Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1179 OF 2010

Devidas Ramachandra Tuljapurkar ... Appellant

Versus

State of Maharashtra & Ors. ...Respondents

J U D G M E N T

Dipak Misra, J.

The Controversy

The seminal issue that spiralled in the course of hearing of this appeal centres around the question framed vide order dated 18.2.2015, for this Court thought it apposite to answer, whether the poem titled "Gandhi Mala Bhetala" ('I met Gandhi') in the magazine named the 'Bulletin' which was published, in July-August, 1994 issue, meant for private circulation amongst the members of All India Bank Association Union, could in the ultimate eventuate give rise to framing of charge under Section

292 IPC against the author, the publisher and the printer. The question framed reads thus:-

> "Regard being had to the importance of the matter, we had sought the assistance of Mr. Fali S. Nariman, learned senior counsel, to assist the Court, and he has gladly rendered. At the time of hearing, we have asked the learned senior counsel, learned Amicus Curiae, to assist the Court as regards the proposition whether in a write-up or a poem, keeping in view the concept and conception of poetic license and the liberty of perception and expression, use the name of a historically respected personality by way of allusion or symbol is permissible."

Mr. Gopal Subramanium, learned senior counsel, appearing for the appellant, in his written note of submissions, has segregated the said question into five parts, namely, (a) whether there could be a reference to a historically respected personality; (b) could that reference be by way of allusion or symbol; (c) could that allusion be resorted to in a write-up or a poem; (d) whether the conception and concept of poetic license permits adopting an allusion; and (e) whether any of the above could involve ascribing words or acts to a historically reputed personality which could appear obscene to a reader. He has urged with solemn vehemence that when the author is not represented before the Court, adjudication on an important

issue which fundamentally relates to freedom of thought and expression, would be inappropriate and a poem or a write-up is indeed a part of free speech and expression, as perceived under Article 19(1)(a) of the Constitution and that apart the expression "poetic licence" is neither a concept nor a conception because the idea of a poetic freedom is a guaranteed and an enforceable fundamental right and this Court should not detract and convert it into a permissive licence. Additionally, learned senior counsel has contended that quintessential liberty of perception and expression when placed in juxtaposition with "poetic licence", is inapposite since the expression "permissible" sounds a discordant note with "liberty of perception and expression", a sacrosanct fundamental right, integral to human dignity, thought, feeling, behaviour, expression and all jural concepts of human freedom guaranteed not only under the Constitution but even recognised under the International Covenants, for they can never be placed in the company or association of expressions such as "license" or "permissibility". Emphasising on the said facet, submitted Mr. Subramanium that the Constitution has

liberated the citizens from 'license' and 'permissibility', which are expressions of disempowerment and the entire freedom struggle was centered around the concept of empowerment. There is a suggestion in the written note of submissions to place the matter before a Bench of five Judges as enshrined under Article 145(3) of the Constitution. In spite of the said submission, learned senior counsel, we must appreciably state, has copiously dealt with the issues that have emerged from the question, in his written note of submissions.

Mr. Fali S. Nariman, learned senior counsel and amicus curiae supported the phraseology in the question with immense intellectual vigour, patience, perseverance and endeavour and submitted that the issue that this Court has thought of addressing is absolutely invulnerable and unalterable as the Constitution of India does not recognise absolute freedom and Article 19(2) of the Constitution regulates the same and Section 292 IPC being a provision which is saved by Article 19(2), the presence or absence of the author is immaterial; what is to be seen is whether the poem prima facie exhibits obscenity, especially, in the context of Mahatma

Gandhi, the "Father of the Nation", as the identity of the historically respected personality is absolutely clear and there is no scintilla of doubt in the mind of any average reader. Learned amicus curiae would submit that the question deserves to be dealt with and answered in proper perspective.

Clarification of the question framed

2. We are obligated to clarify the position. It is apt to state here the question framed by us has to be contextually understood. The question was framed in the factual matrix of the case. The proposition presented is that despite all the poetic licence and liberty of perception and expression, whether 'poem' or 'write-up' can use the name of a historically respected personality by way of an allusion or symbol in an obscene manner. "Historically respected personality" was used in the backdrop of the use of the name of Mahatma Gandhi. When the name of such a respected personality is used as an allusion or symbol, and language is revoltingly suggestive whether that is likely to come within the perceived ambit and sweep of Section 292 IPC, whether it is permissible. We shall dwell

upon this facet when we will discuss the poem in a prima facie manner, for the purpose of scrutinising the order framing charge; and we shall also deal with the submission of Mr. Subramanium, which has been assiduously put forth by him that the name of Gandhi has been used as a surrealistic voice and hence, the poet is entitled to use the language as a medium of expression in the poem. We do not intend to catalogue names of historically respected personalities as that is not an issue in this case. Here the case rests on the poem titled "I met Gandhi". As far as the words "poetic license", are concerned, it can never remotely mean a license as used or understood in the language of law. There is no authority who gives a license to a poet. These are words from the realm of literature. The poet assumes his own freedom which is allowed to him by the fundamental concept of poetry. He is free to depart from the reality; fly away from grammar; walk in glory by not following the systematic metres; coin words at his own will; use archaic words to convey thoughts or attribute meanings; hide ideas beyond myths which can be absolutely unrealistic; totally pave a path where neither rhyme nor

rhythm prevail; can put serious ideas in satires, ifferisms, notorious repartees; take aid of analogies, metaphors, similes in his own style, compare like “life with sandwiches that is consumed everyday” or “life is like peeling of an onion”, or “society is like a stew”; define ideas that can balloon into the sky never to come down; cause violence to logic at his own fancy; escape to the sphere of figurative truism; get engrossed in “universal eye for resemblance”, and one can do nothing except writing a critical appreciation in his own manner and according to his understanding. When the poet says “I saw eternity yesterday night”, no reader would understand the term ‘eternity’ in its prosaic sense. The Hamletian question has many a layer; each is free to confer a meaning; be it traditional or modern or individualistic. No one can stop a dramatist or a poet or a writer to write freely expressing his thoughts and similarly none can stop the critics to give their comments whatever its worth. One may concentrate on classical facets and one may think at a metaphysical level or concentrate on romanticism as is understood in the poems of Keats, Byron or Shelley or one may dwell on the nature and write poems like

William Wordsworth whose poems, say some, are as didactic. One may also venture to compose like Alexander Pope or Dryden or get into individual modernism like Ezra Pound, T.S. Eliot or Pablo Neruda. That is fundamentally what is meant by poetic license.

