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A COMPARISON OF LAWS AND JURISPRUDENCE ON 'OBSCENITY' IN INDIA, THE US AND THE UK

*Aarushi Mehta

ABSTRACT

Every society abides by a certain code of morals. This is in order to protect the collective interests of everyone living in association, and also to guard one's own integrity. Morals also play a role in preserving culture. Weakening of one's moral compass dissuades one from following the law, and subsequently leads to the condoning of not only indecent acts, but also crimes. This disrupts the harmony of society and leads to an atmosphere of discomfort and lack of safety. Anything lacking in discipline or a sense of core values is thought to be immoral. Obscenity can be taken to be a form of immorality. Obscenity, in its wide ambit, may include any kind of lewd expressions, graphic or explicit descriptions, derogatory portrayal, vulgar depiction, or content capable of inciting moral repugnance. According to Black's Law Dictionary, "obscenity means character or quality of being obscene, and conduct tending to corrupt the public merely by its indecency or lewdness."[1] According to Webster's New International Dictionary, "the word 'obscene' means disgusting to the senses, usually because of some filthy grotesque or unnatural quality, grossly repugnant to the generally accepted notions of what is appropriate."[2] Both in language and in law, obscenity has been defined loosely. Its meaning is largely affected by the prevalent morality of the time. Although not properly defined, there are various laws in our country which regulate obscene published content in various media of expression – film, literature, art and critique. However, when it comes to the act of interpretation, a hard look into India's preceding judgements on the matter shows us a picture of a dynamic and evolving concept of obscenity. The essence and scope of the term have been explained and interpreted differently by different Indian Judges, by laying reliance on jurisprudence and various landmark case laws from the heavily influential United States of America as well as the United Kingdom.

INTRODUCTION

* SVKM NMIMS Kirit P. Mehta School of Law

[1] *Obscenity,* Black's Law Dictionary (10th ed. 2014)
[2] *Obscenity,* Webster's New International Dictionary (3rd ed. 1961)

The concept of obscenity in the historical context related more to sacrilegious, profane, and immoral acts, than with the sexual connotation is carries today. The very first instance of action taken against obscene behaviour can be dated to as early as the 4th century, where the Roman Catholic Church would ban religiously non-conforming works. A body called the Sacred Congregation of Roman Inquisition, equipped with the power to suppress immoral and heretical books and writings, was formed in 1542 by Pope Paul II. Such works were also censured in England and other protestant countries, where seditious content was restricted and regulated.

The modern concept of obscenity began to take shape with the invention and advent of the printing press, which enabled, with its increasing use, vast and easy publication of sexually explicit material. Books and prints with enticing contents became commonly available by the 17th century, throughout Europe, and publishers received a harsh response from church authorities and governments and church authorities, in the form of arrest and prosecution.

The word 'obscene', although vague in definition, owing to its significance nevertheless finds a place in some form or another in the criminal laws of most nations. The reason why obscenity attracts criminal punishment is because the concept itself inherently involves some form of mental intent. The fundamental purpose of criminal law is not only to protect the rights of an individual, but also to preserve and safeguard public morality and well-being of the State. Obscenity is a classified offence in every continent in the world. However, the strictness of law enforcement and quantum of punishment differs. Liberal countries like Japan have relatively less stringent laws on the matter, whereas conservative countries such as Iran and Pakistan and even Africa have quite extreme forms of punishment for violation of such laws. Until the mid-nineteenth century, sexually explicit content was not statutorily prohibited. The federal Comstock Law of 1873, adopted in the United States, was one of the first laws to criminalize certain acts and publications which fit the criteria of 'obscene' or 'lewd'. The term was incorporated into the Indian judicial system by the British.

RESEARCH PROBLEM

Indian Courts have, by way of their judgements and cited reasoning, indicated that the concept of obscenity changes as time passes. Therefore, what may have once been considered obscene at a point in time, may not be thought of as so at a later period. The acceptable and legally permissible level of obscenity in cinema, art, photography, and literature is still not settled in India.

