioners as a Public Interest Litigation before the Hon'ble High Court of Delhi wherein Union of India had been arrayed as Respondent No.1, WhatsApp as Respondent No.2, Facebook as Respondent No.3, the Indian entity of Facebook as Respondent No. 4, and TRAI as Respondent No.5. The Petitioners had prayed for a restraint on the sharing of data as also creation of an option for existing

Users to continue under the old policy as also a regulatory mechanism to be created by the Government of India as the said internet messaging services are nothing but 'telecommunication' services.

However, vide its impugned judgment dated 23.09.2016, the Hon'ble High Court has been pleased to grant only partial relief in the Writ Petition. The Hon'ble High Court, even after acknowledging that certain appropriate directions would be required to be passed in order to protect the rights of the Users of WhatsApp, has been pleased to limit the relief to those Users who deleted their WhatsApp account on or before 25th September 2016. Further, the Hon'ble High Court has issued a limited direction to the Union of India and the TRAI in order to examine the feasibility of bringing such services under a regulatory mechanism. In the most humble submission of the Petitioners, in the absence of any regulatory framework and in view of the clear and present danger and threat to the rights of millions of citizens who use WhatsApp, the Hon'ble High Court ought to have protected the rights of such citizens until internet messaging services are brought under a regulatory regime.

It is further submitted that the Hon'ble High Court has created an artificial distinction between the rights of Users who delete the WhatsApp application before 25th September 2016

P

and those who continue using the application after 25th September 2016. This has resulted in an emergent situation where, owing to the amended Privacy Policy of WhatsApp [which has been sought to be implemented after obtaining consent of millions of Users who are citizens of India, in an entirely deceptive manner and without informing the users about the full consequences of the amended Policy], the rights of millions of citizens have stood severely compromised.

In the most humble submission of the Respondents, it is imperative that the rights of millions of users are protected by the directions of the Hon'ble Courts, in the absence of any statutory / regulatory framework for internet messaging services, and that to that effect the impugned judgment of the Hon'ble High Court, inasmuch as it has only granted partial relief to the Petitioners, would deserve to be modified by orders of this Hon'ble Court.

It is reiterated that it is the responsibility of the State to guarantee and ensure the protection of the personal and private data and information of these millions of citizens, when they use such modes of communications to engage in conversations and exchange private and confidential data and information.

Q

In fact, post the impugned judgement, several jurisdictions have taken proactive action restraining WhatsApp from sharing the data belonging to Users. Such jurisdictions include –

- Germany;
- United Kingdom;
- EU group of nations.

Even in the United States, there is currently a pending complaint against such sharing of data. It is this responsibility of the State that has manifested into prohibitive directions being issued by the authorities in other countries / jurisdictions – where the State authorities have acted proactively and ensured the protection of the personal and private data and information of millions of citizens by issuing directions for preventing the implementation of the modified privacy policy of WhatsApp.

However, the State authorities in India have failed to even take cognizance of this potential threat to the rights of millions of citizens and thereby failed to fulfil their constitutional mandate.

Hence the present Special Leave Petition.

LIST OF DATES

2010

The internet application known as "WhatsApp" had commenced its operations sometime in the year 2010.

2012

The privacy policy of WhatsApp from the very beginning has been of total / complete safety against any kind of sharing and it is only on that basis that more and more users / subscribers got linked with this application. There was some modification in the Privacy Policy in 2012.

25/26.08.2016

In its revised modification on 25/26.08.2016 Respondents No. 2 to 4 have introduced a new Privacy Policy which severely compromises the rights of its users and makes the Privacy rights of users completely vulnerable.

29.08.2016

Writ Petition (C) No. 7663 of 2016 had been filed by the Petitioners as a Public Interest Litigation before the Hon'ble High Court of Delhi, praying for various reliefs in order to protect the rights of

S

millions of citizens who are users of internet messaging services such as WhatsApp. A Copy of the Writ Petition is annexed herewith as **ANNEXURE - P1**. (Page 52 to 83).

14.09.2016

When the matter was taken up for hearing before the Ld. Division Bench, the Ld. Counsel appearing for WhatsApp had, inter alia, submitted that the only information which is collected and retained by Whatsapp is the name and phone number of its users; Whatsapp does not and will not share the messages, photographs or documents of Users with Facebook; Whatsapp will only share with Facebook the name and phone number of the users, and the information regarding other users with whom they are in contact, after 25th September 2016; Users have the option of opting out of the amended Privacy Policy of Whatsapp. On 14.09.2016 the Hon'ble Delhi High Court had been

T

pleased to direct WhatsApp to file an affidavit explaining the factual position and placing their stand on record.

21.09.2016

A Short Affidavit was filed by the Respondents – WhatsApp in response to the Writ Petition. A Copy of the Short Affidavit of WhatsApp along with all its annexures is annexed herewith as **ANNEXURE – P2**. (Page 84 to 92). This affidavit was in stark contrast to the submissions made and the stand taken on behalf of WhatsApp during the proceedings before the Hon'ble High Court on 14.09.2016.

21.09.2016

Two short notes had been handed over by the Ld. Counsel for the Petitioners in the Hon'ble High Court, summarizing the suggestions on behalf of the Petitioners. A Copy of the two Short Notes is annexed herewith as **ANNEXURE – P3**. (Page 93 to 95).

23.09.2016

The impugned judgment was passed by the Hon'ble High Court of Delhi, wherein

U

the Hon'ble Court has been pleased to grant only partial relief to the Petitioners.

27.09.2016

In Germany, the Hamburg Commissioner For Data Protection and Freedom of Information issued an administrative order, prohibiting Facebook from collecting and storing data of 35 million German WhatsApp users - with immediate effect. Facebook has also been ordered to delete all data that has already been forwarded by WhatsApp.

08.11.2016

Facebook agreed to pause its collection of WhatsApp user data in the UK as a result of a probe by the Office of the Information Commissioner of UK.

16.11.2016

Facebook suspended its collection of WhatsApp user data for advertising purposes across Europe, following intense pressure from data privacy watchdogs in the EU.

~~17.09.2016~~

Hence the present Special Leave Petition

* **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, Adv.

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 Khazanchi, Adv. 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

4

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

6

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;

8

(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

19

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

11

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

kks

IN THE SUPREME COURT OF INDIA

[Under Order XVI Rule 3(1)(a)]

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION

(Under Article 136 of the Constitution of India)

(With prayer for Interim Relief)

SPECIAL LEAVE PETITION (CIVIL) NO. _____ OF 2016

POSITION OF PARTIES

	In the Hon'ble High Court	In this Hon'ble Court
--	------------------------------	--------------------------

BETWEEN:

- | | | | |
|----|---|------------------|------------------|
| 1. | Karmanya Singh Sareen
Aged about 19 years
F-11, Jangpura Extension
New Delhi – 110014 | Petitioner No. 1 | Petitioner No. 1 |
| 2. | Shreya Sethi
Aged about 22 years
D-121, First Floor,
Defence Colony,
New Delhi – 110024 | Petitioner No. 2 | Petitioner No. 2 |

Versus,

- | | | | |
|----|---|-----------------|--------------------------|
| 1. | Union of India,
Through Secretary,
Ministry of Communications,
Department of Telecommunications
Sanchar Bhawan,
20, Ashoka Road,
New Delhi. | Respondent no.1 | Contesting
Respondent |
|----|---|-----------------|--------------------------|

- 2. WhatsApp Inc.,
650, Castro Street,
Suite 120-219,
Mountain View,
California 94041,
USA. Respondent No. 2 *Contesting*
Respondent No. 2
- 3. Facebook Inc.,
1, Hackerway,
Menlo Park,
California 94025,
USA. Respondent No. 3 *Contesting*
Respondent No. 3
- 4. Facebook India Online Services Pvt. Ltd,
Units Nos. 1203 and 1204,
Level 12, Building No. 20,
Raheja Mindspace, Cyberabad
Madhapur, Hitech City,
Hyderabad, Kurnool,
Telangana – 500081. Respondent No. 4 *Contesting*
Respondent No. 4
- 5. Telecom Regulatory Authority of India Limited,
Through its Chairman,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
New Delhi 110 002. Respondent No.5 *Contesting*
Respondent No.5

To

The Hon'ble Chief Justice of India
And His Companion Justices of the
Supreme Court of India.

The Petitioner above named

MOST RESPECTFULLY SHOWETH:

1.1 The present Special Leave Petition is being filed against the impugned final judgment dated 23.09.2016 passed by the Id. Division Bench of the Hon'ble Delhi High Court in

Writ Petition (C) No. 7663/2016 - titled as Karmanya Singh Sareen & Anr. Vs. UOI & Ors. whereby the Id. Division Bench of the Hon'ble Delhi High Court has been pleased to partially allow the WP (C) No. 7663/2016.

1.2 Vide the impugned judgment dated 23.09.2016, the Hon'ble High Court, despite observing that having regard to the complete security and protection of privacy provided by WhatsApp Inc. 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 this Hon'ble Court, it would be appropriate to issue certain directions to protect the interest of the users of "WhatsApp" - has erroneously granted only partial relief in the Writ Petition, by protecting the data of the Users of WhatsApp only upto the date of 25th September 2016.

1.3 It is most respectfully submitted that vide the impugned judgment, the Hon'ble High Court has created an artificial distinction between the rights of Users who delete the WhatsApp application before 25th September 2016 and those who continue using the application after 25th September 2016. This has resulted in an emergent

situation where, owing to the amended Privacy Policy of WhatsApp [which has been sought to be implemented after obtaining consent of millions of Users who are citizens of India, in an entirely deceptive manner and without informing the users about the full consequences of the amended Policy], the rights of millions of citizens have stood severely compromised.

- 1.4 It is submitted that the impugned judgment is bad in law, in so far as the Hon'ble High Court has only granted partial relief to the Petitioners, and therefore the impugned judgment would deserve to be modified by orders of this Hon'ble Court.

2. QUESTIONS OF LAW:

- 2.1 Whether the Right of privacy of Users and millions of citizens of India is violated by the Privacy Policy of August 2016 of WhatsApp?
- 2.2 Whether internet messaging services which equip users to exchange text/audio/video messages, data, make audio/video calls constitute 'Telecommunication' services and are liable to be regulated by the relevant authorities?
- 2.3 Whether the sharing of data by WhatsApp under its new privacy policy constitutes a breach of trust and estoppel

especially with such users who were already using the service as on 23rd August 2016?