3. We may slightly delve into the area in Sanskrit literature that gave immense emphasis on aesthetics. The concept of *rasa* though mentioned in the Vedas and by Valmiki gets consummate expression in all its complexity with Bharata when he introduces it to explain aesthetic experience. "*Vibhavanubhav vyabhichari sanyogadrasnishpati*". Bharata discusses in detail the contributing factors like *vibhavas, anubhavas, vybhicharibhavas* and *sthayibhavas*. Dandin emphasises on lucidity, sweetness, richness and grandeur to basically constitute poetry and that is why it is said "*Dandinha Padlalityam*". Some critics like Vamana, stressing on soul of poetry perceive '*riti*' as "*Ritiraatma kavyasya*". Some also subscribe to the theory that '*rasa*' gets expressed through *dhvani*. There are thinkers who compare writings of T.S. Eliot, when he states poetic delineation of sentiments and feelings, to

have the potentiality of being associated with the 'element of surprise' which is essential to poetry, and there he is akin to Indian poeticians like Kuntaka who called poetry '*vakrokti*' which he explains as "*vaidagdhyabhangibhaniti*" – a mode of expression depending on the peculiar turn given to it by the skill of the poet. Some emphasise on "best words used in best order" so that poem can attain style and elevation. To put it differently, the 'poetic licence' can have individual features, deviate from norm, may form collective characteristics or it may have a linguistic freedom wider than a syntax sentence compass.

4. We have emphasised on these facets as we are disposed to think that the manner in which the learned senior counsel has suggested the meaning of 'poetic license' is not apt. Freedom of writing is not in question. That cannot be. And we say so without any fear of contradiction.

5. In course of our judgment, we shall deal with the other facets that have been so assiduously put forth by Mr. Subramanium and so indefatigably controverted by Mr. Fali S. Nariman, learned amicus curiae.

The factual score

6. As far as the suggestion given for placing the matter before a five-Judge Bench, we are of the considered view that there is no need for the same.

7. Presently, we shall state the exposition of facts. On the basis of a complaint lodged by one V.V. Anaskar, a resident of Pune, and a member of 'Patit Pawan Sangthan', with the Commissioner of Police, relating to the publication of the poem, which was published, in July-August, 1994, meant for private circulation amongst the members of All India Bank Association Union, a crime was registered as FIR No. 7/95 at P.S. Gandhi Chowk, Latur, on being transferred from Pune, for the offences punishable under Sections 153-A and 153-B read with Section 34, IPC and eventually after due investigation charge sheet was filed for the said offences along with 292, IPC against the present appellant, the publisher and the printer, respondent no.3, of the Bulletin and the author, one Vasant Dattatraya Gujar. When the matter was pending before the Chief Judicial Magistrate, Latur, all the accused persons filed an application for discharge and the learned Magistrate by order dated

4.5.2001 held that no case for the offences under Sections 153-A and 153-B was made out and accordingly discharged them of the said offences but declined to do so in respect of the offence under Section 292, IPC. On a revision being filed, the learned Additional Sessions Judge did not think it appropriate to interfere with the order passed by the trial Magistrate which constrained the accused persons to invoke jurisdiction under Section 482 of the CrPC and the High Court of Bombay, Aurangabad Bench dismissed the application. The said decision is the subject of matter of this appeal by special leave at the instance of the publisher. The author has chosen not to assail the order passed by the High Court.

Concept of obscenity

8. Apart from submitting that the orders passed by all the Courts are absolutely perverse and deserve to be lancinated, it is submitted by Mr. Subramanium, learned senior counsel that to appreciate the question framed by this Court, despite his reservation on the legal score as regards its phraseology, the meaning of the term "obscenity" has to be appositely

understood. He has referred to the Black's Law Dictionary that defines obscenity as follows:-

> *"**Obscene,** adj. (16c) - Extremely offensive under contemporary community standards of morality and decency; grossly repugnant to the generally accepted notions of what is appropriate. Under the Supreme Court's three-part test, material is legally obscene - and therefore not protected under the First Amendment - if, taken as a whole, the material (1) appeals to the prurient interest in sex, as determined by the average person applying contemporary community standards; (2) portrays sexual conduct, as specifically defined by the applicable state law, in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value. Miller v. Callifornia, 413 U.S. 15, 93 S.Ct. 2607 (1973).*
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> *If there be no abstract definition, ... should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" United States V Kennerley, 209 F. 119, 121 (S.D.N.Y.1913) (per Hand.J.)"*

9. The learned senior counsel has also referred to the decision of the Allahabad High Court in ***Kamla Kant Singh Vs. Chairman/ManagingDirector, Bennetta Colman and Company Ltd. and Ors.***[1], wherein the High Court dealt with the meaning of the word 'obscenity'. The delineation is as follows:-

[1] (1987) 2 AWC 1451

> *"15. The word obscenity has been explained in 'Jowitts' Dictionary of English Law as follows:*
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> > *"An article is deemed to be obscene, if its effect, or where the article comprises two or more distinct items, the effect of any one of its items if taken as a whole, is to tend to deprave and corrupt persons, who are likely having regard to all the relevant circumstances to read, to see or hear matters contained or embodied in it. (See R. v. Claytone and Hasley, (1963) 1 QB 163, R. v. Anderson, (1972) 1 QB 304)". Obscenity and depravity are not confined to sex. (See John Calder Publications v. Powell, (1965) 1 QB 509.)*
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> *16. …According to Black's Law Dictionary obscenity means character or quality of being obscene, conduct, tending to corrupt the public merely by its indecency or lewdness. According to Webster's New International Dictionary, 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."*

10. The High Court of Madras in ***Public Prosecutor v. A.D. Sabapathy***[2], has opined that the word "obscene" must be given its ordinary and literal meaning, that is, 'repulsive', 'filthy', 'loathsome', 'indecent' and 'lewd'. The learned senior counsel has also referred to the judgment of Supreme Court of

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[2] AIR 1958 Mad. 210

Canada in ***R. v. Beaver***[3], wherein Maclaren, J.A., has defined 'obscene' as follows:-

> "*The word 'obscene' … was originally used to describe anything disgusting, repulsive, filthy or foul. The use of the word is now said to be somewhat archaic or poetic; and it is ordinarily restricted to something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas, or being impure, indecent, or lewd.*"

11. After generally referring to the meaning of the term obscenity, learned senior counsel has emphasised on the tests adopted in various countries relating to obscenity. Mr. Subramanium has referred to various authorities of United Kingdom, United States of America, European Courts and this Court to pyramid the proposition that the tests laid down by legal system including the authorities of this Court do not suggest that that the instant poem can remotely be treated as obscene. First, we shall dwell upon the tests and standards laid by various Courts and then the binding authorities of this Court and thereafter to the concept of freedom of speech and expression on the constitutional parameters and finally delve to adjudge the facet of obscenity and address applicability of the

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[3] (1905), 9 O.L.R. 418

determined test in the context of the question and ultimately the nature of the poem and the justifiability of the order impugned.

