
OBSCENITY AND MEDIA

Rahul Singh, Assistant Professor, Innovative Institute of Law, Greater Noida

ABSTRACT

The word 'obscene' has been derived from the French term 'obscenite' and Latin term 'obscenus' originated during the late sixteenth century meaning ill-omened or abominable. The word 'obscene' or 'obscenity' has been nowhere defined in the Indian Penal Code but set out the parameters the activities or commission of acts which will amount to obscenity and the Court follows the Commodity Standard Test in determining whether a particular object, picture, pamphlets contain any obscene material content. The test of obscenity has been laid down by several countries depending on the moral principles, decency codes and social structure of that particular country.

This paper tries to highlight the relation between obscenity and technologically advanced media or should we call it obscenity v. modernity. In this technological advanced world where every little information comes handy does technology or media play a role in promoting obscenity because technology has brought the world closer and made very access one click away. Obscenity is a social problem is affects the society at large especially women and children are worst hit by the growth and exposure to obscenity. It is a mind pollution that paralyzes the mind-set of children who are most affected by the obscenity exposed through advertisements or road side hoardings. Since term obscenity is a subjective term and not defined under the penal code thus, providing a breathing space and lacunae for the media to publish or host content in the name of uplifting or promoting modern lifestyle and elevation from social conservative outlook. In this technological era it becomes very much essential to set out the yardstick demarcating the line of obscenity because indecency is a wider concept and a proper definition is very much needed in this world of glamour and light. Electronic media which includes entertainment channels and social media are to be kept under check so as to curb immoral influences on the society at large in the name of modernity.

CONCEPT OF OBSCENITY

The word 'obscene' has been derived from the French term 'obsconite' and Latin term 'obsceus' originated during the late sixteenth century meaning ill-omened or abominable which also sums up to something that is offensive to the accepted contemporary standards of decency and morality of the society in legal terms. Ironically, the term 'obscenity' is always considered in pretext of sexual conduct or something not soothing to the senses but whereas it should be considered the other way round and not given such a narrow definition and the yardstick for defining obscenity should be something that paralyzes and poisons the thought process of any person in the society. The word 'obscene' or 'obscenity' has been nowhere defined in the Indian Penal Code but set out the parameters the activities or commission of acts which will amount to obscenity and the Court follows the Commodity Standard Test in determining whether a particular object, picture, pamphlets contain any obscene material content. The test of obscenity has been laid down by several countries depending on the moral principles, decency codes and social structure of that particular country. If this what defines obscenity then the articles or reports published on rape, the most heinous crime against a woman is that not obscenity, because somewhere reading such articles is obnoxious and not soothing to our senses and at times publication of such crimes add fuel to the distorted brains. Sometimes in the name of reaching out to the public the digital world pose an immense threat to the accepted standards of society.

Once the famous painter, M.F.Hussain canvassed a painting of Goddess Saraswati nude, the artist had to face severe criticism and it outrage anger among the people who could not accept such painting as they considered the painting derogatory and the against the accepted standards of society according to some while some did not find it obscene from artistic point of view. This is what creates the confusion because views and perspective differ from people to people and from community to community and so, the definition of obscenity depends on that particular society's morals and norms.

OBSCENITY AND FREEDOM OF SPEECH AND EXPRESSION

Article 19(1)(a) of the Constitution of India lays down the provision for freedom of speech and expression which inexplicitly covers freedom of press and media as held from time to time through various judicial decisions. The rights guaranteed under Article 19 are not absolute and subjected to reasonable restrictions. Among the various other restrictions mentioned under

Article 19(2) any act which is against decency or morality is vehemently criticised and not accepted and right to freedom of speech and expression stands restricted on this ground and standards of decency or morality when not met out is an essential characteristics that constitutes obscenity. The restrictions were laid with the view to restrict publication of speeches or reports against the morals of the public, which will affect public morality and tranquillity.