As Indian society changes, it demands different standards of adjudication, and along with changing morals of Western nations is a subsequent widening of tolerance and acceptance in our country as well. As people become more liberal in thought, more accepting in nature, and more demanding of freedom, so does the validity of certain notions change, that would have previously been shunned or considered taboo. Although the laws have remained constant over a significant period of time, the application of these laws have largely depended on changing perception, societal conditions, contextual background of each case, as well as the tools of interpretation applied in order to deliver justice and also to set an example to be followed. This does not imply that the content under scrutiny has changed to become increasingly or decreasingly obscene. It simply means that the manner of viewing or consuming and perceiving this content has changed.

It can be understood that, being heavily culturally influenced by the Western Nations with increasing globalization, and lacking jurisprudence of their own, most Indian cases have been decided by conforming to one school of thought or another, whose essence has been laid down in landmark cases of the UK and US, which form the subject matter of this research paper. In this paper, the author attempts to analyse the various differing and disagreeing ways in which the meaning of obscenity has been construed, look into the laws governing the same, and lay out a conclusive explanation of the term as it is interpreted presently. The author will critically examine the most significant and impactful international cases, which is essential to gain perspective on the subject, and the primary focus of the paper will be on identifying, analysing and resolving the conflict between these cases.

OBJECTIVES OF RESEARCH

The researcher aims to achieve the following objectives through this paper:

1) To analyse the difference in characterization of the concept of obscenity in the laws and jurisprudence of various countries.
2) To examine the change in meaning and scope of the term "obscenity" with the passage of time and delivery of numerous judgements.
3) To understand the various factors which led to the acceptance and rejection of different tests of obscenity laid down in landmark cases.
4) To identify the various tools of interpretation utilised by judges in coming to a verdict.
5) To analyse the conflicts which came about between the cases dealt with, and the manner they were finally resolved.

RESEARCH QUESTIONS

1) What are the existing laws established in USA, UK and India, which penalize misdemeanour falling under the charge of obscenity?
2) Which are the most pertinent cases on the subject matter of obscenity, which lay down its essential ingredients, rules for classification, and punishment in case of disobedience?
3) What are the rules of interpretation and manners of construction utilized in these cases, to come to different outcomes and different modes of delivery of justice?
4) Were the judgements given out correctly or incorrectly, and whether justice was delivered in each case?
5) How is the conflict between these cases resolved and what is the legal scenario as it stands today?

STATEMENT OF HYPOTHESIS

In this research paper, the author hypothesizes that the wider the time frame is between the delivery of any two judgements on the subject of obscenity, the more will interpretation of the concept of obscenity vary.

1. LAWS AND ENACTMENTS GOVERNING OFFENSES RELATED TO OBSCENITY

Position in UK: Edmund Curll, a book publisher, was punished for releasing an explicit edition of a mildly pornographic work, a novel titled Venus in the Cloister. This was the first known instance of someone to be convicted on a charge of obscenity in England, and the incident dates back to the 1720s. His sentence was relatively meagre, and was dismissed with a fine and one hour in a pillory. This was due to the fact there were no specific laws on the subject matter existing at the time. Thereafter, obscenity was recognized under the common law as indictable misconduct.

After significant passage of time, subsequently, The Obscene Publications Act 1959 came into force, which currently criminalises the publication of obscene articles in the UK.

Section 1 of the Act lays down definitions of the terms "article", "publish" and 'obscene'.

- Article is taken to mean anything which contains or embodies any matter to be read, looked at, or listened to, such as books, sound records, pictures and film.
- Publishing includes making available for consumption in the following ways: sale, distribution, hiring, lending, circulation, display, projection and transmission, be it physical or electronic. A publication could also be a one-on-one internet conversation between two people discussing their sadist, paedophilic and incestuous sexual fantasies, as held in the case of R v Gavin Smith.[3]
- Any article would be held as obscene if it had a tendency to corrupt or deprave the minds of those likely to have gone through its contents. The meaning of "deprave" was explained in the case of Penguin Books Ltd.[4], which described it as making something perverted or immoral, and "corrupt" would mean rotten and eroded of morality by destroying the purity of the thing in question. This definition of obscenity was also reflected in the judgement of Regina v. Hicklin[5] in 1868.

In case an article is held to be obscene, Section 4 of the act provides for the defence of "public good." This defence would be applicable if the article had any sort of political,

[3] [2012] EWCA Crim 398
[4] [1961] Crim LR 176
[5] [1868] LR 3 QB 360

scientific or cultural or value, or contributed to the interests of art, theatre, literature and learning. This defence could also be availed by people who had no knowledge of the obscenity of the contents of the article, and had no sufficient way or reason of knowing so.