Test evolved in United Kingdom

12. As far as United Kingdom is concerned, Mr. Subramanium has referred to ***Regina v. Hicklin***[4], the meaning given by Cockburn C.J. and drawn our attention to the Article by J.E. Hall Williams in *Obscenity in Modern English Law*[5] wherein the learned author observed that ***Hicklin*** (supra) gave a complete go by to the principle of "mens rea" which propounds a certain degree of protection to the accused. The learned author was critical on the concept of presumption as propounded in ***Hicklin*** (supra). In the said article, learned author referred to certain observations in ***R. v. Martin Secker & Warburg LD***[6]**.** In the said case, Stable J. has stated

> "The test of obscenity to be applied today is extracted from a decision of 1868; it is this: "…. Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose mind are open to such immoral influences, and

[4] LR 1868 3 QB 360
[5] 20, Law and Contemporary Problems (1955): 630-647
[6] (1954 1 WLR 11 1138

into whose hands a publication of this sort may fall." Because this test was laid down in 1868, that does not mean that you have to consider whether this book is an obscene book by the standards of nearly a century ago. Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall in this year, or last year when it was published in this country. Considering the curious change of approach from one age to another, it is not uninteresting to observe that in the course of the argument of the case in 1868 the rhetorical question was asked: "What can be more obscene than many pictures "publicly exhibited, as the Venus in the Dulwich Gallery?" There are some who think with reverence that man is fashioned in the image of God, and you know that babies are not born in this world, be they of either sex, dressed up in a frock-coat or an equivalent feminine garment.

We are not sitting here as judges of taste. We are not here to say whether we like a book of this kind. We are not here to say whether we think it would be a good thing if books like this were never written. You are here trying a criminal charge and in a criminal court you cannot find a verdict of "Guilty" against the accused unless, on the evidence that you have heard, you and each one of you are fully satisfied that the charge against the accused person has been proved.

Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. Then you say: "Well, corrupt or "deprave whom?" and again the test: those whose minds are open to such immoral influences and

> into whose hands a publication of this sort may fall. What, exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for a fourteen-year-old school girl? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public."

In the ultimate eventuate, the learned Judge concluded, thus:-

> "I do not suppose there is a decent man or woman in this court who does not whole-heartedly believe that pornography, the filthy bawdy muck that is just filth for filth's sake, ought to be stamped out and suppressed. Such books are not literature. They have got no message; they have got no inspiration; they have got no thought. They have got nothing. They are just filth and ought to be stamped out. But in our desire for a healthy society, if we drive the criminal law too far, further than it ought to go, is there not a risk that there will be a revolt, a demand for a change in the law, and that the pendulum may swing too far the other way and allow to creep in things that at the moment we can exclude and keep out?"

The aforesaid view of Stable, J. resulted in declaring the accused not guilty.

13. In England on July 29, 1959, the Obscene Publication

Act, 1959 (for short, "the 1959 Act") was enacted to amend the law relating to publication of obscene matters, provided for the protection of literature and to strengthen the law concerning pornography. Section 1(1) of the 1959 Act reads as follows:-

> "1. – (1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article 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."

14. Section 4 of the 1959 Act stipulates that a person accused of obscenity shall not be convicted if it is proved that the publication in question is justified for public good as it is in the interest of art, literature, science, etc. The said provision is as follows:-

> "4 (1) A person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern. (2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act to establish or to negative the said ground."

15. Mr. Subramanium, learned senior counsel has referred to ***R. v. Penguin Books Ltd.***[7] where the Court was dealing with the publication of the book 'Lady Chatterley's Lover' by the Penguin Books. The said case ended with "not guilty verdict" as a consequence of which the book was allowed to be openly published and was sold in England and Wales.

16. In ***R. v. Peacock***[8], a verdict, an unreported one, rendered on January 6, 2011 by Southwark Crown Court, London, submitted Mr. Subramanium, has resulted in great upsurge in the demand for a review in the obscenity laws in England and Wales. In the said case, Michael Peacock, was charged on indictment with six counts under the 1959 Act for allegedly distributing the obscene DVDs that contained videos of homosexual sadomasochism and BDSM pornography. The accused in the said case successfully pleaded not guilty. The legal experts of England and Wales started opining that the 1959 Act had become redundant.

17. Relying on the aforesaid authorities, it is submitted by Mr. Subramanium, learned senior counsel appearing for the

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[7] [1961] Crim LR 176

[8] Unreported case, See http://www.bbc.com/news/uk-16443697

appellant that Hicklin test in its original has been abandoned in United Kingdom and the approach has been more liberal regard being had to the developments in the last and the present century. It is his submission that the perception of the Victorian era or for that matter, thereafter has gone through a sea-change in the last part of 20th century and in the first part of this century and the freedom of speech and expression has been put on a high pedestal in the modern democratic republic. It is urged by him that in the digital age, the writings and the visuals do no longer shock or deprave or corrupt any member of the society as the persons are capable enough to accept what is being stated and not to be depraved or corrupted.

Prevalent Tests in the United States of America

18. Presently, we shall proceed to deal with the prevalent test in the United States of America. Learned senior counsel for the appellant has taken us to various authorities of the U.S. Supreme Court and other Courts. In ***Chaplinsky v. New***

Hampshire[9], the appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the Municipal Court of Rochester, New Hampshire for violation of Chapter 378, Section 2 of the Public Laws of New Hampshire. In course of time, the appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States as it placed an unreasonable restriction on freedom of speech, freedom of press and freedom of worship and further it was vague and indefinite. Be it noted, the challenge was made in the highest court of the United States that declared that the statutes purpose was to preserve the public peace and it did not violate the constitutional framework. The Court observed allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right to free speech is not absolute at all times and under all circumstances.

19. In ***Roth v. United States***[10], the principal question was whether the Federal Obscenity Statute violated the First Amendment of the US Constitution which guaranteed freedom

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[9] 315 U.S. 568 (1942)
[10] (1957) 354 US 476

of speech. The Court held that free speech is provided under the First Amendment gave no absolute protection for every utterance. We may profitably reproduce the observations made therein:-

> "All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion-have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States."

The Court further opined that:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

20. In ***Memoirs v. Masachusetts***[11], while explaining the term 'obscenity', the Court referred to the ***Roth*** (supra) and stated thus:-

> "3. We defined obscenity in Roth in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole

[11] 383 U.S. 413 (1966)

> appeals to prurient interest." Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

After so stating, the U.S. Supreme Court proceeded to consider whether the book in question could be stated to be truly without social importance. Thus, there was no departure from the redeeming social importance test, but it also introduced "contemporary community standards" test.

21. In ***Marvin Miller vs. State of California***[12], while rejecting the 'redeeming social value' test as laid down in ***Roth*** (supra) and followed in ***Memoirs*** (supra), the US Court established three pronged test which are as follows:-

> "15. The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage Memoirs test, supra. But now the Memoirs test has been abandoned as unworkable by its author,[13] and no Member of the Court today supports the Memoirs formulation.

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[12] 413 US 15 (1973): 93 S.Ct. 2607

[13] See the dissenting opinion of Mr. Justice Brennan in Paris Adult Theatre I v. Slaton, 413 US 49, 73, 93 S. Ct. 2628, 2642, 37 L.Ed.2d 446 (1973)

> 17. The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, quoting Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts, 383 U.S., at 419, 86 S.Ct., at 977; that concept has never commanded the adherence of more than three Justices at one time[14]. See supra, at 21. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellante courts to conduct an independent review of constitutional claims when necessary."