- 2.4 Whether WhatsApp's conduct of not providing an option to the User 'not to share' data with Facebook is contrary to law?
- 2.5 Whether the manner of obtaining consent of users under the new privacy policy, including from children from the age of 13 years, is misleading, deceptive and unlawful?
- 2.6 Whether the Hon'ble High Court erroneously granted only partial relief in the Writ Petition, as a result of which the rights of millions of Users of WhatsApp who are also citizens of India, have been severely compromised?
- 2.7 Whether there exists any distinction between Users who delete their WhatsApp application before the date of 25th September 2016 and those who continue using WhatsApp after 25th September 2016?
- 2.8 Whether directions would be required to be issued to protect the interest of the users of "WhatsApp" and whether such directions should contain a specific option to the User 'Not to share' data with Facebook?
- 2.9 Whether it would be permissible to allow internet messaging applications like WhatsApp to seek to obtain the "consent" of millions of Users in an entirely deceptive

manner and without informing them of the full consequences of their privacy policies – in a country where the majority of users are not even equipped to read, much less comprehend the terms of such privacy policies?

2.10 Whether the Hon'ble High Court failed to appreciate that there is an urgent and emergent need for bringing into existence a regulatory framework / mechanism in order to ensure that the privacy rights of millions of users of internet messaging applications such as WhatsApp are protected?

2.11 Whether the Hon'ble High Court failed to appreciate that in the absence of any such regulatory framework / mechanism, directions would be required to be issued by the Hon'ble Courts in order to ensure that the privacy rights of millions of users of internet messaging applications such as WhatsApp are protected?

2.12 Whether the delay and lackadaisical attitude of the State in taking cognizance of this potential threat to the rights of millions of citizens and thereby failing to fulfil their constitutional mandate, even when prohibitive directions have been issued by the authorities in other countries / jurisdictions – where the State authorities have acted

proactively and ensured the protection of the personal and private data and information of millions of citizens by issuing directions for preventing the implementation of the modified privacy policy of WhatsApp, would require this Hon'ble Court to issue directions for protections of the rights of millions of citizens?

2.13 Whether the right of privacy of millions of citizens of the country would deserve to be protected in the interregnum, irrespective of the pendency of the decision of this Hon'ble Court on the question whether the right to privacy is a fundamental right – which has been referred to a Constitution Bench in *K.S. Puttaswamy Vs. Union of India – (2015) 8 SCC 735*.

3. DECLARATION IN TERMS OF RULE 3(2)

The Petitioner states that no other petition seeking leave to Appeal has been filed by the Petitioner against the impugned judgment before this Hon'ble Court.

4. DECLARATION IN TERMS OF RULE 5

The Annexures P-1 to P-3 produced along with Special Leave Petition are true copies of the records of the Courts below and forms part of the record of the Courts below against whose order the leave to appeal is sought for in this Petition.

5 GROUND:

- 5.1 Because the impugned judgment fails to protect the rights of citizens who are Users of WhatsApp and the data generated / shared / owned by them.
- 5.2 Because the Ld. Division Bench fails to appreciate that the artificial distinction of existing users and future users cannot be created especially when both classes of users are entitled to protect their Privacy.
- 5.3 Because the Ld. Division Bench failed to appreciate that the so-called consent sought to be obtained is by misleading and deceiving users with the opening line of the Privacy policy 2016 which reads "Respect for your privacy is coded into our DNA".
- 5.4 Because the Ld. Division Bench failed to appreciate that the manner in which consent was being obtained viz., by providing a button AGREE, in the first frame of the opening screen of the policy itself exhibited the intention that the user ought not to even peruse the entire policy.
- 5.5 Because the Ld. Division Bench failed to accede to the prayer of the Petitioners that WhatsApp ought to be directed to provide an option to the User to share or not to share by providing a DONT SHARE button. This would

ensure that only data of such users who expressly consent to sharing ought to be shared.

- 5.6 Because unregulated violation of privacy of citizens poses a grave threat to the Freedom of Life and liberty as also the Freedom of Speech and expression. Such freedoms are to be protected against misuse and the State has a duty to regulate any breach of these rights.
- 5.7 Because the impugned judgment of the Hon'ble High Court, in so far as it has only granted partial relief to the Petitioners - is bad in law and would therefore deserve to be modified by orders of this Hon'ble Court.
- 5.8 Because the Hon'ble High Court erroneously granted only partial relief in the Writ Petition, as a result of which the rights of millions of Users of WhatsApp who are also citizens of India, have been severely compromised.
- 5.9 Because the impugned judgment has created an artificial and impermissible distinction between Users who delete their WhatsApp application before the date of 25th September 2016 and those who continue using WhatsApp after 25th September 2016.
- 5.10 Because the Hon'ble High Court, even while observing that certain directions would be required to be issued to protect the interest of the users of "WhatsApp", has

erroneously limited the directions only with respect to protection of interest of users who delete the WhatsApp application before 25th September 2016.

5.11 Because the Hon'ble High Court failed to appreciate that the Servers of internet messaging applications such as WhatsApp are located in foreign territories and as such, in the absence of regulatory framework or directions of this Hon'ble Court in the Interregnum, data of Users which is stored on such Servers is highly vulnerable and their rights can be easily violated by any third party.

5.12 Because the Hon'ble High Court failed to appreciate that it would be entirely impermissible to allow internet messaging applications like WhatsApp to seek to obtain the "consent" of millions of Users in an entirely deceptive manner and without informing them of the full consequences of their privacy policies – in a country where the majority of users are not even equipped to read, much less comprehend the terms of such privacy policies.

5.13 Because the Hon'ble High Court failed to appreciate that there is an urgent and emergent need for bringing into existence a regulatory framework / mechanism in order to ensure that the privacy rights of millions of users of

internet messaging applications such as WhatsApp are protected.

5.14 Because the Hon'ble High Court failed to appreciate that in the absence of any such regulatory framework / mechanism, directions would be required to be issued by the Hon'ble Courts in order to ensure that the privacy rights of millions of users of internet messaging applications such as WhatsApp are protected.

5.15 Because the Hon'ble High Court has issued a limited direction to the Union of India and the TRAI in order to examine the feasibility of bringing such services under a regulatory mechanism. In the most humble submission of the Petitioners, in the absence of any regulatory framework and in view of the clear and present danger and threat to the rights of millions of citizens who use WhatsApp, the Hon'ble High Court ought to have protected the rights of such citizens until internet messaging services are brought under a regulatory regime.

5.16 Because the Hon'ble High Court has failed to appreciate that it would be an imperative and in order to protect the rights of millions of citizens who are users of WhatsApp – that a complete "Opt Out" or "Don't Share" option is

given to all users in order to ensure that the private and confidential data exchanged by them over such internet messaging services, on being assured that their such data and information shall remain secure and protected from third parties, is neither compromised nor subjected to potential misuse.

5.17 Because the Hon'ble High Court failed to appreciate that the right to privacy is an inherent right of every citizen of the country, notwithstanding the fact that the issue of whether such right has been elevated to the level of a fundamental right under the Constitution is pending before a larger Bench of the Hon'ble Supreme Court.

5.18 Because the Hon'ble High Court failed to appreciate that in any case, the guarantee and assurance of being able to freely communicate and share data / information with others without any threat of such private conversations being accessed by any third party – is most essential and vital for citizens to be able to freely exercise their fundamental right to freedom of speech and expression, both in letter and in true spirit.

5.19 Because the Hon'ble High Court has erroneously observed that it is not open to the users to contend that "WhatsApp" shall be compelled to continue the same

terms of service. As explained hereinabove, unlike transmission of electricity, the medium of transmission of messages provided by services such as WhatsApp is purely a medium and any / all data or information which is transmitted on such medium belongs solely to the Users thereof. It would be entirely impermissible to allow any such medium to seek to unilaterally amend its policies in order to enable itself to access and also exploit the messages transmitted through such medium. In other words, allowing any such attempt on the part of internet messaging services such as WhatsApp would amount to permitting Postmen to open, read, access, and exploit the contents of letters in whatever manner they deem fit.

5.20 Because the Hon'ble High Court has erroneously held that since the terms of service of "WhatsApp" are not traceable to any statute or statutory provisions, the issue sought to be espoused in the writ petition is not amenable to writ jurisdiction under Article 226. It is most respectfully submitted that it is the settled position of law and has been held by this Hon'ble Court in various judgments, that in the absence of any statutory or regulatory framework / mechanism, the constitutional courts can issue directions in order protect and safeguard

the rights and interests of the citizens till such statutory or regulatory framework / mechanism is brought into existence.

5.21 Because despite the directions contained in the impugned judgment, WhatsApp has failed to make any change to its privacy policy in order to ensure that the same is in consonance with the order of the Hon'ble High Court. In fact, WhatsApp has sought to obtain deeming consent of the terms of its Privacy Policy in terms of the various provisions thereof.

5.22 Because the Hon'ble High Court failed to appreciate that as a result of the impugned judgment, the Users of WhatsApp who, by using the medium to transmit messages and data owned by them, have been solely instrumental in enabling WhatsApp to earn huge revenues, have no option but to delete the application in order to protect and safeguard the privacy of their data and information. In the humble submission of the Petitioners, this option is no option at all in this age where communicating over internet messaging services like WhatsApp has become a daily need and necessity for millions of citizens.

5.23 Because the Hon'ble High Court failed to appreciate that the so-called consent that WhatsApp is claiming to have obtained from millions of Users who choose to continue after 25th September 2016 – is no consent at all since the same is being obtained in an entirely deceptive manner without informing the User about the full and true consequences of new Privacy Policy, and especially in the context of India – where majority of the users of the services of WhatsApp are not even equipped to read, much less comprehend the terms of such vaguely crafted clauses of their privacy policies.

5.24 Because the Hon'ble High Court failed to consider the suggestions given on behalf of the Petitioners for protection of the rights of millions of citizens and issuance of directions to WhatsApp and Facebook for:-

- 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.

5.25 Because any slackness, delay; lackadaisical attitude on the part of Respondents No.1 and 5 in perceiving / appreciating the colossal threat of violation of fundamental rights of the Petitioners by Respondents No.2 to 4 by proposed changes in the Privacy Policy would then actually result into irreversible damage to those Fundamental Rights of the Petitioners. Respondents No.1 and 5 are obliged under the constitutional as well as statutory scheme to immediately initiate all such steps and take all such actions, as required to be taken by them under law, as expeditiously as possible, thereby ensuring that there is no damage caused to the fundamental rights of all users of WhatsApp who are also citizens of India and are guaranteed enjoyment and protection of their fundamental rights under Part III of the Constitution of India.