Position in USA: The early 19th century saw the beginning of prohibition, restriction and banning of sale and distribution of obscene materials in the majority of American states via state laws. A timeline of events which lead to the current legal position on the matter of obscenity in the USA is as follows:

- 1873: The first federal law the subject was enacted, predominantly due to the consistent efforts of the founder and leader of the New York Society for the Suppression of Vice, Anthony Comstock, and the statute in force was named after him as the Comstock Act. It penalized the act of transferring obscene material through mail and post. This material also included birth control information and devices for abortion. However, there was no clear and definite scope or meaning of obscenity given, and the Courts were asked to determine the same on a case by case basis.
- 1879: The lower State courts in USA had been using the Hicklin test since the time it was first adopted and implemented in Britain. However, in this year, the test was solidified into American jurisprudence and adopted at a national level, when the prominent federal judge Samuel Blatchford upheld the conviction of D. M. Bennett using the Hicklin standard.
- 1896: The Supreme Court, in Rosen v. United States[6], adopted the Hicklin test as the appropriate test of obscenity.
- 1933: The Hicklin test ceased to be the accepted standard of measurement of obscenity at a federal level when Judge John Woolsey in United States v. One Book Called Ulysses[7] held that the book was not obscene, and rejected the application of Hicklin test. He instead stated and ruled that, at the time of assessing obscenity, the court must look at the work in its entirety, and not pick passages to be interpreted out of context. Further, the effect and impact of the work must be tested on an average reader, not the most susceptible person, and doing so must apply the standard of a contemporary community.

[6] 161 U.S. 29 (1896),
[7] 72 F.2d 705 (2d Cir. 1933)

- 1957: The Apex Court of USA, while delivering their verdict in Roth v. United States[8], acknowledged the invalidity of the Hicklin, and also laid down the new Roth test of obscenity, which added a requirement of appeal to prurient interests while examining material in search of obscenity.
- 1964: Justice Potter Stewart utilized the Roth test in Jacobellis v. Ohio[9], and found that the content in question contained no social importance. He also pointed out that the community standard must apply at a national level, not as per local standards.
- 1966: A new Brennan test was laid down by the court bench in Memoirs v. Massachusetts[10], which combined the elements of prurient interest and lack of social value with an element of patent offensiveness due to sexual description or representation.
- 1973: The current applicable test of obscenity in America, the Miller test was laid down by the Apex Court in Miller v. California[11], which stated in clear words that obscenity is not protected under the First Amendment, while mere erotic content is. Chief Justice Warren Burger defined the test as applicable to an average reader, being patently offensive in nature, and lacking serious scientific, literary, artistic or political value.

Position in India: The first major Indian case on obscenity law was Ranjit Udeshi v. State of Maharashtra[12], and the judgement was not more than 50 years ago, in 1964. Until then, India did not have much of its own obscenity jurisprudence. The judges were conservative in their approach, and upheld the practice of testing the content in question by the standards of weak minds which are open to immoral influence, and this thinking fell in line with the Hicklin test of UK. The Judges in the Udeshi case upheld the constitutional validity of Section 292 of the Indian Penal Code, but also supported the government's ban on the 1928 novel Lady Chatterley's Lover by D.H. Lawrence's novel, which was, by 1960, actually in the process of being embraced and recognised in various other countries as literature, rather than an obscene publication.

However, these old standards have now been rejected, and the judges of the Indian Courts have moved to the community standards test, which gives due importance to the context and

[8] 354 U.S. 476 (1957)
[9] 378 U.S. 184 (1964)
[10] 383 U.S. 413 (1966)
[11] 413 U.S. 15 (1973)
[12] 1965 AIR 881

implications of the published material, and also views it through the liberal lens of current moral standards, as can be seen in cases such as Aveek Sarkar v. State of West Bengal[13], Maqbool Fida Husain v. Raj Kumar Pandey[14], and also in the case of Ajay Goswami v. Union of India[15], which also upheld the validity of Section 292, but while examining its scope along with Sections 3, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, held that suppression of the freedom of expressions endangers community interests.

As of now, there are many Indian laws and provisions which deal with the subject of obscenity in India.