22. The US Supreme Court in ***Miller*** (supra) stated that the application and ascertainment of 'contemporary community standards' would be the task of the Jury as they best represent the 'contemporary community standards'. The Court observed:-

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[14] 'A quotation from Voltaire in the fly leaf of a book will not constitutionally redeem and otherwise obscene publication .....' Kois v. Wisconsin, 408 U.S., 229, 231, 92 S.Ct., 2245, 2246, 33, L.Ed. 2d 312 (1972). See Memoirs v. Massachusetts, 383 U.S., 413, 461, 86 S.Ct., 975, 999, 16 L.Ed. 2d 1 (1966) (white, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of 'social importance'. See id., at 462, 86 S. Ct. at 999

"19. Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places.[15] At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.[16]

25. Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or

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[15] Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be 'sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' See *California v. LaRue*, 409 U.S. 109, 117—118, 93 S.Ct. 390, 396—397, 34 L.Ed.2d 342 (1972).

[16] The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States*, 354 U.S., at 492 n. 30, 77 S.Ct., at 1313 n. 30, 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop v. United States* 486, 499-500.'

> is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility."

23. In ***Reno v. American Union of Civil Liberties***[17], the plaintiffs filed a suit challenging the constitutionality of provisions of Communications Decency Act, 1996 (CDA). The central issue pertained to the two statutory provisions enacted to protect minors from 'indecent' and 'patently offensive' communication on the internet. The Court declared that Section 223(a)(1) of the CDA which prohibited knowing transmission of obscene or indecent messages to any recipient under 18 years of age and Section 223(d)(1) of the said Act

[17] 521 U.S. 844 (1997)

which prohibited knowing, sending and displaying of obscene or indecent messages to any recipient under 18 years of age, to be abridging "the freedom of speech" protected by the First Amendment.

24. In ***State of Oregon v. Earl A. Henry***[18], the Oregon Supreme Court declared the offence of obscenity to be unconstitutional as it was in violation of Article I, Section 8 of the Oregon Constitution that provides for freedom for speech and expression. Article I Section 8 reads thus:-

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

25. The State Statute of Oregan i.e. ORS 167.087 that criminalized selling, exhibiting, delivery and dissemination of obscene material was struck down as being violative of Article I Section 8. The Oregon SC held thus:-

> "The indeterminacy of the crime created by ORS 167.087 does not lie in the phrase "sexual conduct" that is further defined in ORS 167.060 (10). It lies in tying the criminality of a publication to "contemporary state standards." Even in

[18] 732 P.2d 9 (1987)

> ordinary criminal law, we doubt that the legislature can make it a crime to conduct oneself in a manner that falls short of "contemporary state standards." In a law censoring speech, writing or publication, such an indeterminate test is intolerable. It means that anyone who publishers or distributes arguably "obscene" words or pictures does so at the peril of punishment for making a wrong guess about a future jury's estimate of "contemporary state standards" of prurience."

As we understand, with the passage of time tests have changed and there are different parameters to judge obscenity but the authorities clearly lay down that the freedom of speech is not absolute on all occasions or in every circumstance.

Comparables Test

26. Mr. Subramanium has pointed out that in American Jurisprudence the argument of "comparables" has gained considerable force in cases of obscenity and freedom of speech. He has referred to Joan Schleef's note on ***United States v. Various Articles of Obscene Merch***[19] wherein the learned author has shown comparables test. Explaining the said concept, the learned author projects that the gist of the

[19] Joan Schleef, Note, United States v. various Articles of Obscene Merch, 52, U. Cin. L. Rev. 1131, 1132 (1983)

comparables argument is that in determining whether materials are obscene, the trier of fact may rely on the widespread availability of comparable materials to indicate that the materials are accepted by the community and hence, not obscene under the Miller test. The learned senior counsel has also referred to an article, namely, *Judicial Erosion of Protection for Defendants in Obscenity Prosecutions? When Courts Say, Literally, Enough is Enough and When Internet Availability Does Not Mean Acceptance* by Clay Clavert[20] wherein the learned author has opined thus:-

> "Akin to the three-part test in *Miller* itself, a successful comparables argument requires three foundational elements be present with the proffered evidence: similarity or "reasonable resemblance"[21] of content; *availability* of content, and *acceptance*, to reasonable degree, of the similar, available content."

The learned author in his conclusion has summed up:-

> "The *Miller* test is more than thirty-five years old[22], but developments and changes are now taking place in courtrooms that affect its continuing viability. In particular, this article has demonstrated that the taken-as-a-whole requirement may be in some jeopardy, as at least two courts-one in 2008 and one in 2009-have allowed the prosecution to get away with only showing jurors selected portions of

[20] Journal of Sports and Entertainment Law (Vol.1, Number 1), Harvard Law School, 2010
[21] United States v. Pinkus, 579 F.2d 1174, 1175 9th Cir. 1978).
[22] Miller v. California, 413 U.S. 15 (1973)

> the works in question. The other change addressed here is driven by technology, with the Internet forcing judges to consider a new twist on the traditional comparables argument that defense attorneys sometimes use to prove contemporary community standards. Pro-prosecution rulings in this area have been handed down in both *Adams*[23] and *Burden*[24]. And while Judge Bucklew in *Little*[25] allowed Internet-based search evidence to come into court, she refused to instruct the jury that it could-not even that it must-consider it as relevant of community standards".

And again,

> "While the U.S. Supreme Court is no longer in the business of regularly hearing obscenity case as it once was, it may be time for the Court to revisit the *Miller* test and to reassess the work-as a whole requirement and to consider whether Internet based comparables arguments about contemporary community standards are viable in a digital online world the High Court never could have imagined when it adopted *Miller* back in 1973. Unit such time, lower courts will be left to wrestle with these issues, with some seeming to clearly sidestep *Miller* on the taken-as-a whole requirement in contravention of the high court's admonishment in 2002 that this was as essential rule of First Amendment jurisprudence."

Thus, the comparables test even if it is applied, the concept of contemporary comparative standards test along with other tests has not been abandoned.

The learned author in his article has referred to the

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[23] No. 08-5261, 2009 U.S. App. Lexis 16363 (4th Cir. July 24, 2009)
[24] 55 S.W. 3d 608 (Tex. Crim. App. 2001)
[25] No. 08-15964, 2010 U.S. App. Lexis 2320 (11th Cir. Feb. 2, 2010

majority view in ***Ashcroft v. Free Speech Coalition***[26] where Justice Anthony Kennedy added:-

> "Under Miller, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is *part of the narrative,* the work itself does not for this reason become obscene, even though the scene in isolation might be offensive."

Mr. Subramanium has urged that the comparables test has also been accepted in a different context by some High Courts in India. In this regard, he has been inspired by the ratiocination in ***Kavita Phumbhra v. Commissioner of Customs (Port), Calcutta***[27] by the Calcutta High Court wherein certain publications were imported by the petitioner which were meant for sale only to adults. The High Court took note of the change in the society as well as similar articles and works readily being available in newspapers and magazines and stated thus:-

> "As mentioned earlier, moral standards vary from community and from person to person within one society itself. The morals of the present day in our society also do not represent a uniform pattern. The variations and the variables inside a certain society are also crucial considerations while judging whether an object comes within the

[26] 535 U.S. 234, 248 (2002)
[27] (2012) 1 Cal LJ 157

> mischief of obscenity. We cannot shut our eyes to the changes that are taking place in our society as we cannot be blind to the kind of advertisements, newspaper articles, pictures and photographs which are regularly being published and most certainly with a target viewers and readership in mind. Any closer observer will definitely reckon the vast changes that have taken place around us, particularly in the field of audio and visual representations which are dinned into our ears or which arrest our ocular tastes. A certain shift in the moral and sexual standard is very easily discernable over the years and we may take judicial note of it. The appellant has produced many articles of high circulating newspapers and reputed magazines which are freely available in the market. Judged by that, these items which were produced in courts, do not appear to be more sexually explicit than many of those which are permitted to be published in leading journals and magazines."