- 5.26 Because the Petitioners, like millions of other citizens of India, use the internet messaging services provided by WhatsApp to share his personal, private and confidential information in the form of text messages, audio / video recordings or otherwise, with his friends / family / contacts who are also using the services of WhatsApp. The Petitioners shares the said personal, private and confidential information on the assurance that such information belonging to the Petitioners shall not be used / accessed / exploited / compromised by WhatsApp in any manner whatsoever, and in fact it would be impermissible to do so.
- 5.27 Because without prejudice to the submissions of the Petitioners and users of WhatsApp in India that this basic and essential feature of complete protection of privacy of the details and contents of all the Users of WhatsApp cannot at all be changed, it is submitted that for any bonafide exercise of obtaining consent for sharing of details / data of Users by compromising the basic and essential feature of complete privacy – can also be achieved by laying down a methodology whereby and whereunder all those Users of WhatsApp who, upon comprehending the terms and conditions in relation to

new Privacy Policy sought to be adopted by WhatsApp – extend / give their consent for that purpose [sharing of data], then it is only in relation to such Users of WhatsApp that the alteration could be made by WhatsApp, while remaining obliged to continue to extend absolute privacy to all other Users of WhatsApp. In other words, the consent should be sought only from 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. Such an approach would be an absolute imperative, having regard to the level of education, the level of comprehending the effect and extent of the proposed changes in the privacy policy and such an approach would also be in the larger interest of all the users who constitute one class, and all of them belong thereto.

5.28 Because this Hon'ble Court, being the sentinel on the qui vive for the private, personal and public rights of millions of citizens of this Country who are using / consuming the

services of Respondents No.2 to 4 and other internet messaging services, would not permit any compromise and / or unlawful, illegal and unconstitutional exploitation of the private and confidential information shared by the users / consumers on these internet messaging services like WhatsApp through its new privacy policy.

5.29 Because there is an immediate need and necessity for setting up a legal framework to regulate the privacy policies of such internet messaging services as well as those provided by Respondents No.2 to 4 – in order to ensure complete protection and in order to maintain the sanctity of the private and confidential information shared by the users / consumers of the Country on these internet messaging services.

5.30 Because in the absence of any guidelines / regulations governing the policies of Respondents No. 2 to 4 and other similar internet messaging services in so far as they relate to use of private / confidential information of users / consumers, there is a clear and immediate threat not only to the privacy and personal rights of the users / consumers but also to the safety and security of the nation.

- 5.31 Because the change in Privacy Policy of Respondents no. 2 to 4 and the Policies of other messaging services amounts to a direct invasion and compromise with the privacy of the users / consumers and amounts to violation of the rights of millions of users / consumers of the services of WhatsApp and other similar internet based messaging services.
- 5.32 Because as per the impugned Privacy Policy the Messaging service is seeking to obtain a presumptive worldwide, non-exclusive licence to all the works created by the Users and transmitted through the service and the Respondents seek to usurp the rights to exploit the said works including creating of derivative works for the purpose of the service. Such licensing is contrary to the applicable law in India especially when it involves minors below the age of 18 who are incapable of granting such licences.
- 5.33 Because this Hon'ble Court would not permit internet messaging services, such as those of Respondents No.2 to 4, to unilaterally amend the terms of their privacy policies in an entirely clandestine manner so as to mislead millions of users / consumers into agreeing to the amended terms, without making full disclosure of the

consequences of such amendments which are bound to tremendously increase the vulnerability of the privacy and personal rights of the users / consumers.

5.34 Because any compromise with the privacy and sanctity of the private and confidential information of the millions of users / consumers of internet messaging services such as WhatsApp shall be in direct violation of not only the private, personal and public rights of the citizens of the Country, but also the statutory scheme envisaged under the Information Technology Act, 2000. In this regard, the attention of this Hon'ble Court is invited to the provisions of Section 72 of the Information Technology Act, 2000, which is reproduced as under:-

"72. Penalty for breach of confidentiality and privacy.-

Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both."

- 5.35 Because it would be entirely impermissible and illegal for the internet messaging services as those provided by Respondents No. 2 to 4 to not follow the binding provisions of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, (hereinafter referred to as the "2011 Rules") notified by the Central Government on 11.04.2011 u/s 87(2)(ob) read with Section 43A of the Information Technology Act, 2000.
- 5.36 Because the terms "consent" and "disclosure" in the 2011 Rules would deserve to be interpreted / defined so as to ensure that the entities providing internet messaging services such as Respondents No. 2 to 4 are obliged to make full and true disclosure of the effect and consequences of their so-called "Privacy Policies" and only after making such full and true disclosure, the entities would be permitted to operate / provide their services after obtaining an educated and well-informed consent of the users / consumers.
- 5.37 Because internet messaging platforms such as the mobile application of Respondent No. 4 are nothing but telecom services/platform provided for the use of the general public. The value of such a service/application/platform is

defined only by the number of users, content generated by the users, purposes for which the application is put to use by the users etc. In other words, it is the users and the usage of the application/service which defines the value and worth of the said service/application/platform. As such, it is the users who are the majority stakeholders in the application. The application would not exist / would be of no value at all, in the absence of the users and the content generated by the users. The application/service/platform is only a minority stakeholder and only performs the service of enabling the users to generate/share content or communicate through the said application/service/platform. It is therefore abundantly clear that any unilateral change in any term, condition or policy with respect to the usage of said application, without the informed consent of the majority stakeholders i.e. the users, would be entirely impermissible.

5.38 Because the change in the Privacy Policy by WhatsApp comes in the form of a display on the screen wherein there is a large button in green colour titled as "AGREE" and there is a miniscule sized hyperlink providing the option to read more regarding the so-called "Privacy Policy" and there is no disclosure whatsoever, much less

any indication as to the true consequences of the user agreeing to the so-called "Privacy Policy".

5.39 Because the so-called "option" as provided to the user to agree / disagree with the terms of the so-called new "Privacy Policy" is nothing but a mere eyewash and is in fact a blatant attempt to lure / brainwash / mislead the user into blindly accepting the unilaterally decided terms of the so called "Privacy Policy".

5.40 Because the users have acted on the representation of the WhatsApp and shared private information on it based on its representation dated February 19, 2014 on WhatsApp Blog that nothing would change in the policy of WhatsApp and that information shared by the users would remain private.

5.41 Because the change of the policy by WhatsApp on 25th August 2016 is detrimental to the interests of the users since the information deemed to be private by its users would now be used by WhatsApp, facebook & their family companies for their purposes including for commercial exploitation, etc..

5.42 Because WhatsApp has misrepresented to its users as it had built a user base in the Country based on its commitment not to collect user data for advertising

revenue and that acting in reliance on WhatsApp representations, internet users provided detailed personal information to the company.

5.43 Because the change of policy by WhatsApp is a violation of the fundamental rights and in breach of the rights of privacy that an individual's private information is protected from public scrutiny and no prior notice has been given to the individual regarding this unilateral change in policy and the same is thus violative of Article 21 of the Constitution of India.

5.44 Because the acquisition by Facebook by WhatsApp means that that Facebook has acquired the addresses and telephone numbers of million of users worldwide enabling Facebook to build complete profiles on users against the consent of WhatsApp users and which act the WhatsApp Users did not consent to.

5.45 Because the change of policy by WhatsApp is violative of the representation made initially by WhatsApp to its users which was of added levels of privacy that the brand provided and this breach of privacy tantamounts to an act of coercion for the current users of WhatsApp.

5.46 Because there is breach of trust by WhatsApp towards its users who have been using WhatsApp since its inception

in as much as although WhatsApp in its representation in February, 2014 (after entering into a partnership with Facebook) stated in its WhatsApp Blog that nothing would change, whereas it has now radically and unilaterally altered its policy without consultation with the users that the phone number, profile name & photos, online status and status message, last seen status, and receipts of the users may be available to anyone who uses the Services of WhatsApp, further users with whom communication is done may store or re-share information (including phone number or messages) with others who are on and off the Services of WhatsApp and Third Parties Services that may receive information about WhatsApp Users may share.

5.47 Because this unilateral change of policy misrepresented to the consumers and users has adverse repercussions in the field of communications for the public and WhatsApp practices shall unfavourably effect billions of consumers.

5.48 Because there is settled jurisprudence that company may not alter the privacy settings of its users without aptly informing its users about the same. The manner in which WhatsApp has changed its policy and has sent the information about the same to its users, cannot be said to be in the realm of fair practice.

5.49 Because the change of policy by WhatsApp is an act or practice that is deceptive inasmuch it involves a representation, omission, or practice that is likely to mislead the consumer acting reasonably under the available circumstances, which is to the consumer's detriment.

5.50 Because the act of change of policy by WhatsApp is an act that is likely to mislead the public.

5.51 Because the information that WhatsApp has announced in its changed policy is important to its Users/ consumers and the Consumers/ Users would have had the freedom and option to chose another product if they had anticipated that WhatsApp would change its policy.

5.52 Because WhatsApp omitted to present relevant information that should have been presented to the Consumer/User as this information would have been material and which WhatsApp knew that an ordinary consumer would need in order

to evaluate the usage of the WhatsApp product or service and thus the act of omitting to provide this information in its original policy was fraudulent.

5.53 Because WhatsApp's delineation and representation of its original policy of privacy and anonymity was material to users in their decision to install and use WhatsApp and thus WhatsApp's failure to adequately disclose that this commitment to privacy was subject to reversal is unconscionable.

5.54 Because by failing to make special provisions to protect user data in the event of an acquisition and by the change of policy, WhatsApp has unreasonably created an obstacle to the free exercise of consumer decision making which is violative of the rights enshrined under Article 14 and 19 of the Constitution of India.

5.55 Because WhatsApp users could not reasonably have anticipated that by actively selecting a pro-privacy messaging service on the basis of a 'no change policy' of WhatsApp, they would subject their data to Facebook's data collection practices and the said practice by WhatsApp is unfair, arbitrary and illegal against the well settled jurisprudence principles.

5.56 Because by virtue of change in this policy, this injury is not avoidable by consumers themselves and unreasonably constraints consumers to completely delete the WhatsApp or desist the use of services to stop WhatsApp from collecting their private data.

5.57 Because by virtue of the Change in Policy by WhatsApp, users/ consumers are thus forced to choose between abandoning their privacy interest and stopping the use of WhatsApp services and this is violative of the freedom available to consumers and an unfair practice.