- The Cable Television Network Control Act, 1995 regulates display of obscene content on television.
- The Cinematograph Act, 1952 requires mandatory certification of films by the Board as per the nature of its content, which is to be published in the Official Gazette of India.
- The Indecent Representation of Women Prohibition Act, 1986, particularly deals with material that portrays women in a degrading, derogatory or disrespectful manner.
- Indian Penal Code lays down the main provisions for prosecuting people under the offence of obscenity. Section 292 defines obscene matter as being lascivious, appealing to prurient interest, or being depraving or corrupt in nature in part or as a whole, and also penalizes profit made from such content. Material includes any kind of writing such as a book or newspaper, any art in the form of drawing or painting, any other object, figure or representation, and also movie titles and pictures as laid down in Raj Kapoor v. Laxman[16]. Section 293 lays down the term and amount of penalty for the sale, circulation and distribution of such content. Section 294 punishes obscene acts done and songs sung in public places to the annoyance of others.
- The Information Technology Act, 2000 deals with creation and distribution of obscene material in electronic form.

2. REGINA V. HICKLIN

[13] (2014) 4 SCC 257
[14] 2008 CrLJ 4107 (Del)
[15] (2007) I SCC 143
[16] (1980) 2 SCC 175

(The Queen, on the Prosecution of Henry Scott v. Benjamin Hicklin and Another)

Facts of the case in brief: The appellant was a member of "The Protestant Electoral Union," and the objective of the body was to protest against blasphemous and immoral teachings which go against English values, and to find such men who would assist in exposing to the public the deep-rooted wrongdoings of the Romish Church. He would often purchase copies of a pamphlet called "The Confessional Unmasked" from the central office of the society in London. The contents of this pamphlet talked about controversial topics, like malpractices of the Church, and what kind of questions were asked to women at the time of confession. To quote the judgement, "On one side of the page were passages in the original Latin, and opposite to each passage was a free translation in English. The pamphlet also contained a preface and notes condemnatory of the tenets and principles of the writers. About half of the pamphlet related to controversial questions, but the latter half of the pamphlet was grossly obscene, as relating to impure and filthy acts, words, and ideas." He would then sell two to three thousand copies of these pamphlets, at the cost at which he would buy them for, and would sell it to anyone and everyone who would apply for it.

Issue dealt with: The recorder, being of opinion that the sale and distribution of the pamphlets at cost, without any additional charges than the purchase price paid, meant that the appellant had no intentions of making any profit, and his bonafide motive was to raise awareness of these evils among the masses. Therefore, he should not be held liable for obscenity, as the mental intent was lacking. The recorder therefore quashed the earlier order of the justices. The issue before the Bench, on appeal, was whether the recorder's judgement should be upheld, or be reversed to restore the original decision of the justices. The main issue of significance decided upon by this case was whether the ill-intent is assumed to be present in case of selling or distributing obscene material, or whether the motive of the seller and the situational context must be considered as well.

Judgement delivered and reasoning: The Bench held that the order of justices was right and must stand, and the recorder's judgement must be rejected. All four judges deciding upon this case, i.e. Chief Justice Cockburn, Justice Blackburn, Justice Mellor and Justice Lush, concurred upon the same line of reasoning to deliver the verdict. The learned magistrates had, in their findings, originally held the contents of the pamphlet to be indictable, but the recorder, in reversing their decision, stated that the intention of the appellant was to expose

the errors in the practices and confessional system of the Roman Catholic Church, and not to negatively affect the public mind, although that may have emerged as an outcome upon distribution. The judges finally explained that they differed from the recorder's views due to the fact that in case of an infraction of the law, the intention to break the law must be inferred, and the criminal character of the publication is not affected bonafide ulterior motives or honest character of the offender. An object may be legal and noble, but it must never be achieved in an illegal manner. They firmly stated that publishing an obscene pamphlet is a clear offence against the law of the land, and publication of such nature was misdemeanour, and was not justified or excused by the appellant's innocent motive or object. The appellant must be taken to have intended the natural consequences of his act.

Precedent established: Chief Justice Alexander Cockburn laid out the following test for obscenity, which later came to be known as the Hicklin Test: "I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." In supporting his formulation of the test, he explains that published work of any sort may be widely distributed, and can nevertheless fall into the hands of persons of all ages and classes, and people of pure minds can be exposed to the danger of moral contamination. The effect of such a publication is detrimental to the public good as a natural consequence, although the original intention may not be to have such an effect, and would this be mischievous in law. The maxim he quotes is that one must do no evil even if good may come from it.