Having dealt with the 'comparables test' as is understood from the aforesaid decisions, we are to repeat that the contemporary community standards test is still in vogue with certain addition.

Test laid down by the European Courts

27. Now we shall proceed to deal with the perception of obscenity by the European Courts. In ***Vereinigung Bildender***

Kinstler v. Austria[28], the European Court of Human Rights was concerned with the issue pertaining to withdrawal of a painting entitled "Apocalypse" which had been produced for the auction by the Austrian painter Otto Muhl. The painting, measuring 450 cm by 360 cm showed a collage of various public figures such as Mother Teresa, the former head of the Austrian Freedom Party (FPO) Mr. Jorg Haider, in sexual positions. While the naked bodies of these figures were painted, the heads and faces were depicted using blown-up photos taken from newspapers. The eyes of some of the persons portrayed were hidden under black bars. Among these persons was Mr. Meischberger, a former general secretary of the FPO until 1995, who at the time of the events was a member of the National Assembly. The Austrian Court permanently barred the display of painting on the ground that the painting debased the plaintiff and his political activities. The Association of Artists appealed to the European Court and the said Court thought it appropriate to come to the conclusion that the prohibition by the Austrian Court of the painting was not acceptable. It observed that though the painting in its

[28] Application No. 68354/2001, 25th January 2007

original state was somewhat outrageous but it was clear that the photographs were caricature and the painting was satirical. We have been commended, in this regard, to certain passages by Mr. Subramanium. They read as follows:-

> "33. However, it must be emphasised that the painting used only photos of the heads of the persons concerned, their eyes being hidden under black bars and their bodies being painted in an unrealistic and exaggerated manner. It was common ground in the understanding of the domestic courts at all levels that the painting obviously did not aim to reflect or even to suggest reality; the Government, in its submissions, has not alleged otherwise. The Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.
>
> xxx xxx xxx
>
> 35. Furthermore, the Court would stress that besides Mr Meischberger, the painting showed a series of 33 persons, some of whom were very well known to the Austrian public, who were all presented in the way described above. Besides Jörg Haider and the painter himself, Mother Teresa and the Austrian cardinal Hermann Groer were pictured next to Mr Meischberger. The painting further showed the Austrian bishop Kurt

> Krenn, the Austrian author Peter Turrini and the director of the Vienna Burgtheater, Claus Peymann. Mr Meischberger, who at the time of the events was an ordinary Member of Parliament, was certainly one of the less well known amongst all the people appearing on the painting and nowadays, having retired from politics, is hardly remembered by the public at all."

28. Mr. Nariman, learned amicus curiae in this regard has submitted that the European Court of Human Rights' view is divided inasmuch as four of the Judges in a Court of seven have expressed the view, which is as follows:-

> "26. The Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression. Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of

> Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities"; their scope will depend on his situation and the means he uses (see Muller and Others v. Switzerland, judgment of 24 May 1988)."

29. Learned amicus curiae has also referred to one of the dissenting opinions of Judge Loucaides, which is to the following effect:-

> "The majority found that the images portrayed in the "painting" in question were "artistic and satirical in nature". This assessment had a decisive effect on the judgment. The majority saw the "painting" as a form of criticism by the artist of Mr Meischberger, a politician and one of the persons depicted in it. It was he who brought the proceedings which led to the impugned measure.
>
> The nature, meaning and effect of any image or images in a painting cannot be judged on the basis of what the painter purported to convey. What counts is the effect of the visible image on the observer. Furthermore, the fact that an image has been produced by an artist does not always make the end result "artistic". Likewise, an image will not become "satirical" if the observer does not comprehend or detect any message in the form of a meaningful attack or criticism relating to a particular problem or a person's conduct.
>
> In my view, the picture in question cannot, by any stretch of the imagination, be called satirical or artistic. It showed a number of unrelated personalities (some political, some religious) in a vulgar and grotesque presentation and context of senseless, disgusting images of erect and

ejaculating penises and of naked figures adopting repulsive sexual poses, some even involving violence, with coloured and disproportionately large genitals or breasts. The figures included religious personalities such as the Austrian Cardinal Hermann Groer and Mother Teresa, the latter portrayed with protruding bare breasts praying between two men—one of whom was the Cardinal—with erect penises ejaculating on her! Mr Meischberger was shown gripping the ejaculating penis of Mr Haider while at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa!

The reader will of course need to look at the "painting" in question in order to be able to form a view of its nature and effect. It is my firm belief that the images depicted in this product of what is, to say the least, a strange imagination, convey no message; the "painting" is just a senseless, disgusting combination of lewd images whose only effect is to debase, insult and ridicule each and every person portrayed. Personally, I was unable to find any criticism or satire in this "painting". Why were Mother Teresa and Cardinal Hermann Groer ridiculed? Why were the personalities depicted naked with erect and ejaculating penises? To find that situation comparable with satire or artistic expression is beyond my comprehension. And when we speak about art I do not think that we can include each and every act of artistic expression regardless of its nature and effect. In the same way that we exclude insults from freedom of speech, so we must exclude from the legitimate expression of artists insulting pictures that undermine the reputation or dignity of others, especially if they are devoid of any meaningful message and contain nothing more than senseless, repugnant and disgusting images, as in the present case.

> As was rightly observed in the judgment (paragraph 26) "… Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, 'duties and responsibilities'; their scope will depend on his situation and the means he uses …"
>
> Nobody can rely on the fact that he is an artist or that a work is a painting in order to escape liability for insulting others. Like the domestic courts, I find that the "painting" in question undermined the reputation and dignity of Mr Meischberger in a manner for which there can be no legitimate justification and therefore the national authorities were entitled to consider that the impugned measure was necessary in a democratic society for the protection of the reputation or rights of others.

The learned amicus curiae has also commended us to the joint dissenting opinion of Judges Spielmann and Jebens. What is important to be noted is as follows:-

> "9. In our opinion, it was not the abstract or indeterminate concept of human dignity—a concept which can in itself be dangerous since it may be used as justification for hastily placing unacceptable limitations on fundamental rights[29]

[29] See D. Feldman, "Human Dignity as a legal value. Part I", (1999) *Public Law* pp.682–702 at p.697: "The notion of dignity can easily become a screen behind which paternalism or moralism are elevated above freedom in legal decision-making." As another author has pointed out, " *[l]a notion de dignité, indéfinie, est à l'évidence manipulable à l'extrême. Grande peut-être alors la tentation d'un ordre moral évoquée par G. Lebreton (Chr. D. [1996, J., 177]). La confusion établie entre moralité publique et dignité s'y prête particulièrement à l'heure où le politiquement correct traverse l'Atlantique* ", J.-P. Théron, "Dignité et libertés. Propos sur une jurisprudence contestable", in *Pouvoir et liberté. Etudes offertes à Jacques Mourgeon* , (Brussels, Bruylant, 1998), p.305,

— but the concrete concept of "fundamental personal dignity of others"[30] which was central to the debate in the present case, seeing that a photograph of Mr Meischberger was used in a pictorial montage which he felt to be profoundly humiliating and degrading.