5.58 Because this policy change is not supported by any evidence that it outweighs benefits to consumers or to competition.

5.59' Because the impugned privacy policy does not provide the user adequate measures as required by law.

5.60 Because the change of policy by WhatsApp is hit by the principle of estoppel in as much as it has acted in violation of its earlier representation dated February 19, 2014, wherein WhatsApp in its blog (WhatsApp Blog) represented that nothing would change for its users and that WhatsApp will remain autonomous and operate independently whereas in the new WhatsApp policy in the new WhatsApp Terms Of Service dated 25th August 2016 it is stated as under that WhatsApp would share the information provided by the User to help us operate, provide, improve, understand, customize, support, and market it's Services.

6. GROUNDS FOR INTERIM RELIEF:

6.1 Because the vide the impugned judgment, the Hon'ble High Court has created an artificial distinction between the rights of Users who delete the WhatsApp application before 25th September 2016 and those who continue using the application after 25th September 2016.

6.2 Because the impugned judgment has resulted in an emergent situation where, owing to the amended Privacy Policy of WhatsApp [which has been sought to be implemented after obtaining consent of millions of Users who are citizens of India, in an entirely deceptive manner and without informing the users about the full consequences of the amended Policy], the rights of millions of citizens have stood severely compromised.

6.3 Because if the interim relief is not granted by this Hon'ble Court, the private and confidential data and information of millions of citizens who are

users of internet messaging services such as WhatsApp – shall stand immediately compromised and exposed to potential misuse, thereby causing irreversible damage to the rights of millions of citizens. The State authorities in other countries / jurisdictions – have already acted proactively and ensured the protection of the personal and private data and information of millions of citizens by issuing directions for preventing the implementation of the modified privacy policy of WhatsApp.

6.4 Because the Petitioners have a good prima facie case on merits and the balance of convenience also lies in the favor of the Petitioners.

6.5 Because gross injustice and irreparable loss is likely to be caused to the Petitioner if the interim relief, as prayed for, is not granted by this Hon'ble Court.

7. MAIN PRAYER:

In the circumstances, it is most respectfully prayed that your lordships may graciously be pleased to:

- (i) Grant leave to appeal against the impugned judgment dated 23.09.2016 in WP (C) No. 7663/2016 passed by the Ld. Division Bench of the Hon'ble Delhi High Court.
- (ii) And/or pass such other further orders, as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case.

8. PRAYER FOR INTERIM RELIEF:

- (i) Grant ad-interim ex-parte stay of the impugned judgment dated 23.09.2016 in WP (C) No. 7663/2016 passed by the Id. Division Bench of the Hon'ble Delhi High Court.
- (ii) And/or pass such other further orders, as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

FILED BY

(GAURAV SHARMA)

Advocate for the Petitioners

Drawn On: 15.12.2016

Filed On: 17.12.2016

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2016

IN THE MATTER OF:

Karmanya Singh Sareen & Anr.

Petitioners

Versus

Union of India & Ors.

Respondents

CERTIFICATE

Certified that the Special Leave Petition is confined only to the pleadings before the Court whose order is challenged and the documents relied upon in those proceedings. No Additional documents or grounds have been taken or relied upon in the Special Leave Petition. It is further certified that the copies of the documents / Annexures attached to the Special Leave Petition are necessary to answer the question of law raised in the petition or to make out grounds urged in the Special Leave Petition for consideration of this Hon'ble Court. This certificate is given on the basis of the instructions given by the Petitioners whose affidavit is filed in support of the Special Leave Petition.

Filed by

(Gaurav Sharma)
Advocate for the Petitioner

Drawn on: 15/12/16

Filed on: 17/12/16

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2016

IN THE MATTER OF:

Karmanya Singh Sareen & Anr.

Petitioners

Versus

Union of India & Ors.

Respondents

AFFIDAVIT

I, Shreya Sethi, aged about 22 years, d/o Shri Sandeep Sethi, R/o D-121, First Floor, Defence Colony, New Delhi – 110024 do hereby solemnly affirm and state as under:-

1. That I am Petitioner No.2 in the present Special Leave Petition and am fully conversant with the facts and proceedings of the present case and as such, I am competent to swear and depose this affidavit.
2. That I have read and understood the contents of the accompanying special leave petition (Paras 1 to 8) (Pages 16 to 48), the Synopsis and List of Dates (Page B to U) and Interlocutory Applications and having understood the same, say that the facts stated therein are true and correct to my knowledge derived from official records.
3. That the Annexures P-1 to P-3 attached to the Special Leave Petition are true copies of respective originals.
4. That the Petitioner has not filed any other appeal against the impugned order.

SI

DEPONENT

VERIFICATION:

I, the above named deponent do hereby verify that the contents of my foregoing affidavit are true and correct. No part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this ^{12th} day of December 2016.

DEPONENT

IN THE HON'BLE HIGH COURT OF DELHI AT NEW DELHI
[UNDER EXTRAORDINARY WRIT JURISDICTION]
WRIT PETITION NO. 7663 OF 2016

IN THE MATTER OF A PUBLIC INTEREST LITIGATION :-

1. Karmanya Singh Sareen,
Aged about 19 years,
F-11, Jangpura Extension,
New Delhi 110 014. Petitioner No.1
2. Shreya Sethi,
Aged about 22 years,
D-121, First Floor,
Defence Colony,
New Delhi – 110 024 Petitioner No.2

Versus

1. Union of India,
Through Secretary,
Ministry of Communications,
Department of Telecommunications
Sanchar Bhawan,
20, Ashoka Road,
New Delhi. Respondent no.1
2. Whatsapp Inc.,
650, Castro Street,
Suite 120-219,
Mountain View,
California 94041,
USA. Respondent no.2
3. Facebook Inc.,
1, Hackerway,
Menlo Park,
California 94025,
USA. Respondent no.3
4. Facebook India Online Services Pvt..Ltd,
Units Nos. 1203 and 1204,
Level 12, Building No. 20,
Raheja Mindspace,
Cyberabad, Madhapur,
Hitech City, Hyderabad,
Kurnool, Telangana – 500081. Respondent no.4

5. Telecom Regulatory Authority of India Limited,
Through its Chairman,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
New Delhi 110 002.

..... Respondent no.5

WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING FOR 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 AND 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 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.

The Petitioners above-named respectfully submits as under:

1. The Petitioners are citizens of India. The writ petitioners have no personal interest in the litigation and that the petition is not

- guided by self-gain or for gain of any other person / institution / body and that there is no motive other than of public interest in filing of the present writ petition.
2. The petitioners have knowledge of the facts alleged in the present writ petition, they have made inquiries and investigation on the privacy policy of the internet based messaging services including Respondents No.2 to 4. The petitioners have also done extensive research in the matter on the internet including searching for articles, blogs and reports as have been attached in the present petition.
 3. The Petitioners like millions of other users in India, are users of Whatsapp, Facebook and other mobile applications. The Petitioners being affected both as users and for all other users forming one class, are filing the present writ petition in public interest on behalf of themselves and millions of users who are citizens of India who use the Whatsapp messaging service and other internet messaging services.
 4. It is submitted that all the persons / bodies / institutions which are likely to be affected by the orders sought in the present writ petition have been made parties in the present writ petition and that no other person / bodies / institution are likely to be affected by the order sought in the present petition.
 5. It is submitted that Petitioner No.1 is 19 years of age. He resides in Delhi at the address mentioned above. Petitioner No.1 is currently a student undergoing his Engineering course at Imperial College, London. He has completed his First year of Engineering and is scheduled to commence his second year in the current academic session. Petitioner No.2 is 22 years of age and is a Final Year Law student. She is a permanent resident of Delhi. The petitioners have the means to pay the cost, if any, imposed by this Hon'ble Court and that

- they undertake to pay the cost if imposed by this Hon'ble Court.
6. It is submitted that the petitioners prior to the present petition / public interest litigation have not filed any other PIL in the past.
 7. The Respondent No. 1 is the Union of India represented through its Secretary, Department of Telecommunications which is the overseeing Ministry for Telecommunication Services in India. Respondent No. 2 – Whatsapp Inc. (hereinafter referred to as "Whatsapp") is the provider of the messaging service popularly known as "Whatsapp". In 2014, Whatsapp was acquired by Facebook – i.e. Respondent No. 3. Respondent No. 4 – Facebook India Online Services Private Limited is the India office of Respondent No. 3. The said Respondent No. 3 being the principal company; now controls all services relating to Respondent No. 2, Respondent No. 3 and Respondent No. 4. Respondent No. 5 through its Chairman, is the Regulatory Authority involved in regulating Telecommunication Services in India.
 8. The Petitioners, like millions of other citizens of India, use the internet messaging services provided by Whatsapp to share his personal, private and confidential information in the form of text messages, audio / video recordings or otherwise, with his friends / family / contacts who are also using the services of Whatsapp. The Petitioners shares the said personal, private and confidential information on the assurance that such information belonging to the Petitioners shall not be used / accessed / exploited / compromised by Whatsapp in any manner whatsoever, and in fact it would be impermissible to do so.
 9. It is submitted that an internet based messaging service provider – only provides a medium to operate that service.

The details and data which travel on the medium provided by the internet messaging service provider – do not belong to the said service provider, but belong to the users of this internet based messaging service, constituting a class in itself. The details and data of users of an internet message service do not belong to the service provider and, therefore, any capital / monetary valuation of the details and data of users would also never belong to / can get owned by the service provider. Unlike any electricity producing company which has to necessarily involve in producing electricity for delivery to its consumers for consumption, an internet message service provider – except for providing a medium to its users, does not create / manufacture anything on its own. It only provides a medium for transmission of details / data / messages etc. It therefore does not get entitled to claim any right of any kind whatsoever with the details and data of the / belonging to users of any internet based messaging service and which should always remain under the ownership and belonging of the users themselves and users as a class.

10. It is submitted that operations regarding any messaging services on an internet medium would fall within the purview of Telegraph Act, 1885 and the Telecom Regulatory Authority of India Act, 1997 as amended in the year 2000.
11. The internet application known as "Whatsapp" had commenced its operations sometime in the year 2010. It had a declared Privacy Policy and it is on that basis that the users / subscribers had started getting on to use of this application and had started putting their personal details / data on this internet based messaging service / application. The privacy policy of Whatsapp from the very beginning has been of total / complete safety against any kind of sharing and it is only on that basis that more and more users / subscribers got linked with this application. There was some modification in 2012, however, the privacy policy of Whatsapp had remained in

continuation from 2010 till very recent of August 2016. In other words, complete security and protection of privacy of the details and data belonging / relating to all the users of Whatsapp – has remained an extremely significant, essential and basic feature of this internet based messaging service. There is sufficient material to support the fact that Whatsapp as a messaging service attracted Users to its platform by virtue of assuring complete maintenance of Privacy.