The implication of the ruling, in subsequent judgements which relied upon it, was that material could be declared obscene even if isolated parts contained immoral material, rather than considering the publication as a whole. The decision further implied that the test depended on the impact of the material on the most susceptible audience, not the average reader. The Hicklin test entered American jurisprudence in the appellant case of United States v. Bennett (1879), and its place was incorporated by the Apex Court in Rosen v. United States (1896).

Rule of interpretation used: The Mischief Rule of interpretation has been utilized in the present case, which had been laid down in the landmark Heydon's case in 1584. The four things for consideration in this rule are:

1) History of common law: This was one of the first cases in the UK to deal with the concept of obscenity, and lay down a definitive test which could be utilised to deal with cases of the same nature in the future. Historical punishment for such offences was meagre, and not recorded as precedents to be followed.
2) Mischief for which law did not provide remedy: The mischief in the present case was the distribution of obscene material, although with an honest intention of holding an authority accountable for the acts it committed.
3) What is the remedy: The remedy is the Hicklin standard of measurement laid down in this case, which became an important tool of adjudication in the English and American legal system.
4) What is the reason for providing that remedy: The reason for providing this remedy was that there were no existing ways of classifying an act to be obscene in nature, and no demographic as a defined stakeholder in case of commission of obscene acts.

3. MILLER V. CALIFORNIA

Facts of the case: The Appellant, Miller had organized a mass mailing campaign to promote the sale of illustrated adult content picture books. His prosecution under the offence of obscenity was particularly based on his conduct in causing five unsolicited advertising brochures sent to unsuspecting users via mail. These brochures majorly comprised of drawings depicting men and women very explicitly engaging in various different sexual activities in groups of two or more, and the genitalia were not censored, and infact were prominently depicted. This case thus involved the application of California State's criminal obscenity statute to a state of affairs in which sexually explicit material had been shoved onto unwilling recipients by aggressive and forceful sales action.

Issue dealt with and laws applied: The issue before the bench was whether the question of obscenity in this case could be dealt with by the applicable state statute. The State Statute relied upon in the present case was Section 311 of the Californian Penal Code. The following clauses of this section are relevant: Clause a) – defines 'obscene' (appeal of matter is to prurient interests), Clause b) – defines 'matter' (books, magazines, newspapers, paintings, film, etc.), Clause c) – defines 'person' (individual, partnership, association, firm, legal

entity), Clause d) – defines 'distribution' (transfer of possession), Clause e) – defines 'knowingly' (aware of the character of the matter).

Court's decision: The Apex Court found that, despite the guidelines it had established, it is nearly impossible to formulate and enact a national obscenity standard, which would be uniformly applicable to all States of America. As a result, the Court decided and held that each state should be free to legislate on the matter of obscenity as per their culture and representative of their communities, through their own State statutes. The Apex Court also observed that the publication in question in the present case had no artistic, political, literary or scientific value, and decided that the harsh portrayal of explicit sexual conduct for personal commercial gain did not fit the newly laid down standard.

Precedent established: The new standard of measuring obscenity, which is the current one in operation in the United States, was laid down in this case, called Miller's test. As given in the judgement, it lays down that: "A work may be subject to state regulation where that work, taken as a whole,

a) appeals to the prurient interest in sex;
b) portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and,
c) taken as a whole, does not have serious literary, artistic, political, or scientific value."

This case also laid down the following crucial aspects for future consideration:

1. "Obscene material is not protected by the First Amendment. Roth v. United States, 354 U. S. 476, reaffirmed."[17]
2. "The test of "utterly without redeeming social value" articulated in Memoirs, supra, is rejected as a constitutional standard."[18]
3. "The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the state, and need not employ a "national standard.""[19]

[17] Pp. 413 U. S. 23-24.
[18] Pp. 413 U. S. 24-25.
[19] Pp. 413 U. S. 30-34.