10. It should be noted in this connection that in an order of June 3, 1987,[31] in a case about cartoons, the German Federal Constitutional Court relied on the concept of human dignity as expressly enshrined in the Basic Law (Article1(1)),[32] in dismissing a complaint by a

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concerning two decisions of October 27, 1995 by the French Conseil d'Etat, sitting as a full court, Commune de Morsang-sur-Orge and Ville d'Aix-en-Provence, AJDA, 1995, 942, RFDA, 1995, 1204, submissions by Mr Frydman, and Rev. trim. dr. h., 1996, 657, submissions by Mr Frydman, note by Nathalie Deffains. See also P. Martens, "Encore la dignité humaine: Réflexions d'un juge sur la promotion par les juges d'une norme suspecte", in *Les droits de l'homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert* , (Brussels, Bruylant, 2000), pp.561 *et seq* . On the role played by morals in the debate on dignity, see J. Fierens, "La dignité humaine comme concept juridique", (2002) *Journal des Tribunaux* , pp.577 *et seq* ., in particular p.581. See also, from the perspective of the "paradigm of humanity", B. Edelman, "La dignité de la personne humaine, un concept nouveau", D., (1997), chron. p.185, and reprinted in the book by the same author, *La personne en danger* , (Paris, PUF, 1999), pp.505 et seq.

[30] On the distinction between protection of the dignity of others and protection of one's own fundamental dignity, see B. Maurer, *Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme* , (Paris, La documentation française, 1999), in particular pp.450 *et seq* . and pp.464 *et seq* .

[31] BVerfGE 75, 369 ; EuGRZ, 1988, 270 . See also the article by G. Nolte, "Falwell vs. Strauβ: Die rechtlichen Grenzen politischer Satire in den USA und der Bundesrepublik", EuGRZ, (1988), pp.253–59.

[32] See the German Federal Constitutional Court's decision of June 3, 1987 (BVerfGE 75, 369 ; EuGRZ, 1988, 270), discussed below: " *Die umstrittenen Karikaturen sind das geformte Ergebnis einer freien schöpferischen Gestaltung, in welcher der Beschwerdeführer seine Eindrücke, Erfahrungen und Erlebnisse zu unmittelbarer Anschauung bringt. Sie genügen damit den Anforderungen, die das Bundesverfassungsgericht als wesentlich für eine künstlerische Betätigung ansieht* (BVerfGE 67, 213 [226] = EuGRZ 1984, 474 [477] *unter Berufung auf* BVerfGE 30, 173 [189]). *Daβ mit ihnen gleichzeitig eine bestimmte Meinung zum Ausdruck gebracht wird, nimmt ihnen nicht die Eigenschaft als Kunstwerk. Kunst und Meinungsäußerung schließen sich nicht aus; eine Meinung kann — wie es bei der sogenannten engagierten Kunst üblich ist — durchaus in der Form künstlerischer Betätigung kundgegeben werden (Scholz, a.a.O., Rdnr. 13). Maßgebliches Grundrecht bleibt in diesem Fall Art. 5 Abs. 3 Satz 1 GG, weil es sich um die spezielle Norm handelt* (BVerfGE 30, 173 [200])." It should be noted that in German Constitutional Law, freedom of the arts (Kunstfreiheit) is specifically protected by Art.5(3) of the Basic Law. "The exercise of this freedom is not limited, as is freedom of expression, by the provisions of general laws or the right to reputation, but it must be considered in conjunction with other constitutional rights, notably the right to the free development of personality and human dignity", E.

publisher. The cartoon portrayed a well-known politician as a pig copulating with another pig dressed in judicial robes. The court did not accept the publisher's argument relating to artistic freedom as protected by Article 5(3) of the Basic Law.[33] It is important to note that the court accepted that the cartoons could be described as a work of art; it was not appropriate to perform a quality control (*Niveaukontrolle*) and thus to differentiate between "superior" and "inferior" or "good" and "bad" art.[34] However, it dismissed the complaint, finding that the cartoons were intended to deprive the politician concerned of his dignity by portraying him as engaging in bestial sexual conduct. Where there was a conflict with human dignity, artistic freedom (*Kunstfreiheit*) must always be subordinate to personality rights.[35]

11. One commentator, Eric Barendt, rightly approved this decision, stating:

"Political satire should not be protected when it amounts only to insulting speech directed against an individual. If, say, a magazine feature

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Barendt, *Freedom of Speech* , (2nd edn, Oxford, Oxford University Press, 2005), p.229, citing the order of the German Constitutional Court of July 17, 1984 in the "street-theatre" case, [BVerfGE 67, 213 ; EuGRZ, 1984, 474] in which the court held that a moving street theatre, in which Franz-Josef Strauss, then a candidate for the Chancellorship, was portrayed in the same float as prominent Nazis, should be protected under freedom of the arts in the absence of evidence that there was a very serious injury to personality rights.

[33] Article 5(3) of the German Basic Law provides: "Art and science, research and teaching are free. ..." As already noted, freedom of the arts (Kunstfreiheit) is specifically protected by Art.5(3) of the Basic Law and the exercise of this freedom is not limited as freedom of expression is. It must be considered in conjunction with other constitutional rights, such as the right to human dignity. See E. Barendt, *Freedom of Speech* , (2nd edn, Oxford, Oxford University Press, 2005), p.229.

[34] " *Die Grundanforderungen künstlicher Tä;tigkeit festzulegen, ist daher durch Art. 5 Abs. 3 Satz 1 GG nicht verboten sondern verfassungsrechtlich gefordert. Erlaubt und notwendig ist allerdings nur die Unterscheidung zwischen Kunst und Nichtkunst; eine Niveaukontrolle, also eine Differenzierung zwischen 'höherer' und 'niederer', 'guter' und 'schlechter' (und deshalb nicht oder weniger schutzwürdiger) Kunst, liefe demgegenüber auf eine verfassungsrechtlich unstatthafte Inhaltskontrolle hinaus (Scholz in: Maunz/Dürig, GG, Art. 5 Abs. 3 Rdnr. 39). "*

[35] E. Barendt, *Freedom of Speech,* 2nd ed., Oxford, Oxford University Press, 2005, p.230.

> attributes words to a celebrity, or uses a computerized image to portray her naked, it should make no difference that the feature was intended as a parody of an interview she had given. It should be regarded as a verbal assault on the individual's right to dignity, rather than a contribution to political or artistic debate protected under the free speech (or freedom of the arts) clauses of the Constitution."[36]
>
> 12. In a word, a person's human dignity must be respected, regardless of whether the person is a well-known figure or not.
>
> 13. Returning to the case before us, we therefore consider that the reasons that led the court to find a violation (see paragraph 4 above) are not relevant. Such considerations must be subordinate to respect for human dignity."