12. On 26th August 2016, the Petitioners, to his surprise, realized that Respondent No. 2 has sought to suddenly change its Privacy Policy proposing to make drastic changes and severely compromises with the rights of the users of Whatsapp service. It has sought to alter / change the most valuable, basic and essential feature of this internet based messaging service, by unilaterally threatening to take away the protection to privacy of details and data of its Users and sharing the same with Facebook and all its group companies including for the purpose of commercial advertising and marketing. As explained hereinafter, a façade is being created as if a consent is being taken from the Users before the alteration / change of the essential and basic feature of this service – is carried out. This façade collapses on its own weight in as much as this basic and essential feature of non-sharing of data / details of Users, in any manner whatsoever, cannot at all be changed. Further, the manner in which 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 whereupon, Whatsapp is pretending to obtain consent of the Users.

13. Without prejudice to the submissions of the Petitioners and users of Whatsapp in India that this basic and essential

feature of complete protection of privacy of the details and contents of all the Users of Whatsapp cannot at all be changed, it is submitted that for any bonafide exercise of obtaining consent for sharing of details / data of Users by compromising the basic and essential feature of complete privacy – can also be achieved by laying down a methodology whereby and whereunder all those Users of Whatsapp, who, upon comprehending the terms and conditions in relation to new Privacy Policy sought to be adopted by Whatsapp – extend / give their consent for that purpose [sharing of data], then it is only in relation to such Users of Whatsapp that the alteration could be made by Whatsapp, while remaining obliged to continue to extend absolute privacy to all other Users of Whatsapp. In other words; the consent should be sought only from 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. Such an approach would be an absolute imperative, having regard to the level of education, the level of comprehending the effect and extent of the proposed changes in the privacy policy and such an approach would also be in the larger interest of all the users who constitute one class, and all of them belong thereto.

14. In summary, the new Privacy Policy of the Whatsapp service seeks to –
 - a. Collect all information relating to every Whatsapp account.
 - b. Collect all phone numbers, names and other details from the users' contact list.
 - c. Collect the messages shared by all users.

- d. Collect user connections and create a favourites list from the contact list of the user.
- e. Automatically collection information relating to usage and log, transactions, status, device and connection information.
- f. Collect third party information i.e. information provided by third parties about the users.
- g. Collect information from companies with whom Whatsapp will work.
- h. Collect information from third party services.
- i. Use all the information that it has to help in operating, providing, improving, understanding, customising, supporting and marketing of its services. Such services would include communications about Whatsapp Services and the Facebook Family of Companies.
- j. Allow commercial messaging on Whatsapp.
- k. Receive information and share information with Facebook Family of Companies.
- l. Facebook and other Companies in the Facebook Family may also use information from Whatsapp to improve user experiences such as product suggestions, relevant offers and advertisements.
- m. Facebook could use the Whatsapp messages of users in order to assist Whatsapp in operating its services and also for providing the services which would include commercial marketing of Facebook products and other advertising.
- n. The new Privacy Policy also takes a worldwide, non-exclusive, royalty-free, sub-licensable, and transferable license to use, reproduce, distribute, create derivative works of, display, and perform the information (including the content) of the user including uploads, messages etc. which are sent, stored or received through Whatsapp.

- o. Whatsapp can retain popular photos and videos shared by Whatsapp users on their server for a long period of time.
 - p. Even if a person deletes the Whatsapp application from his/her mobile device, the past information can still be retained for an undefined period, unless the user consciously deletes the entire account itself.
 - q. The user is giving Whatsapp the right to transfer the data and information to the United States of America and Whatsapp can collect, use, process, share information in the US and all other countries where it has facilities regardless of where the user is located.
15. The above Privacy Policy is in stark contrast to the Privacy Policy existing from 7th July 2012. In its first revised modification on 25th August 2016, Respondents No. 2 to 4 have introduced this Policy which severely compromises the rights of its users and makes the Privacy rights of users completely vulnerable.
16. India has the largest number of users of Whatsapp messaging service [being approx. 70 million, or 7 crores active Indian users] and hence this Hon'ble Court ought to take cognizance of the proposed changes in the Privacy Policy of Whatsapp messaging service. Such a messaging service requires to be regulated under Indian Law by the Government of India in order to ensure that the rights of citizens are not compromised and sensitive data, private data, personal data including that of minors between the ages of 13-18 are protected.
17. Hence, the present Writ Petition.

BRIEF BACKGROUND OF WHATSAPP, FACEBOOK AND OTHER INTERNET BASED SERVICES

18. With the advancement of technology, the traditional modes of communication, including post, telephone etc., have been completely replaced by the Internet. The digital era, with the advent of the Internet, has seen a large number of services starting with e-mails and websites and now expanding into various other services provided through internet and mobile platforms, such as:-
- a. Messaging services, e.g. Whatsapp, Hike, WeChat, BBM etc.
 - b. Internet telephony, e.g. Line, Viber etc.
 - c. Video Calling services, e.g. Skype, Facetime, IMO etc.
 - d. Social Networking websites, e.g. Facebook, Orkut etc.
 - e. Taxi/Cab services, e.g. Uber, Ola, etc.
 - f. Gaming services, e.g. Pokemon Go, Clash of Clans, etc.
 - g. Entertainment services, e.g. Netflix, Hotstar etc.
 - h. Music services, e.g. Saavn, Gaana.com, etc.
 - i. Banking services – all banks have phone and internet banking facilities.
 - j. E-commerce platforms e.g. Amazon, Flipkart, Snapdeal, etc.
 - k. Other operations such as Flight / travel booking, e.g. MakeMyTrip, ClearTrip, Agoda, Booking.Com etc.
19. One of the most successful services are the messaging services which offer / provide several features like instant delivery of messages, creation of groups, seamless transmission of data (including text, images, audios, videos etc.). The usage of internet messaging services and other internet / mobile based services has grown exponentially in India. India's internet penetration has increased over the past few years and has grown from 238 million users [i.e. 23.8

crore users] in June 2015 to 306 million users [i.e. 30.6 crores users] in December 2015. By 2016, the number of internet users in India has been projected to reach 371 million users [i.e. 37.1 crore users] which would be almost 1/3rd of the entire population. Copies of material supporting the user related data is annexed as ANNEXURE A.

20. Whatsapp was launched as a service in the year 2010. Initially, the number of people using the Whatsapp Messaging service was not very high. Slowly, the internet messaging services of Whatsapp gained popularity due to its recognition and respect for the Privacy of the user. It also gained popularity owing to the fact that for using the said services, there was no requirement of having an E-mail ID and it was sufficient to have a mobile number in order to use the said services. Thus, this service became popular not just among the educated urban class but also among the semi-urban and rural classes where citizens were already using mobile phones, but did not have email address, which are normally required to use other internet based platforms and services.
21. Whatsapp has become one of the most successful messaging services in India, with a collective user base of approx. 70 million [i.e. 7 crore] users. This number is likely to rise with the availability of more affordable smart phones and the recent Digital India campaign run by the Government of India.
22. Facebook, as a social networking platform, is a much more public platform. It has a user base of approx. 142 million users [i.e. 14.2 crore users] in India and approx. 1.59 billion users worldwide. Facebook is a public platform where despite the privacy settings that are available to the user, most posts on Facebook are viewable by a larger set of audience who could be "Friends" of the user, and some Facebook posts are

viewable to "Friends of Friends", "Non Friends" and even the general public.

- 23. The manner in which Facebook operates qua the user also depends upon the manner in which the "Friends" of such user operate Facebook. Thus while Whatsapp is like a private messaging service or a very limited-access group messaging service, Facebook is more like a semi-public platform or a social networking platform.
- 24. Under these circumstances several apprehensions about the privacy policy / data sharing policies of Whatsapp had been raised even when Whatsapp was acquired by Facebook in the year 2014. Even at that time, it was the stand of Whatsapp that there would be no compromise on its privacy policy and they also introduced what was termed as "end-to-end encryption" in order to create a sense of security in the minds of the users that the information (including messages, audio / video recordings etc.) shared by them, would still remain private, and would not be accessed / stored by anyone, including Whatsapp or any third party.

Privacy Policy dated 25th August 2016:

- 25. However, all of a sudden on 25th August 2016 and on 26th August 2016, millions of users of Whatsapp services received alerts with respect to a new Privacy Policy introduced by the service. Most users, unknowingly AGREED to the terms of the new Policy without knowing the consequences of the same. Press reports appeared in the newspapers about the new Privacy Policy and how data would now be shared with the Facebook family of companies. Respondents No.2 to 4 and the Facebook family of companies appear to have completely breached / violated the trust / rights of billions of Whatsapp users worldwide, and millions of users in India, by proposing

to bring in place a revised "Privacy Policy" which, in fact, allows the entire Facebook platform to fully and/or partially access, use and exploit the information and / or data of users of Whatsapp.

26. The Petitioners tried to read and comprehend the terms and conditions now proposed by Whatsapp and realized that they would require legal assistance in understanding the width / extent / import and consequences of the norms now proposed by Whatsapp in its Privacy Policy. It is only with such assistance that the Petitioners could appreciate that though the new Privacy Policy seeks to give an impression that it is continuing to retain end-to-end encryption and other features for securing the privacy of the users, a thorough reading of the policy as a whole clearly shows that it is very cleverly worded and is also very misleading in nature as it starts with the sentence "Respect for your privacy is coded into our DNA", while it severely compromises with the security, safety and privacy of the data and information belonging to / shared by the users. In fact this very sentence appeared years ago when Whatsapp was acquired by Facebook in 2014 and had a completely different policy than the one announced on 25th August 2016. The integrity of the Whatsapp messaging service is also severely affected by the new policy which has been introduced by the messaging service.

27. On 26th August 2016, several users including the Petitioners received a notification asking users to "Agree" to the new privacy policy. The said notification conceals more than it reveals inasmuch as none of the consequences of agreeing to the privacy policy are explained to the user considering that not all users of Whatsapp may be literate, educated and / or legally perceptive, and therefore the manner in which the consent of the user is being obtained is totally deceiving in nature.