Rule of interpretation applied: The literal rule of interpretation has been applied in this case. As per the literal rule, or the safest rule, only the words and expression of the established law is taken into consideration, and the courts do not go beyond it. It confines the meaning of a concept to the words utilized by the framers in making the laws which regulate the subject in question. It does look beyond what has been stated, and conforms to the letter of the law. In the present case, The Supreme Court laid full reliance on the Californian State Law on the matter of obscenity. There is no deviation from the set out definitions under the State Law. It also stated that State Laws are validly applicable in the present case, and a rigid national standard may not be adopted. It therefore did not look beyond the Statute, i.e., the California Penal Code.

The liberal mode of construction applied for beneficial or welfare purposes, has also been utilised. This is because, in this case, the Supreme Court, with an open mind and progressive reasoning, laid down a new test for adjudging the matter of obscenity, in which the content would now be subject to an average reader, not a sensitive one, and would be seen as a whole and in its context, not in an isolated manner, so that no person is wrongly or harshly convicted of an offence. The Supreme Court also added the criteria of the material to have no political, scientific, or cultural value to the public, therefore it safeguards the right to expression for legitimate purposes, and keeps the best interests of the public in mind.

4. RANJIT UDESHI V. STATE OF MAHARASTHRA

Facts in brief and laws in question: The appellant was one of the four owners of a book stall, and was being held liable under section 292 of the Indian Penal Code for the sale of a book by D.H. Lawrence titled Lady Chatterley's Lover. This book had previously been held obscene in the UK, and an explicit version of it was being sold at the stall. The appellant mainly claimed that he did not have any intention to corrupt the minds of the public, nor was the book in question obscene if it were read as a whole. He further argued that Section 292, which punishes a person selling any kind of obscene book or material, is vague and also restrictive of the Fundamental Right of Speech and Expression guaranteed under Article 19(1)(a) of the Indian Constitution.

Issue before the bench: The main issues to be dealt with were the constitutionality of Section 292 of the Indian Penal Code and the obscene nature of the book published.

Decision of the Court: The Supreme Court upheld the constitutionality of the assailed Section 292. They examined the text of the book using Hicklin's test, and concluded that it satisfied the requirements for obscenity. The appeal against the conviction of Ranjit Udeshi was dismissed.

Reasoning behind the judgement: With regards to the first issue, Justice Hidayatullah observed that Article 19(1)(a) of the Constitution is subject to reasonable restrictions, as mandated by Article 19(2). He opined that these restrictions must be placed on the right to expression, keeping in mind the greater interests of public decency and morality, and stated that Section 292 is therefore protected as it falls within this exception, and was therefore held to be constitutional. Coming to the second issue, the Court observed that, although obscenity possesses poor value in conveying ideas and information, there are certain exceptions where elements of supposed obscenity may be present, such as anatomical diagrams in medical science books, which would be excused. However, the text in the novel Lady Chatterley's lover was held to be lewd and depraving, and not artistic. According to Hicklin's test, the material should be viewed as a whole, but parts containing obscenity must be considered and examined separately, to see if it violates the test. The book was therefore held to be obscene under this rule of the test.

Rule of interpretation used: In this case, the Golden Rule of interpretation was used. This rule allows departure from strict literariness, to apply the natural and ordinary meaning of words. Further, whenever there is an ambiguity in defined law, or certain definitions give varying results if interpreted in different manners, the Golden Rule is used to expand the ambit of the definition, so as to assist in the delivery of justice. In the present case, it was found that Section 292 of the Indian Penal Code did not define obscenity. Therefore the Supreme Court had to come up with a distinction between what could be artistic and what would be simply obscene. They stated that the test of obscenity would have to be applied to determine whether something falls within constitutional limits. Something cannot be held to be obscene solely by the virtue of containing nudity or sexual content. Going by Hicklin's test, the Court held that the matter in question must have a tendency to "deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication

of this sort may fall." This test was also ruled to not be violative of Article 19 of the Constitution.

5. MAQBOOL FIDA HUSAIN V. RAJ KUMAR PANDEY

Facts of the case in brief: World renowned artist M.F. Husain had made a painting titled Bharat Mata or Mother India, which was sold to a private collector in 2004. This work of art depicted India visualised as a naked woman. The painting was put up for action in 2006 to raise money for earthquake victims for charity in an online auction. Upon seeing advertisements of the same, people complained, protested, and filed petitions in various parts of the country. The Supreme Court consolidated these filings and transferred the matter to be dealt with in Delhi..