In 1965 in the case of *Ranjit Udeshi vs State of Maharashtra*¹, the Supreme Court had taken into consideration the Victorian era English test principle held in *R vs Hicklin*² held that if the material was obscene and tended to subvert or corrupt the people who are likely to come across such material. There were three major drawbacks of the Hicklin were the terms “deprave or corrupt” had a wide ambit and taking these terms into prosecutions under the Hicklin test would focus on specific words or phrases that were frequently considered as obscene and considering it from the perspective of it’s affect on people who are likely to come across such material were considered as ‘deprave or corrupt’ as opined by the Court as “the most vulnerable constituency test”. The Court in *Ranjit Udeshi’s* case held that clarifying that obscenity must be tested by taking into account the work of art *as a whole* and in the context relevant. Gradually with the passage of time the other drawbacks of Hicklin test were subsequently liberalised in cases **D-G Doordarshan vs Anand Patwardhan**³, and then in *Ajay Goswami vs Union of India*⁴, the hon’ble apex Court shifted from the view of “most vulnerable constituency test” held earlier in *Ranjit Udeshi’s* case to that of the affect on an average, reasonable and strong-minded reader and in *Aveek Sarkar vs State of West Bengal*⁵, the Supreme Court it expressly abandoned observations of the Hicklin case after a half-century of struggle, replaced it with the observation held in 1957 American case of in *Roth vs US*⁶. It held that:

“The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.”

¹ AIR 1965 SC 881

² L.R. 3 Q.B. 360 (1868) Court of the Queen’s Bench

³ 1996(8) SCC 433

⁴ AIR 2007 SC 493

⁵ (2014) 4 SCC 257

⁶ 354 U.S 476:Volume 354:1957: US Supreme Court Cases

The dignity of woman is constitutionally protected and publication of any such material derogatory to a woman is prevented and prohibited by the supreme law of the land and hence protects woman and children from any such media projections which are likely to affect the thought process and mindset of a human being and always kept under constant check and if violations are made in this regard strict actions are taken and imposes statutory limitations laid down under the Indian Penal Code, 1860, the Indecent Representation of Women Act, 1986, and The Cinematograph Act, 1952.

Its current definition is based on what is commonly referred to as the Miller Test, which stems from the 1973 Supreme Court case *Miller v. California*. In order for material to be considered obscene, it must fulfil all three aspects of this test. When material is defined as obscene, it is not constitutionally protected under the First Amendment. There has been a resurgence of interest in the definition of and laws regarding obscenity since the advent of the Internet⁷. Due to our new information technology, words and images are spread faster and more widely than ever before, and although much of the information found on the information superhighway is of legitimate social value, there is a large amount of content that even the most liberal-minded would consider to be of questionable value⁸. As is clear to most Internet users, pornographic websites are abundant – and available for anyone to view. J. Robert Flores of the National Law Center for Children, states, “the pornography industry has... become among the most aggressive marketers on the Internet.... Today only a lucky few are able to avoid [pornographic material]” (Clancy, 2002, p. 50). In addition, Forrester, an American research company, had estimated that in 1998, the commercial Internet market for pornography was nearly \$1 billion, about ten percent the amount spent on e-commerce (Clancy, 2002, p. 50). Clearly, the online pornography industry is flourishing. Although some find its growth alarming, it is important to remember that pornographic material is not illegal unless it fails the Miller Test for obscenity⁹. The U.S. Supreme Court set up a test for obscenity in its 1973 decision *Miller v. California*¹⁰. The Court provided three fundamental guidelines

•“Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest”.

⁷ Twinkle Kataria, An Indian Perspective, What is Obscenity? As available on(jlsr.thelawbrigade.com/wp-content/uploads/2016/02/twinkle.pdf) accessed on 11.02.2018

⁸ *Ibid.*

⁹ 3rd Year LL.B, Law Center 2, University of Delhi

¹⁰ *Miller v. State of California* 413 US 15

•“Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”.

•“Whether the work, taken as whole, lacks serious literary, artistic, political, or scientific value.” These different guidelines are sometimes called the prurient-interest, patently offensive and serious-value prongs of the Miller test.

Section 1 of the Obscene Publications Act, 1959 of U.K is a crucial piece of law governing content of books, photographs, magazines, video tapes and computer software – defines obscenity as that which tend to deprave and corrupt persons who are likely, having any regard to all relevant circumstances, to read, to see or hear the matter contained or embodied in it.

Indian Scenario:

The Information Technology Act 2000

Section 67

Publishing of Information which is obscene electronic form: Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a terms which may extend to two years and with fine which may extend to twenty-five thousand rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to fifty thousand rupees.