28. The above-mentioned notification / option comes in the form of a display on the screen wherein there is a large button in green colour titled as "AGREE" and there is a miniscule sized hyperlink providing the option to read more regarding the so-called "Privacy Policy". There is no disclosure whatsoever, much less any indication as to the true consequences of the user agreeing to the so-called "Privacy Policy". In other words, the so-called "option" provided to the user to agree / disagree with the terms of the so-called "Privacy Policy" is nothing but a mere eyewash, and is in fact a blatant attempt to lure / brainwash / mislead the user into blindly accepting the unilaterally decided terms of the so called "Privacy Policy". In fact, it is the submission of the Petitioners that this so-called "Privacy Policy" is not a "Privacy Policy" at all, and is only a camouflage with the ulterior motive to intrude into the privacy of the users in an entirely illegal and impermissible manner. Some of the screenshots of the above-mentioned option / notification are annexed herewith as **ANNEXURE B (Colly.)**
29. These screen shots reveal that none of the users have in fact been apprised of the actual consequences and true import of agreeing to the new privacy policy of Whatsapp. In fact, the Petitioners has even come across several well educated users including doctors, engineers and lawyers who have innocently agreed to the terms and conditions without realizing the true impact, effect and consequences of the same.
30. The Petitioners respectfully reiterate that without prejudice to the submissions of the Petitioners and users of Whatsapp in India that this basic and essential feature of complete protection of privacy of the details and contents of all the Users of Whatsapp cannot at all be changed, it is submitted that for any bonafide exercise of obtaining consent for sharing of details / data of Users by compromising the basic and

essential feature of complete privacy – can also be achieved by laying down a methodology whereby and whereunder all those Users of Whatsapp who, upon comprehending the terms and conditions in relation to new Privacy Policy sought to be adopted by Whatsapp – extend / give their consent for that purpose [sharing of data], then it is only in relation to such Users of Whatsapp that the alteration could be made by Whatsapp, while remaining obliged to continue to extend absolute privacy to all other Users of Whatsapp. In other words, the consent should be sought only from 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. Such an approach would be an absolute imperative, having regard to the level of education, the level of comprehending the effect and extent of the proposed changes in the privacy policy and such an approach would also be in the larger interest of all the users who constitute one class, and all of them belong thereto.

31. Thus, the Petitioners submit that there is an urgent need for Respondent No.1 to step in and to protect the right of its citizens especially users who are located in India. The Respondent No.1, either with the assistance of Respondent No.5 or any other appropriate authority, deserve to look into this issue concerning millions of citizens of the country and the users of the messaging service before such a Privacy Policy is made applicable to Indian users.
32. Such a policy could also have severe consequences and pose a threat to the security framework also inasmuch as such a messaging service is capable of being used as a tool for anti-national activities.

33. The messaging service which can be used by any user above the age of 13 years also severely affects the rights of minors including school children in India. In fact, in the earlier policy, in order to use the messaging service with more stringent privacy conditions, the service was limited to users above the age of 16 years. This has now been changed and reduced to the age of 13 years. This is severely affecting the rights of the innocent children including minors who are incapable of giving the licences and consents as are envisaged in the new privacy policy. This is without prejudice to the submission that such licences and consents obtained in this manner are completely violative and contrary to law.
34. The privacy policies of Whatsapp, dated 7.7.2012 and 25.8.2016, are annexed herewith as ANNEXURES 'C' and 'D'. The differences between the earlier privacy policy dated 7.7.2012 and the present policy dated 25.8.2016 are tabulated in the chart which is annexed herewith as ANNEXURE 'E'.
35. While being in the process of trying to understand the meaning, extent / consequences of the revised Privacy Policy, the Petitioners also realized that people have already started expressing their serious concern on the bonafide / permissibility of any such proposed alteration by Whatsapp.
36. There are several comments / articles / blogs on the internet which have commented upon the new privacy policy of Whatsapp and threats which can be perceived due to the operation of the said policy. Articles which have appeared in several leading publications including leading technology blogs are attached herewith as ANNEXURE 'F' (Colly). In some of these articles, it has also been reported that the relevant authorities from the office of the Information Commissioner's Office (ICO) in United Kingdom have already commenced investigation / probe into the changes made

against the Privacy Policy of Whatsapp, and whether the users are being informed of the actual consequences of such changes in the policies. It also appears that concerns have been raised even by the US Federal Trade Commission about the Privacy Policies of Facebook and also when Whatsapp was acquired by Facebook. The positions taken by Whatsapp as explained on its own blogs at different dates exhibits the complete contradiction in the conduct of Whatsapp, firstly in attracting Users to its platform and then in changing the Privacy policy to the detriment of its users. Printouts from the official whatsapp blog are annexed and are marked as ANNEXURE 'G' (colly).

37. It is further submitted that the entities such as Respondents No.2 to 4, which are providing internet messaging services, besides being obliged to be regulated by the authorities in India, including Respondent No.5, are also bound by the provisions of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011. A copy of the said Rules of 2011 is attached herewith as ANNEXURE 'H'.
38. The Petitioners being affected both as users and for all other users forming one class, are filing the present writ petition in public interest on behalf of themselves and millions of users who are citizens of India who use the Whatsapp messaging service and other internet messaging services. The present Writ Petition is being filed, inter alia, on the following grounds:-

GROUND:-

- A. Because any slackness, delay, lackadaisical attitude on the part of Respondents No.1 and 5 in perceiving / appreciating the colossal threat of violation of fundamental rights of the Petitioners by Respondents No.2 to 4 by proposed changes in

the Privacy Policy would then actually result into irreversible damage to those Fundamental Rights of the Petitioners. Respondents No.1 and 5 are obliged under the constitutional as well as statutory scheme to immediately initiate all such steps and take all such actions, as required to be taken by them under law, as expeditiously as possible, thereby ensuring that there is no damage caused to the fundamental rights of all users of Whatsapp who are also citizens of India and are guaranteed enjoyment and protection of their fundamental rights under Part III of the Constitution of India.

- B. Because the Petitioners, like millions of other citizens of India, use the internet messaging services provided by Whatsapp to share his personal, private and confidential information in the form of text messages, audio / video recordings or otherwise, with his friends / family / contacts who are also using the services of Whatsapp. The Petitioners shares the said personal, private and confidential information on the assurance that such information belonging to the Petitioners shall not be used / accessed / exploited / compromised by Whatsapp in any manner whatsoever, and in fact it would be impermissible to do so.
- C. Because an internet based messaging service provider – only provides a medium to operate that service. The details and data which travel on the medium provided by the internet messaging service provider – do not belong to the said service provider, but belong to the users of this internet based messaging service, constituting a class in itself. The details and data of users of an internet message service do not belong to the service provider and, therefore, any capital / monetary valuation of the details and data of users would also never belong to / can get owned by the service provider. Unlike any electricity producing company which has to necessarily involve in producing electricity for delivery to its

consumers for consumption, an internet message service provider – except for providing a medium to its users, does not create / manufacture anything on its own. It only provides a medium for transmission of details / data / messages etc. It therefore does not get entitled to claim any right of any kind whatsoever with the details and data of the / belonging to users of any internet based messaging service and which should always remain under the ownership and belonging of the users themselves and users as a class.

D. Because the internet application known as "Whatsapp" had commenced its operations sometime in the year 2010. It had a declared Privacy Policy and it is on that basis that the users / subscribers had started getting on to use of this application and had started putting their personal details / data on this internet based messaging service / application. The privacy policy of Whatsapp from the very beginning has been of total / complete safety against any kind of sharing and it is only on that basis that more and more users / subscribers got linked with this application. There was some modification in 2012, however, the privacy policy of Whatsapp had remained in continuation from 2010 till very recent of August 2016. In other words, complete security and protection of privacy of the details and data belonging / relating to all the users of Whatsapp – has remained an extremely significant, essential and basic feature of this internet based messaging service. There is sufficient material to support the fact that Whatsapp as a messaging service attracted Users to its platform by virtue of assuring complete maintenance of Privacy.

E. Because on 26th August 2016, the Petitioners, to his surprise, realized that Respondent No. 2 has sought to suddenly change its Privacy Policy proposing to make drastic changes and severely compromises with the rights of the users of Whatsapp service. It has sought to alter / change the most

valuable, basic and essential feature of this internet based messaging service, by unilaterally threatening to take away the protection to privacy of details and data of its Users and sharing the same with Facebook and all its group companies including for the purpose of commercial advertising and marketing. As explained hereinafter, a façade is being created as if a consent is being taken from the Users before the alteration / change of the essential and basic feature of this service – is carried out. This façade collapses on its own weight in as much as this basic and essential feature of non-sharing of data / details of Users, in any manner whatsoever, cannot at all be changed. Further, the manner in which 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 whereupon, Whatsapp is pretending to obtain consent of the Users.

- F. Because without prejudice to the submissions of the Petitioners and users of Whatsapp in India that this basic and essential feature of complete protection of privacy of the details and contents of all the Users of Whatsapp cannot at all be changed, it is submitted that for any bonafide exercise of obtaining consent for sharing of details / data of Users by compromising the basic and essential feature of complete privacy – can also be achieved by laying down a methodology whereby and whereunder all those Users of Whatsapp who, upon comprehending the terms and conditions in relation to new Privacy Policy sought to be adopted by Whatsapp – extend / give their consent for that purpose [sharing of data], then it is only in relation to such Users of Whatsapp that the alteration could be made by Whatsapp, while remaining obliged to continue to extend absolute privacy to all other Users of Whatsapp. In other words, the consent should be

sought only from 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. Such an approach would be an absolute imperative, having regard to the level of education, the level of comprehending the effect and extent of the proposed changes in the privacy policy and such an approach would also be in the larger interest of all the users who constitute one class, and all of them belong thereto.

- G. Because this Hon'ble Court, being the sentinel on the qui vive for the private, personal and public rights of millions of citizens of this Country who are using / consuming the services of Respondents No.2 to 4 and other internet messaging services, would not permit any compromise and / or unlawful, illegal and unconstitutional exploitation of the private and confidential information shared by the users / consumers on these internet messaging services like Whatsapp through its new privacy policy.
- H. Because there is an immediate need and necessity for setting up a legal framework to regulate the privacy policies of such internet messaging services as well as those provided by Respondents No.2 to 4 – in order to ensure complete protection and in order to maintain the sanctity of the private and confidential information shared by the users / consumers of the Country on these internet messaging services.
- I. Because in the absence of any guidelines / regulations governing the policies of Respondents No. 2 to 4 and other similar internet messaging services in so far as they relate to use of private / confidential information of users / consumers, there is a clear and immediate threat not only to the privacy

7-

and personal rights of the users / consumers but also to the safety and security of the nation.