Laws in question: The Delhi trial court issued summons, levying charges on M.F. Husain on the following grounds: Section 292 of the Indian Penal Code for distribution of obscene material, Section 294 for obscene acts and songs in public places, and Section 298 for hurting religious sentiment. Further allegations were made that he had also committed a crime under section 500 of the Indian Penal Code for defamation (to India's honour and dignity), and also under the Prevention of Insults to National Honour Act and the Emblems and Names (Prevention of Improper Use) Act. This was because the artwork displayed the Ashoka Chakra in an objectionable manner, which is a symbol forming a part of the Indian national emblem, and the centre of India's national flag. A revision petition against these impositions was filed by M.F. Husain.

Issue dealt with: The issue before the court was whether M.F. Husain was guilty under the respective charges and allegations levied on him.

Decision of the court and reasoning behind the judgement: The High Court held M.F. Husain not guilty and freed him of all charges. The main reason was that Justice Sanjay Kishan Kaul, in his deliberation, explained the importance of art as a tool of expression. The criteria give out by him to be considered while balancing the offence of obscenity with artistic freedom were in line with the progressive Miller test of USA. These points were as follows:

i. "contemporary mores and national standards;
ii. where art and obscenity are mixed, art must be preponderating and obscenity must be trivial;
iii. the test should be that of an ordinary person of common sense and prudence;
iv. if the material is for public interest, it may be protected under the right to free speech, but obscenity without a preponderating public interest is not protected."

The Court also ruled that so far as the question arises as to nudity or semi-nudity, the perspective of the artist, the postures of the actors or figures, the context and surrounding circumstances must also be looked into. They clearly rejected the Hicklin test of obscenity by stating that "art should not be seen in isolation without going into its onomatopoetic meaning."

The Court opined that, in order to protect the values of liberty, equality, and fraternity, a tolerance towards other's views is required. Intolerance would have a chilling effect on freedom of expression. Further, even if some people would have liked the depiction of India to be a clothed woman as they held conservative views, it would not be sufficient for the Court to hold Husain criminally liable. This was another clear sign of rejection of the Hicklin test.

The High Court ruled that just because the painting had been uploaded on a website and could be accessed by anyone, it would not mean that it was an obscene act done in a public place, therefore Section 294 was not applicable. The Court also stated that Husain lacked the mental intent to hurt religious sentiments, and was therefore not guilty under Section 298. The allegation under Section 500 for defamation was dropped, as no imputations harming the reputation of the complainant were made, and it also was held that the placement of the Ashok Chakra was not in a manner that would cause disrespect.

Rule of interpretation used: In this case, liberal mode of construction was used by the judges, for the benefit of the artist, M.F. Husain, and for the general welfare of all kinds of artwork and content creators in India. This is because, even when the matter went from the Delhi High Court to the Supreme Court on the acquittal of Husain, The Supreme Court had refused to entertain a petition to prosecute an artist simply because his work may have offended a few people in the country. This is a very progressive way of dealing, and set an

example to safeguard every citizen's right to freely express themselves, and they may be criticized, but cannot be criminally punished for the same.

6. CONFLICT AND FINDINGS

Conflict: As it can be seen from the case analyses made above, the characterization of obscenity has been very different in each of the two. The Hicklin case was the first of its kind, to provide a concrete remedy for the mischief of misconduct under obscenity, and in order to ensure proper conviction and prosecution of offenders, defined the appropriate demographic for the test to be sensitive readers and people of all ages. It also stated that an isolated pat of the work may be looked into, to deem the whole work as obscene, so that no kind of indecency is admitted. This test was accepted and absorbed into American jurisprudence, and both the UK and the US considered this to be a valid test for a very long time. However, along with change in culture, society, and technology, also came the evolution of law and precedents to adapt with the times. The newest Miller test of obscenity is the most progressive one so far – which considers the average reader as a base for measurement, looks into the body of wok entirely as a whole, and also pays due regard to context. There is therefore a clear conflict between these two judgements.