30. Mr. Nariman, scanning the judgment has submitted that artistic freedom outweighs personal interest and cannot and does not trump nor outweigh observance of laws for the prevention of crime or laws for the protection of health or morals; that the limits of artistic freedom are exceeded when the image of a person (renowned or otherwise) is substantially

[36] *Op. cit.*, p.230. The author adds in a footnote the following: "For an Italian case on the point, see the decision of the Corte di Cassazione, Penal Section, of 20 Oct. 1998, reported in (1999) Il Diritto dell'Informazione e dell'Informatica 369, rejecting appeal of author of a newspaper article which included a cartoon implying that a woman senator fellated Berlusconi. Satire is not protected if does not respect personality rights."

deformed by wholly imaginary elements – without it being evident from the work (in the present case from the poem) that it was aimed at satire or some other form of exaggeration; that the freedom of artistic creation cannot be claimed where the work in question constitutes a debasement and debunking of a particular individual's public standing; that the European law recognises that whosoever exercises freedom of expression undertakes in addition duties and responsibilities and their scope depends on the situation and the means used; that it is only where personal interests of an individual are said to be affected that the artistic and satirical nature of the portrayal of the person in the work would outweigh mere personal interest; that the nature, meaning and effect of any image (in say in a painting or a poem) cannot and must not be judged on the basis of what the artist (or author) purports to convey; what counts is the effect of the image on the observer; the fact that an image has been produced by an artist does not always

make the end-result artistic; likewise an image does not become a satirical if the observer does not comprehend or detect any message in the work in question; that where the images depicted in the work product convey no message but "only a disgusting combination of lewd acts and words whose only effect is to debase, insult and ridicule the person portrayed" – this is neither criticism nor satire; and that the artistic freedom is not unlimited and where rights and reputation of others are involved; where there is conflict with human dignity artistic freedom must always be subordinated to personality rights. Thus, the submission of Mr. Nariman is that freedom of speech and expression is not absolute and any work of art cannot derail the prohibition in law.

31. Mr. Subramanium has referred to the judgment in ***Handyside v. United Kingdom***[37], wherein it has been held thus:-

> "The Court's supervisory functions oblige it to pay the utmost attention to the principles

[37] Application No. 5493/72, 7th December 1976, Series A No. 24

> characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.
>
> From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society"."

Mr. Subramanium, learned senior counsel has emphasised that the freedom of expression as protected by Article 10 of ECHR constitutes an essential basis of a democratic society and any limitations on that freedom have to be interpreted strictly. Mr. Subramanium has also referred us

to ***Editorial Board of Pravoye Delo and Shtekel v. Ukraine***[38], wherein the European Court, for the first time, acknowledged that Article 10 of ECHR has to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet. He has also drawn our attention to ***Akda v. Turkey***[39], wherein the European Court has held that ban on translation of classic work of literature that contained graphic description of sex, violated the right to freedom of expression.

32. Mr. Nariman, learned senior counsel and amicus, has commended us to ***Wingrove v. United Kingdom***[40] to show that the interpretation placed by the European Court of Human Rights on Article 10 that deals with freedom of expression. In the said case, a video movie characterising Saint Teresa of Avila in profane ways was held to be properly banned and not a violation of Article 10 of the European Convention on Human Rights. The said case originated from an application lodged with the European Commission under Article 25 by a British

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[38] Application No. 33014/05, 5 May 2011
[39] Application No. 41056/04, 16 February, 2010
[40] 1997 24 ECHRR (1)

national Nigel Wingrove on 18th June, 1990. The object of the request and of the Application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State (United Kingdom) of its obligation under Article 10 of the ECHR. Wingrove wrote the script for a video and directed making of a video work entitled 'visions of ecstasy' – the idea for the film was derived from the life and writings of St. Teresa of Avila, the sixteenth century Carmelite, nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ. In paragraphs 9 and 10 of the report it is stated:-

> "The action of the film centres upon a youthful actress dressed as a nun and intended to represent St. Teresa. It begins with the nun, dressed loosely in a black habit, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing. In her writhing, she spills a chalice of communion wine and proceeds to lick it up from the ground. She loses consciousness. This sequence takes up approximately half of the running time of the video. The second part shows St. Teresa dressed in a white habit standing with her arms held above her head by a white cord which is suspended from above and tied around her wrists. The near-naked form of a second female, said to represent St. Teresa's psyche, slowly crawls her way along the ground towards her. Upon reaching St. Teresa's feet, the psyche

> begins to caress her feet and legs, then her midriff, then her breasts, and finally exchanges passionate kisses with her. Throughout this sequence, St Teresa appears to be writhing in exquisite erotic sensation. This sequence is intercut at frequent intervals with a second sequence in which one sees the body of Christ, fastened to the cross which is lying upon the ground. St Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side. Then she sits astride him, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal, and kisses his lips. For a few seconds, it appears that he responds to her kisses. This action is intercut with the passionate kisses of the psyche already described. Finally, St Teresa runs her hand down to the fixed hand of Christ and entwines his fingers in hers. As she does so, the fingers of Christ seem to curl upwards to hold with hers, whereupon the video ends.
>
> Apart from the cast list which appears on the screen for a few seconds, the viewer has no means to knowing from the film itself that the person dressed as a nun in the video is intended to be St Teresa or that the other woman who appears is intended to be her psyche. No attempt is made in the video to explain its historical background."

Thereafter dealing with the case, the European Court of Human Rights held:-

> "61. Visions of Ecstasy portrays, inter alia, a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature. The national authorities,

> using powers that are not themselves incompatible with the Convention, considered that the manner in which such imagery was treated placed the focus of the work "less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography". They further held that since no attempt was made in the film to explore the meaning of the imagery beyond engaging the viewer in a "voyeuristic erotic experience", the public distribution of such a video could outrage and insult the feelings of believing Christians and constitute the criminal offence of blasphemy. This view was reached by both the Board of Film Classification and the Video Appeals Committee following a careful consideration of the arguments in defence of his work presented by the applicant in the course of two sets of proceedings. Moreover, it was open to the applicant to challenge the decision of the Appeals Committee in proceedings for judicial review. Bearing in mind the safeguard of the high threshold of profanation embodied in the definition of the offence of blasphemy under English law as well as the State's margin of appreciation in this area, the reasons given to justify the measures taken can be considered as both relevant and sufficient for the purpose of Article 10 para 2 (art. 10-2). Furthermore, having viewed the film for itself, the Court is satisfied that the decisions by the national authorities cannot be said to be arbitrary or excessive."