Section 68:

Power of Controller to Give Directions (1) The controller may, by order, direct a Certifying Authority or any employee of such authority to take such measures or cease carrying on such activities as specified in the order if those are necessary to ensure compliance with the provisions of this Act rules or any regulations made there under. (2) Any person who fails to comply with any order under sub-section (i) shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding two lakh rupees or to both. The ingredients of an offence under this section are: a) Publication or

transmission in the electronic form. b) Lascivious material appealing to prurient interests. c) Tendency to deprave and corrupt persons. d) Likely-audience e) To read, see or hear the matter contained or embodied electronic form. The word “publish” has not been defined under the Act. However, the Supreme Court held in the case of *Bennett Coleman & Co. v. Union of India*¹¹ that publish means “dissemination and circulation”. In an electronic form, publication or transmission of information includes dissemination, storage and circulation. Information is defined under section 2 (1) (v) as “information” includes data, text, images, sound, voice, codes, computer programmes, software and data bases or microfilm or computer generated micro fiche. So, the obscene material could be in any of these forms to attract the offence of section 67. This section advocates that the ‘obscene material in electronic form’ must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the ‘obscene material in the electronic form’ is likely to fall. It is necessary to note that any offence related to obscenity in electronic form cannot be tried under section 292 of the IPC, as section 81 of the ITA states that the Act will have an overriding effect: “The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.” Therefore, as a thumb rule, offences related to ‘obscenity in electronic form’ should be tried under the provisions of section 67 only and any attempt to import provisions of section 292 of IPC would tantamount to disregard of legislative intent behind the Act and cause miscarriage of justice¹². But, in the recent judgment of *Avnish Bajaj v. State (NCT of Delhi)*¹³ both the provisions were considered together in arriving at the judgment. Also, the punishment under section 67 of the ITA is more stringent than section 292 of the IPC. Section 67 is also criticized as it is very easy for a person to escape criminal charges just by proving his lack of knowledge of publication or transmission of obscene information in the electronic form. Moreover, though publication or transmission of obscene information may be illegal but mere possession, browsing or surfing through obscene content is not an illegal activity. The issues related to publication of obscene information in electronic form has to be looked at from the perspective of ‘extra-territorial’ jurisdiction and Internet technologies, keeping in view that ‘obscenity’ is no longer a local or static

¹¹ (1972) 2 SCC 788

¹² Vakul Sharma, *Information Technology- Law and Practice*, Universal Publisher

¹³ *Avnish Bajaj v. State(NCT of Delhi)* Delhi HC Judgment dated 29.05.2008

phenomenon. It is now global and dynamic in nature and thus needs strict interpretation of statute.

Section 75:

Act to apply for offence or contravention committed outside India (1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality. (2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

The Indian Penal Code 1860

Section 292:

Sale, etc. of obscene books, etc. As per the IPC , for the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.]

Section 293 - " Sale, etc. of obscene objects to young persons - Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object, as is referred to in IPC Section 292 (definition given below), or offers or attempts so to do, shall be punished (on first conviction with imprisonment or either description for a term which may extend to three years, and which fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees)"

The Young Persons (Harmful Publication) Act, 1956

Section2: Definitions

“harmful publication” means any book, magazine, pamphlet, leaflet, newspaper, or other like publication which consists of stories told with the aid of pictures or without the aid of pictures or wholly in pictures, being stories portraying wholly or mainly incidents of repulsive or horrible nature; in such a way that the publication as a whole tends to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner whatsoever;

Section 3:

Penalty for sale, etc. of harmful publications(1) If a person(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, any harmful publication or (b) for purposes of sale, hire, distribution, public exhibition or circulation, prints, makes or produces or has in his possession any harmful publication, or (c) Advertises or makes known by any means whatsoever that any harmful publication can be procured from or through any person, he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

The Prasar Bharati (Broadcasting Corporation of India) Act, 1990

Section 2: Definitions

(c) “broadcasting” means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electromagnetic waves through space or through cables intended to be received by the general public either directly or through the medium of relay stations and all its grammatical variations and cognate expressions shall be construed accordingly;

The Protection of Human Rights Act, 1993

Section 2: Definitions

(d) “human rights” means the rights relating to life, liberty, equality and dignity of individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India;

Chapters III –VI: (Functions, Powers and Procedure of the National Human Rights Commission, State Human Rights Commissions and Human Rights Courts)

The Indecent Representation of Women (Prohibition) Act, 1986

Section 2(C) of the Act defines indecent representation “the depiction in any manner of the figure of a woman, her form or her body or any part thereof in such a way as to have effect of being indecent or derogatory to or denigrating women, is likely to deprave, corrupt or injure the public morality or morals”.