- J. Because the change in Privacy Policy of Respondents no. 2 to 4 and the Policies of other messaging services amounts to a direct invasion and compromise with the privacy of the users / consumers and amounts to violation of the rights of millions of users / consumers of the services of Whatsapp and other similar internet based messaging services.
- K. Because as per the impugned Privacy Policy the Messaging service is seeking to obtain a presumptive worldwide, non-exclusive licence to all the works created by the Users and transmitted through the service and the Respondents seek to usurp the rights to exploit the said works including creating of derivative works for the purpose of the service. Such licensing is contrary to the applicable law in India especially when it involves minors below the age of 18 who are incapable of granting such licences.
- L. Because this Hon'ble Court would not permit internet messaging services, such as those of Respondents No.2 to 4, to unilaterally amend the terms of their privacy policies in an entirely clandestine manner so as to mislead millions of users / consumers into agreeing to the amended terms, without making full disclosure of the consequences of such amendments which are bound to tremendously increase the vulnerability of the privacy and personal rights of the users / consumers.
- M. Because any compromise with the privacy and sanctity of the private and confidential information of the millions of users / consumers of internet messaging services such as Whatsapp shall be in direct violation of not only the private, personal and public rights of the citizens of the Country, but also the statutory scheme envisaged under the Information Technology

Act, 2000. In this regard, the attention of this Hon'ble Court is invited to the provisions of Section 72 of the Information Technology Act, 2000, which is reproduced as under:-

"72. Penalty for breach of confidentiality and privacy. -

Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both."

- N. Because it would be entirely impermissible and illegal for the internet messaging services as those provided by Respondents No. 2 to 4 to not follow the binding provisions of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, (hereinafter referred to as the "2011 Rules") notified by the Central Government on 11.04.2011 u/s 87(2)(ob) read with Section 43A of the Information Technology Act, 2000.

- O. Because the terms "consent" and "disclosure" in the 2011 Rules would deserve to be interpreted / defined so as to ensure that the entities providing internet messaging services such as Respondents No. 2 to 4 are obliged to make full and true disclosure of the effect and consequences of their so-called "Privacy Policies" and only after making such full and true disclosure, the entities would be permitted to operate / provide their services after obtaining an educated and well-informed consent of the users / consumers.

- P. Because internet messaging platforms such as the mobile application of Respondent No. 4 are nothing but telecom services/platform provided for the use of the general public.

The value of such a service/application/platform is defined only by the number of users, content generated by the users, purposes for which the application is put to use by the users etc. In other words, it is the users and the usage of the application/service which defines the value and worth of the said service/application/platform. As such, it is the users who are the majority stakeholders in the application. The application would not exist / would be of no value at all, in the absence of the users and the content generated by the users. The application/service/platform is only a minority stakeholder and only performs the service of enabling the users to generate/share content or communicate through the said application/service/platform. It is therefore abundantly clear that any unilateral change in any term, condition or policy with respect to the usage of said application, without the informed consent of the majority stakeholders i.e. the users, would be entirely impermissible.

- Q. Because the change in the Privacy Policy by Whatsapp comes in the form of a display on the screen wherein there is a large button in green colour titled as "AGREE" and there is a miniscule sized hyperlink providing the option to read more regarding the so-called "Privacy Policy" and there is no disclosure whatsoever, much less any indication as to the true consequences of the user agreeing to the so-called "Privacy Policy".
- R. Because the so-called "option" as provided to the user to agree / disagree with the terms of the so-called new "Privacy Policy" is nothing but a mere eyewash and is in fact a blatant attempt to lure / brainwash / mislead the user into blindly accepting the unilaterally decided terms of the so called "Privacy Policy".

- S. Because the users have acted on the representation of the Whatsapp and shared private information on it based on its representation dated February 19, 2014 on Whatsapp Blog that nothing would change in the policy of Whatsapp and that information shared by the users would remain private.
- T. Because the change of the policy by Whatsapp on 25th August 2016 is detrimental to the interests of the users since the information deemed to be private by its users would now be used by Whatsapp, facebook & their family companies for their purposes including for commercial exploitation, etc..
- U. Because Whatsapp has misrepresented to its users as it had built a user base in the Country based on its commitment not to collect user data for advertising revenue and that acting in reliance on WhatsApp representations, internet users provided detailed personal information to the company.
- V. Because the change of policy by Whatsapp is a violation of the fundamental rights and in breach of the rights of privacy that an individual's private information is protected from public scrutiny and no prior notice has been given to the individual regarding this unilateral change in policy and the same is thus violative of Article 21 of the Constitution of India.
- W. Because the acquisition by Facebook by Whatsapp means that that Facebook has acquired the addresses and telephone numbers of million of users worldwide enabling Facebook to build complete profiles on users against the consent of Whatsapp users and which act the Whatsapp Users did not consent to.
- X. Because the change of policy by Whatsapp is violative of the representation made initially by Whatsapp to its users which was of added levels of privacy that the brand provided and this

breach of privacy tantamounts to an act of coercion for the current users of Whatsapp.

- Y. Because there is breach of trust by Whatsapp towards its users who have been using Whatsapp since its inception in as much as although Whatsapp in its representation in February 2014 (after entering into a partnership with Facebook) stated in its Whatsapp Blog that nothing would change, whereas it has now radically and unilaterally altered its policy without consultation with the users that the phone number, profile name & photos, online status and status message, last seen status, and receipts of the users may be available to anyone who uses the Services of Whatsapp, further users with whom communication is done may store or re-share information (including phone number or messages) with others who are on and off the Services of Whatsapp and Third Parties Services that may receive information about Whatsapp Users may share.
- Z. Because this unilateral change of policy misrepresented to the consumers and users has adverse repercussions in the field of communications for the public and Whatsapp practices shall unfavourably effect billions of consumers.
- AA. Because there is settled jurisprudence that company may not alter the privacy settings of its users without aptly informing its users about the same. The manner in which Whatsapp has changed its policy and has sent the information about the same to its users, cannot be said to be in the realm of fair practice.
- BB. Because the change of policy by Whatsapp is an act or practice that is deceptive inasmuch it involves a representation, omission, or practice that is likely to mislead the consumer acting reasonably under the available circumstances, which is to the consumer's detriment.

- CC. Because the act of change of policy by Whatsapp is an act that is likely to mislead the public.
- DD. Because the information that Whatsapp has announced in its changed policy is important to its Users/ consumers and the Consumers/ Users would have had the freedom and option to chose another product if they had anticipated that Whatsapp would change its policy.
- EE. Because Whatsapp omitted to present relevant information that should have been presented to the Consumer/User as this information would have been material and which Whatsapp knew that an ordinary consumer would need in order to evaluate the usage of the Whatsapp product or service and thus the act of omitting to provide this information in its original policy was fraudulent.
- FF. Because whatsapp's delineation and representation of its original policy of privacy and anonymity was material to users in their decision to install and use WhatsApp and thus WhatsApp's failure to adequately disclose that this commitment to privacy was subject to reversal is unconscionable.
- GG. Because by failing to make special provisions to protect user data in the event of an acquisition and by the change of policy, WhatsApp has unreasonably created an obstacle to the free exercise of consumer decision making which is violative of the rights enshrined under Article 14 and 19 of the Constitution of India.
- HH. Because Whatsapp users could not reasonably have anticipated that by actively selecting a pro-privacy messaging service on the basis of a 'no change policy' of Whatsapp, they would subject their data to Facebook's data collection

practices and the said practice by Whatsapp is unfair, arbitrary and illegal against the well settled jurisprudence principles.

II. Because by virtue of change in this policy, this injury is not avoidable by consumers themselves and unreasonably constraints consumers to completely delete the Whatsapp or desist the use of services to stop Whatsapp from collecting their private data.

JJ. Because by virtue of the Change in Policy by Whatsapp, users/ consumers are thus forced to choose between abandoning their privacy interest and stopping the use of Whatsapp services and this is violative of the freedom available to consumers and an unfair practice.

KK. Because this policy change is not supported by any evidence that it outweighs benefits to consumers or to competition.

LL. Because the impugned privacy policy does not provide the user adequate measures as required by law.

MM. Because the change of policy by Whatsapp is hit by the principle of estoppel in as much as it has acted in violation of its earlier representation dated February 19, 2014, wherein Whatsapp in its blog (Whatsapp Blog) represented that nothing would change for its users and that WhatsApp will remain autonomous and operate independently whereas in the new Whatsapp policy in the new Whatsapp Terms Of Service dated 25th August 2016 it is stated as under that Whatsapp would share the information provided by the User to help us operate, provide, improve, understand, customize, support, and market it's Services.

39. The Petitioners reserves his rights to add such other grounds and also makes submissions regarding illegality and unconstitutional nature of the policy.

80

40. This Hon'ble Court has the jurisdiction to try and entertain the present petition. The Petitioners permanently reside in Delhi. Several million Whatsapp users also reside in Delhi whose rights are severely affected. Respondent No.1 which is the concerned Ministry and Respondent No.5 the Regulator are located in Delhi. Respondent Nos. 2 to 4 actively conduct their businesses in Delhi as they offer Whatsapp and Facebook services for persons located in Delhi. Hence the cause of action has arisen within the territorial jurisdiction of this Hon'ble Court. The Petitioners have not approached any other Hon'ble Court for the reliefs sought for in the present Writ Petition.

PRAYER

In the light of the facts and circumstances stated, and submissions made hereinabove, it is most respectfully prayed that this Hon'ble Court may be pleased to:-

- (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

83

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

T. Singhdev & Prabhas Bajaj
Advocates on behalf of the Petitioners
E-9, Lower Ground Floor,
Nizamuddin West,
New Delhi- 110013
Ph:011-46010609 & 9999012345

New Delhi
Date : August, 2016.

T.C

84

IN THE HIGH COURT OF DELHI AT NEW DELHI
[UNDER EXTRAORDINARY WRIT JURISDICTION]
WRIT PETITION NO. 7663 OF 2016

IN THE MATTER OF:

Karmanya Singh Sareen and anotherPetitioners


Versus

Union of India and othersRespondents

SHORT AFFIDAVIT ON BEHALF OF RESPONDENT NO. 2
- WHATSAPP INC.