Findings: In the present day, this conflict has been resolved by rejecting all sorts of rigid and orthodox constructions of the concepts of indecency and immorality, and works with scientific, artistic, literary, or political value and significance have been looked at with an open mind and embraced as works created for the greater good of the public. This also mandates protection of freedom of expression of the creators, if their work is done in a lawful manner and by abiding all the guidelines laid down, whether they be Central Laws as in India, a uniform statute accompanied by precedents as in the UK, or Federal and State Laws as in the USA. There have also been cases in India, which have initially adopted the Hicklin Test, but have then progressed and slowly moved on to accept the Miller Test as the appropriate standard. Two of such cases have been looked at in detail, to understand the effect of the changing moral compass of the Indian masses and also the more liberal outlook of the Judges with the passage of time and change in social circumstances. The first case in India to contribute to precedents for obscenity, the Ranjeet Udeshi case, had utilized the

Hicklin test, whereas the more recent M. F. Husain case correctly applies the Miller test to deliver justice and ensure welfare.

7. CONCLUSION AND SUGGESTIONS

It can be inferred from this research paper that a vast number of factors affect the decision making and deliberation procedure, when it comes to the matter of a sensitive subject such as obscenity. Some of the main affecting factors are the established laws and provisions, the need and urgency of a solution depending on the facts of the case, the kind of tools of interpretation utilised in order to understand the true intention of the legislators and the essence of the enactment, as well as the reasoning given by the judges in conveying their verdict.

The Western nations have had their own struggles of reconciliation and adjudication when it comes to the topic of obscenity. It can be seen in the UK that, the dynamic change of societal mind-set over a span of two centuries was accompanied by an equally big change in the meaning of obscenity, from it being blasphemy, sacrilege, moral tarnation, and disobedience towards the ruling power, to now meaning to be vulgar, sexually enticing, age inappropriate, or unnecessary indecency carrying no value for society. Judges in the US struggled with two major issues- one being the distinction of obscenity from eroticism, so as to also make this division in terms of protection under the First Amendment, and second being the applicability of state laws, i.e. whether they should be adopted and applied, or whether a uniform code must be enforced at a federal level. These issues have been solved though a lineage of increasingly progressive and welfare oriented judgements. In both regions, the conceptualization is not free from flaws, but is becoming more and more appropriate to fit the needs of the prevalent time.

It can be seen that Indian society, following the footsteps of the Western world, has in a way achieved the feat of maintaining its cultural values, but also safeguarding artistic freedom. Suppression of thought and ideas in order to fit restrictive boxes of orthodox thinking only proves to be detrimental in the bigger picture. On the flip side, it is equally important to protect the innocent and to preserve the ethical values and principles that are so important to the people of a nation like India. This is done by allowing upholding and utilizing restrictive

laws, but only such restrictions which are made reasonably and for justifiable cause. This serves the purpose of convicting perpetrators, censoring corruptive material, and also embracing works which contain some kind of value and help slowly expose its viewers, readers and consumers to a new perspective and a different outlook.

After analysing all case laws and provisions in detail, the researcher would like to make the following suggestions and recommendations:

1) The most crucial requirement in India is for an inclusive and non-restrictive definition of obscenity, which not only enlists the different categories of offences under the subject, but also comprehensively explains the meaning and ambit of the word "obscenity", so that the guilty can be rightly held liable, the best interests of the society are protected, the representative values of the country's citizens are reflected, but also freedom of expression of the artists is protected so that they are not harassed or penalised solely as a result aggravated criticism received from a few offended people.
2) Considering the vast differences in the socio-cultural background of different countries, it would be very difficult an impractical to come up with a common standard for all on the subject of obscenity. However, if India wishes to harmonize any conflict with foreign system of regulation on the matter, it must refer to the governing system of those countries which not only share a similar jurisprudence as India, but also have the quotient of diversity and secularism, as cultural and religious factors have an overbearing effect on perception of media and material when scrutinized.
3) It must also be remembered that, just as there are progressive judgements being made for the benefit and welfare of the citizens of the country, and sometimes restrictive judgements are also made for the protection of the vulnerable, the Judges must take care to not bring in any sort of subjectivity, bias, or prejudice, especially while setting an example in how to deal with the matter of obscenity when a case of the similar nature as being dealt with arises. Judges must consider the general social and political conditions prevalent, and must also give due regard to the context and factual matrix of the case, in light of the circumstances at the time. Therefore, it is a very delicate task to maintain a balance between protection, progression and prosecution, and the Judges must be made more aware of the same.