Cable Television Networks (Regulation) Act, 1995

prohibits the telecast of programs on cable television, which offend decency & morality & visits a contravention with imprisonment & fine. Sec 5 of this Act read with Rule 6 (1) (o) of the Cable Television Networks Rules, 1994 prohibits the carriage of programs that are not suitable for unrestricted public exhibition. Sec 5-A talks about, “unrestricted public exhibition.

OBSCENITY AND MEDIA

In this era of technology, world has become a global village and information can be exchanged one swipe away. Technology is often compared to a coin having both advantage as well as disadvantage and at times the effect of technology can be venomous on the society. It leads to victimization and increase in crimes. With the advent of globalization and developing media the content and information that is circulated or delivered has become much vulnerable. Obscenity and pornography are two terms often used interchangeably and due to cut throat competition amongst various branches and to get hold of viewers and readers to increase TRP's they often take the escape channel of calling it as modernity and helping in uplifting the society and bringing in transformation from following conservative stereotypes practices as the proper definition of obscenity has not been given apart from stating that the contents affect on average people as a whole who are likely to come across the content. The television channels now days mostly up with adult contents, the entertainment channels where music videos are played where a woman is half-dressed whereas to cope up with competition some contents are shown in the name of news is definitely doesn't soothe the senses. The advertisements that come up relating to contraceptives and deodorants of male which always has the catchphrase of “attracting girls” as if apart from that the deodorants has no purpose to serve and also innerwears which at times are banned because of the content displayed. The detailed description published regarding rape articles do reach all sections of the society. It is well accepted fact now in this present century media plays a very important role in shaping our lives because whether accepted or not the contents displayed has a direct connection with the actual violence that is committed. Out of

ten soaps and daily shows that are played eight project violence or crime stories which in a way sends a wrong message to the society and engaging in pre-marital sex, marital affairs, carrying out conspiracy amongst members, if this is not obscenity then what is. Obscenity does not only relate to sexual conduct but it is always clubbed with indecency, immorality and has a wide ambit and most importantly are we promoting obscenity in the name of modernity. It's high time we should give it a thought.

CASE LAW

Ranjit D. Udeshi v. The State of Maharashtra¹⁴ 176 (Criminal Appeal)

"The word as the dictionaries tells us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form."¹⁵

"The cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality."¹⁶

"Cockburn C.J. laid down the test of obscenity in these words "-----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---- it is quite certain that it would suggest to the minds of young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

¹⁴ AIR (1965) SC 881

¹⁵ Page 885 paragraph 7 of the main Judgment

¹⁶ Page 885 paragraph 8 of the main Judgment

Decision: The Court dismissed the appeal with the following assertions: (1) “Where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity must be so trivial and insignificant that it can have no effect and may be overlooked. In other words, treatment of sex in a manner offensive to public decency and, judged by our national standards, considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result.” (2) “The test to adopt in India is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treatment of sex in a manner appealing to the carnal sides of human nature, or having that tendency.” (3) “The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treatment of sex by an artist and hence there is some poetry even in the ugliness of sex. The book is probably an unfolding of the author’s philosophy of life and of the urges of the unconscious but these are unfolded in his other books. Therefore, there is no loss to society if there was a message in the book. The divagations (sic) with sex are not legitimate embroidery but they are the only attractions to the common man.”¹⁷

Bobby Art International & Others. v. Om Pal Singh Hoon & Others¹⁸

Hidayatullah, C.J. speaking for the Court, said needs to be reproduced: “We may now illustrate out meaning how even the items mentioned in the directions may figure in films subject either to their artistic merit or their social value over-weighing their offending character. The task of the censor is extremely delicate and his duties cannot be subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some with some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and forever from human thought and must give scope for talent to put them before society. The requirements of art and literature included requirements of art and literature include social life and not only in

¹⁷ Paragraph 14 of the main Judgment

¹⁸ AIR (1996) SC 1846

its ideal from and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average person would, in much the same way, as, it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things ideas having redeeming special or artistic ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral. It should be our concern, however, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censor's scissors.”¹⁹