I, Mark Kahn, aged about 46 years, Power of Attorney holder of Respondent No. 2 ("Answering Respondent" or "WhatsApp"), having office at 650 Castro Street, Suite 120-219, Mountain View, California 940041, USA, do hereby solemnly affirm and state as under:

1. I am Power of Attorney holder for the Answering Respondent and competent and authorized to swear and depose the present short Affidavit on behalf of the Answering Respondent pursuant to direction by this Hon'ble Court in Order dated 14 September 2016. I state that I have read the present Petition and understood the contents of the same.
2. At the outset, the Petition lacks merit and is legally untenable. The Answering Respondent denies the averments, allegations,



or submissions made in the Petition as if the same has been traversed in *seriatim* and nothing stated therein may be deemed to have been admitted by the Answering Respondent unless specifically admitted hereinafter.

3. The Answering Respondent reserves its right to file a detailed Counter-Affidavit and any other additional affidavits in reply to the Petition, if and when necessary.

4. WhatsApp is engaged in providing a mobile messaging service, which allows users to exchange messages. WhatsApp is a conduit/gateway that enables exchange of information between different users.

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. WhatsApp's Frequently Asked Questions page ("FAQ") available on its website at

87

<https://www.whatsapp.com/fac/en/general/28030011> states:

"If you are an existing user, you can choose not to share your account information with Facebook to improve your Facebook ads and products experiences. Facebook and the Facebook family of companies will still receive and use this information for other purposes, such as improving infrastructure and delivery systems, understanding how our services or theirs are used, securing systems, and fighting spam, abuse, or infringement activities." A copy of the relevant FAQ page is annexed hereto and marked as Annexure A-1.

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. (Refer pages 64 and 65 of the Petition)



- (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. (Refer page 65 of the Petition)
- (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

89

oppressive regimes. Not even us. End-to-end encryption helps make communication via WhatsApp private – sort of like a face-to-face conversation.” A copy of the blog dated 5, April 2016 available on WhatsApp's website is annexed hereto and marked as Annexure A-2.

(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."

A copy of the relevant FAQ page on encryption is annexed hereto and marked as Annexure A-4.

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. (Refer page 68 of the Petition)

D. CONTRACTS WITH MINORS:

(xiii) The New Terms of Service state that a user must be at least 13 years old to use WhatsApp services (or such greater age required in the user's country for the user to be authorised to use WhatsApp services without parental approval). In addition to being of the minimum age required to use WhatsApp services under applicable law, if a user is not old enough to have authority to agree to the New Terms of Service in his/her country, his/her parent or guardian must agree to WhatsApp's New Terms on his/her behalf. (Refer page 57 of the Petition)

1

E. LICENSE TO THE CONTENT BY THE USERS

(xiv) The New Terms of Service provide that in order to operate and provide WhatsApp's services, the user grants WhatsApp a worldwide, non-exclusive, royalty-free, sublicensable, and transferable license to use, reproduce, distribute, create derivative works of, display, and perform the information (including the content) that the user uploads, submits, stores, sends, or receives on or through its services. The rights the user grants in this license are for the limited purpose of operating and providing WhatsApp's services (such as to allow WhatsApp to display the user's profile picture and status message, transmit user's messages, store user's undelivered messages on its servers for up to 30 days as WhatsApp tries to deliver them, and otherwise as described in the New Privacy Policy).

(xv) The New Terms of Service provide that WhatsApp does not claim ownership of the information that users submit for their WhatsApp account or through WhatsApp services. Users must have the necessary rights to such information that they submit for their WhatsApp accounts or through WhatsApp services and the right to grant the rights and licenses in WhatsApp's New Terms of Service. (Refer pages 58 and 59 of the Petition)

8. It is most humbly prayed that this Hon'ble Court may be pleased to take the present Affidavit on record and dismiss the

82

Petition in view of the above factual clarifications.

SOLEMNLY AFFIRMED AT Martin View ON THIS THE 19th DAY
OF September 2016

[Signature]
DEPONENT

VERIFICATION:

Verified at Martin View, CT, on this 19th day of September 2016
that the contents of the above Affidavit are true to the best of my
knowledge and based on information received and believed to be
correct. No part of the above Affidavit is false and nothing material
has been concealed therefrom.

[Signature]
DEPONENT

T. C

Note of behalf of the Petitioners.

Sl.No.	Clause in the 2016 Privacy Policy as stated in the affidavit	Conclusions/Comments
Para 5(a)	Nothing users share on WhatsApp, including user messages, photos, and account information, will be shared <u>onto</u> Facebook or any of Facebook's other family of apps <u>for others to see</u> , and nothing users post on those apps will be shared on WhatsApp <u>for others to see</u> ;	i. The information will be shared <u>wit</u> Facebook; ii. The information will be <u>viewabl</u> <u>by WhatsApp and Facebook</u> . It i only not available for "others to see"
Para 5(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.	This is contradictory and vague. It is unclear whether WhatsApp and Facebook will read them because in other places of the Policy including at Pages 64, 65 and 68, the Policy categorically says that WhatsApp can retain them indefinitely.
Para 5(c)	WhatsApp <u>still</u> does not allow third-party banner ads on WhatsApp;	After 24 th September 2016 WhatsApp policy says that ads from businesses is permissible. Please see last clause @ page 66
Para 5(d)	An existing user can choose not to have his/her WhatsApp account information shared with	There is <u>no FULL OPT OUT option</u> . User ought to have the option not to have any information shared with Facebook. The Policy gives only a

	<p>Facebook <u>to improve his or her Facebook ads and products experiences;</u></p>	<p><u>PARTIAL opt-out</u> for ads and products experiences.</p>
<p>Para 5(e)& 6</p>	<p>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.</p>	<p>This is like giving <u>NO CHOICE</u> to the User. An existing user has to either AGREE or delete WhatsApp completely. There is no option for <u>DON'T SHARE</u> with Facebook. This option ought to be given to the User.</p>
<p>Para 7</p>	<p>From A(i) to (v) the affidavit states that they don't retain messages. But (vii) states: "To improve performance and deliver media messages more efficiently, such as when many people are sharing a popular photo or video, <u>WhatsApp may retain that content on its servers for a longer period of time.</u>"</p>	<p>This means:</p> <ul style="list-style-type: none"> i. WhatsApp views the contents. ii. They determine the popularity of the same. iii. They decide to retain the same if they want indefinitely. <p>The above defeats the remaining statements made in the affidavit that the messages</p> <ul style="list-style-type: none"> i. Are not read ii. Are encrypted iii. Are not retained iv. And are deleted. <p>It is thus clear that WhatsApp is circuitously taking consent of Users by not being upright.</p>

95

Note of behalf of the Petitioners.

1. The Petitioners submit that the Respondents 2-4 ought to be directed to give:
 - 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.
2. It is, therefore, submitted that Whatsapp should comply with the suggestions in points a to d above, and Whatsapp should provide a 30 day period to the Users from the date of providing the above options.

T.C

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. NO. OF 2017

IN

S.L.P (C) NO. OF 2017

Karmanya Singh Sareen & Anr.

Applicant/Petitioner

Versus

Union of India & Ors.

Respondents

APPLICATION FOR DIRECTIONS

TO
THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUSTICES OF THE
SUPREME COURT OF INDIA.

THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHEWETH:

1. That the applicants/petitioners above named has filed the accompanying petition for Special Leave to Appeal against the impugned Judgement dated 23.09.2016 passed by the Ld. Division Bench of the Hon'ble Delhi High Court in WP (C) No. 7663/2016 whereby the Ld. Division Bench of the Hon'ble Delhi High Court partially allowed the writ petition.
2. That the facts and circumstances giving rise to the accompanying Special Leave Petition are set out therein in detail and are not repeated here for the sake of brevity. The Applicant/Petitioner craves leave of this Hon'ble Court to treat the same as an integral part of the present application as well.

3. That in the humble submission of the Petitioner, vide the impugned judgment, the Hon'ble High Court has created an artificial distinction between the rights of Users who delete the WhatsApp application before 25th September 2016 and those who continue using the application after 25th September 2016.
4. That the impugned judgment has resulted in an emergent situation where, owing to the amended Privacy Policy of WhatsApp [which has been sought to be implemented after obtaining consent of millions of Users who are citizens of India, in an entirely deceptive manner and without informing the users about the full consequences of the amended Policy], the rights of millions of citizens have stood severely compromised.
5. That if the interim relief is not granted by this Hon'ble Court, the private and confidential data and information of millions of citizens who are users of internet messaging services such as WhatsApp – shall stand immediately compromised and exposed to potential misuse, thereby causing irreversible damage to the rights of millions of citizens. The State authorities in other countries / jurisdictions – have already acted proactively and ensured the protection of the personal and private data and information of millions of citizens by issuing directions for preventing the implementation of the modified privacy policy of WhatsApp.

6. That the Petitioners have a good prima facie case on merits and the balance of convenience also lies in the favor of the Petitioners.
7. That gross injustice and irreparable loss is likely to be caused to the Petitioner if the interim relief, as prayed for, is not granted by this Hon'ble Court.

PRAYER

In the facts and circumstances above mentioned the petitioner/applicant most respectfully prays that this Hon'ble Court may be graciously pleased to:-

- (a) Issue a direction to Respondents No.2 to 4 to ensure that the amended Privacy Policy dated 25.8.2016 of Respondent No.2 is not given effect to, during the pendency of the present Special Leave Petition and the WhatsApp service shall not be discontinued / made unavailable in any manner whatsoever by Respondents No.2 to 4;
- (b) Issue a direction to Respondents No.2 to 4 restraining them from sharing the information of its users with the Facebook family of companies or any other entity, in terms of its amended Privacy Policy dated 25.8.2016, during the pendency of the present Special Leave Petition;

- (c) Issue a direction to Respondents No.1 and 5, to issue immediate instructions / directions to Respondents No.2 to 4 to ensure that the amended Privacy Policy dated 25.8.2016 of Respondent No.2 is not given effect to and restraining them from sharing the information of their users with the Facebook family of companies or any other entity, in terms of their amended Privacy Policy dated 25.8.2016, during the pendency of the present Special Leave Petition;
- (d) Issue a direction to Respondents No. 1 and 5, to issue immediate instructions / directions to Respondents No. 2 to 4 to ensure that an unambiguous and clear option is given to the Users for not permitting the sharing of their information with Facebook – during the pendency of the present Special Leave Petition; and/or
- (e) Pass such other further orders, as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

New Delhi
Dated : 17.12.2017

Filed by

(Gaurav Sharma)
Advocate for the Petitioners