Therefore, it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the them is handled by the producer. It must, however, be remembered that the cinematograph is a powerful medium and its appeal is different. The horrors of war as depicted in the famous etching of Goya do not horrify one so much as the same scenes rendered in colour and with sound and movement would do. We may view a documentary on the erotic tableaux from our ancient temples with equanimity of read the Kamasutra but documentary from them as a practical sexual guide would be abhorrent.²⁰

Decision: The Court reversed the decision of the Delhi High Court. It held that since the Tribunal (Censor Board) had viewed the film in “true perspective” and granted the film an ‘A’ certificate, and since Tribunal was an expert body capable of judging public reactions to the film, its decision should be followed. The Court dismissed the first respondent’s writ petition. The Court observed that a film that illustrates the consequences of a social evil necessarily must show that social evil. “We find that the (High Court) judgement does not take due notice of the theme of the film and the fact that it condemns rape and degradation of violence upon women by showing their effect upon a village child, transforming her to a cruel dacoit obsessed with wreaking vengeance upon a society that has caused her so much psychological and physical hurt, and that the scenes of nudity and rape and use of expletives, so far as the Tribunal had permitted them, were in aid of the theme and intended not to arouse prurient or lascivious thoughts but revulsions against the perpetrators and pity for the victim.”

¹⁹ Paragraph 49 of the main Judgment

²⁰ Paragraph 50 of the main Judgment

R. Basu v. National Capital Territory of Delhi and Another²¹

Mr. Arun Aggarwal, a practicing Advocate has filed a complaint before the learned Chief Metropolitan Magistrate, under Sections 292, 293 & 294 IPC, inter-alia, against Star TV, Star Movies and V Channels as many as 30 (thirty) persons have been arraigned as accused persons in the said complaint. Other persons, apart from aforesaid Star TV channels, are the persons who are in charge of and responsible for the day to day affairs of these channels or the various cable operators transmitting these channels. This is termed as probono public prosecution by the complainant in which he brought to the notice of the learned Chief Metropolitan Magistrate that on these channels obscene and vulgar TV films were shown and transmitted through various cable operators. According to the complainant, this amounted to obscenity and, therefore, accused persons committed offence under Sections 292/293/294 IPC and under Section 6 read with Section 7 of the Indecent Representation of Women (Prohibition) Act, 1986. On this complaint, learned CMM viewed these films. And the issues were framed that; Did the accused persons violate Sections 292, 293, and 294 of the Indian Penal Code (relating to obscenity), and Section 6 read with Section 7 of the Indecent Representation of Women (Prohibition) Act? With regard to other two movies it is admitted that they have no censor certificates. However, it is stated in respect of the movie "Big Bad Mama", the application for certification had been made to the CBFC. It is further stated that these movies are telecast from other countries via satellite and the broadcasters in their channels comply with various strict internal codes as also statutory codes prescribed by the Broadcasting Authority of the place of uplink. In respect of some of individual accused persons, it is also contended that they are not responsible for telecast of these movies.²² The grounds which are common to all the petitions on the basis of which it is argued that the summoning orders as well as proceedings are without jurisdiction are the following: I. The entire procedure followed before the issue of process was totally illegal in as much as:(a) Section 200 of Cr.P.C. mandatorily requires the examination of complainant before any further step is taken: AIR 1035 Allahabad 745; AIR 1942 Peshawar page 61; AIR 1949 Calcutta page 58; AIR 1950 Calcutta page 99; AIR 1956 Madras 129. (b) He ordered a police enquiry in which the major issue to be investigated should have been whether the four films had been certified under Section 5-A of the Cinematograph Act, 1952. The police never investigated this. The learned Magistrate did not apply his mind to this. Two of the four films were proved to be certified and the remaining two were not proved to be

²¹ 2007 Cr. LJ 4245

²² Paragraph 5 of the main Judgment

uncertified. II. The Indecent Representation of Women (Prohibition) Act, 1986 does not at all apply to films which are governed by Cinematograph Act as provided in Section 4 Proviso (c) of the Act. III. He acted without jurisdiction in issuing the process under Section 292 of the Indian Penal Code because he did not notice Section 5-A of the 1952 Act. IV. The police had asked the accused's explanation about the company's involvement. The accused had supplied the full explanation by their reply dated 19th December, 1998. The police report on which the learned Magistrate acted said that Rupert Murdoch is the proprietor of Star T.V. Network and Basu is his official In-charge of entire transmission for India. There is no such entity much less a proprietary entity. Star T.V. is only a short form of Satellite Television Asian Region Limited - a company registered in Hong Kong. V. Accused 7 to 30 are cable operators in India and the signals are supplied by the Hong Kong company with which accused No. 1 to 6 have nothing to do. In any event he has issued no process against accused No. 3 & 6.²³

Decision: The High Court held that for the two films without censor certificates the petitioners could not claim immunity from Section 292 IPC. For the other two films, also, the Court said that, since the petitioners had not produced CBFC certificates, they could not claim immunity from prosecution. The Court observed that the legislature had enacted the Cable Television Network (Regulation Act) to tackle the “problem” of obscenity, and a Programme Code had also been introduced. “Various statutory safeguards for regulating transmission on cable television networks in India have been provided therein. The petitioners have to abide by these guidelines and laws relating to the electronic media, keeping in mind the sentiments and social value of the Indian society, while relaying its programmes.” The Court observed that, in view of this development, a joint application was moved by the petitioners and the complainant, in which the complainant agreed not to press his complaint in view of the aforesaid statutory provisions and other provisions now in place.

Aveek Sarkar V. State of West Bengal²⁴

The Supreme Court has held in this case that the photograph of couple, in the nude, is not “obscene” within the meaning of Section 292 of the Indian Penal Code. This judgment is particularly rejects the HICKLIN TEST, the archaic 1868 rule for determining obscenity, that the Court has regularly used in its history – most notably, to uphold the ban on Lady Chatterly’s

²³ Paragraph 6 of the main Judgment

²⁴ (2014) 4 SCC 257

Lover in Ranjit Udeshi's Case.²⁵ The Court seems – at least implicitly – to be expressing its disapproval of Udeshi, almost fifty years after it was decided.²⁶ In contrast to the Hicklin Test, which was focused on individual or isolated aspects of an entire work that could be deemed obscene, as well as its impact on “vulnerable” sections of society, the Court adopts what it called the “community standards” test: “A picture of a nude/seminude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind (sic) and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of “exciting lustful thoughts” can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.”²⁷ The Hicklin test became the basis for concluding the remarks for obscenity in any format. Hickling test came from the famous case of Regina v. Hicklin in this case court said “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.” Lord CJ Cockburn in his opinion in the Hicklin case explained that the danger of prurient literature was that it “would suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of a most impure and libidinous character.”

CONCLUSION

It is said obscenity is a subjective term and it lies in the eyes of the beholder but still they should be still more careful while publishing or circulating content and make sure what reaches the public do not deprave, corrupt or injure their thought process because in the long run society is going to be victimized. Obscenity has no measuring yardstick true, but it becomes very important and crucial on our part to raise voices against the information circulated or delivered if it is felt that the content displayed fails the test of decency and morality and that we are not like blindly following the footprints western trends because at the end of the day it's affect is borne by the society at large as visual display has more affect on the minds of the society. The right to “freedom of speech and expression” is one of the most basic inalienable rights guaranteed by the Constitution of India. This right is considered as the basis of liberty. But this right is not absolute as the Constitution imposes limitation on the same under Article 19(2).

²⁵ Supra 14

²⁶ Paragraph 16, 17 and 22 of the main Judgment

²⁷ Paragraph 24 of the main Judgment

Decency and Morality can be the basis of restriction when it comes to the obscenity issue. The Obscenity is not a legal term. The concept of obscenity is not same everywhere, the concept of it varies from place to place and time to time. It is the most difficult word to define astutely and has been the biggest task before the judiciary to define the same. The Indian judiciary has neither evolved nor developed any new approach of its own towards obscenity. The judicial approach to define it on case to case basis has given an idea of this concept. The society is fast changing. The decisions must be taken keeping in mind the contemporary national standards and not that of a group of sensitive persons. If the society accepts the portrayal of sexual activities on the silver screen, the Court must not strike it down for the sake of a few sensitive persons. If it is acceptable to the society in general, the court must accept it too. It is important to see the bigger picture and the central theme of the work instead of squinting eyes at certain explicit scenes and contents only. The focus should be on the central theme of the work; the whole work should be taken into consideration rather than the isolated passages, then only one can reach to the idea embedded beneath those words, contents or pictures and the message it tries to convey.²⁸

²⁸ *Supra* 7