Mr. Nariman, the friend of the Court has also laid immense emphasis on the concurring opinion of Judge Pettit. The learned Judge though voted with the majority, observed:-

> "... I consider that the same decision could have

been reached under paragraph 2 of Article 10 (art. 10-2) on grounds other than blasphemy, for example the profanation of symbols, including secular ones (the national flag) or jeopardising or prejudicing public order (but not for the benefit of a religious majority in the territory concerned). The reasoning should, in my opinion have been expressed in terms both of religious beliefs and of philosophical convictions. It is only in paragraph 53 of the judgment that the words "any other" are cited. Profanation and serious attacks on the deeply held feelings of others or on religious or secular ideals can be relied on under Article 10 para 2 (art. 102) in addition to blasphemy. What was particularly shocking in the Wingrove case was the combination of an ostensibly philosophical message and wholly irrelevant obscene or pornographic images. In this case, the use of obscenity for commercial ends may justify restrictions under Article 10 para 2 (art 10-2); but the use of a figure of symbolic value as a great thinker in the history of mankind (such as Moses, Dante or Tolstoy) in a portrayal which seriously offends the deeply held feelings of those who respect their works or thought may, in some cases, justify judicial supervision so that the public can be alerted through the reporting of court decisions."

Judge Pettit further proceeded to state:-

"The majority of the Video Appeals Committee took the view that the imagery led not to a religious perception, but to a perverse one, the ecstasy being furthermore of a perverse kind. That analysis was in conformity with the approach of the House of Lords, which moreover did not discuss the author's intention with respect to the moral element of the offence. The Board's Director said that it would have taken

> just the same stance in respect of a film that was contemptuous of Mohammed or Buddha. The decision not to grant a certificate might possibly have been justifiable and justified if, instead of St Teresa's ecstasies, what had been in issue had been a video showing, for example, the anti-clerical Voltaire having sexual relations with some prince or king. In such a case, the decision of the European Court might well have been similar to that in the Wingrove case. The rights of other under Article 10 para 2 (art. 10-2) cannot be restricted solely to the protection of the rights of others in a single category of religious believers or philosophers, or a majority of them. The Court was quite right to base its decision on the protection of the rights of others pursuant to Article 10 (art. 10), but to my mind it could have done so on broader grounds, inspired to a greater extent by the concern to protect the context of religious beliefs "or any other", as is rightly pointed out in paragraph 53 of the judgment. In the difficult balancing exercise that has to be carried out in these situations where religious and philosophical sensibilities are confronted by freedom of expression, it is important that the inspiration provided by the European Convention and its interpretation should be based both on pluralism and a sense of values."

33. Learned Amicus, to cement the proponement of absence of total limitlessness of freedom of speech and expression and to refute the principle of absoluteness has also commended us to the authority in ***Muller and Others v. Switzerland***[41]. In the said case, the question was whether paintings at an

[41] 13 EHRR 212

exhibition depicting in a crude manner, sexual relations particularly between men and animals to which general public had free access as the organisers had not imposed any admission charge or any age limit; the paintings being displayed to the public at large. The European Court of Human Rights stated:-

> "The Court recognises, as did the Swiss courts, that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity". In the circumstances, having regard to the margin of appreciation left to them under Article 10 part 2 (art. 10-2), the Swiss courts were entitled to consider it "necessary" for the protection of morals to impose a fine on the applicants for publishing obscene material.
>
> The applicants claimed that the exhibition of the pictures had not given rise to any public outcry and indeed that the press on the whole was on their side. It may also be true that Josef Felix Muller has been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the "Fri-Art 81" exhibition. It does not, however, follow that the applicants' conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need, as was affirmed in substance by all three of the Swiss courts which dealt with the

case.

In conclusion, the disputed measure did not infringe Article 10 (art. 10) of the Convention."
[emphasis supplied)

Perception and Perspective of this Court

34. Keeping in view the developments in other countries pertaining to the perception as regards "obscenity", "vulgarity" and other aspects, we are obliged to see how this Court has understood the provision, that is, Section 292 IPC, and laid down the law in the context of freedom of speech and expression bearing in mind the freedom of a writer, poet, painter or sculptor or broadly put, freedom of an artist. Section 292 of the IPC presently reads thus:-

"292. Sale, etc., of obscene books, etc.—

(1) 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 person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.]
(2) Whoever—

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with 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 five years, and also with fine which may extend to five thousand rupees].

Exception — This section does not extend to—

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or
(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in—

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or
(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

35. The said Section, prior to the present incarnation, read as follows:-

"292. Whoever—
(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.- This section does not extend to any book, pamphlet, paper, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured. Engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance or idols, or kept or used for any religious purpose.]"

36. For the first time this Court dealt with the effect and impact of the provision in the backdrop of the challenge to the

constitutional validity of the same, in ***Ranjit D. Udeshi v. State of Maharashtra***[42]. Before the Constitution Bench a contention was canvassed with regard to the constitutional validity of Section 292 IPC on the ground it imposes impermissible restriction on the freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution and being not saved by clause 2 of the said Article. The Constitution Bench referred to Article 19(2) and held thus:-

> "**7.** No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act, 1925 (7 of 1925) to give effect of the International Convention for the suppression of or traffic in obscene publications signed by India in 1923 at Geneva. It does not go beyond obscenity which falls directly within the words "public decency and morality" of the second clause of the article. The word, as the dictionaries tell 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

[42] (1965) 1 SCR 65

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. Mr Garg seeks to limit action to cases of intentional lewdness which he describes as dirt for dirt's sake and which has now received the appellation of hard-core pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and *intended* to arouse sexual feelings.

8. Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That 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 the general public and one such is the interest of public decency and morality. Section 292 of the 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. The word obscenity is really not vague because it is a word which is well understood even if persons differ in their attitude to what is obscene and what is not."

[Emphasis added]

And again,

"9.....It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely poor value in the

> propagation of ideas, opinions and information of public interest or profit. When there is propagation of ideas, opinions and photographs collected in book form without the medical text would may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292 of the Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Article 19."

37. After dealing with the said facet, the Court referred to various decisions of the English Courts, especially to ***Hicklin*** (supra), wherein the Queen's Bench was called upon to consider a pamphlet, the nature of which can be gathered from the title and the colophon which read:-

> "The Confession Unmasked, showing the depravity of Romish priesthood, the enquity of the confessional, and the questions, put to females in confession."

It was bilingual with Latin and English texts on opposite pages and the latter half of the pamphlet according to the report was grossly obscene relating to impure and filthy acts, words or ideas. Cockburn, C.J. laid down the test of obscenity

in the following 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 the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

38. After reproducing the said paragraph, the Court observed that the said test has been uniformly applied in India. Thereafter, the Court posed a question whether the said test of obscenity squares with the freedom of speech and expression guaranteed under the Constitution or it needs to be modified and if so, in what respects. The Court opined that the first of the said questions invite the Court to reach a decision on a constitutional issue of a most far-reaching character and it must be aware that it may not lean too far away from the guaranteed freedom. In that context, the Court observed that the laying down of the true test is not rendered any easier because art has such varied facets and has such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not the general or

artistic appeal or message, which he cannot comprehend. But by what he can see, and the intellectual sees beauty and art but nothing gross. The Indian Penal Code does not define the word "obscene" and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts. The test to be evolved must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. Thereafter the court observed:-

> "None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michael Angelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shop would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act."

39. After so stating, the Court referred to certain authorities

of the United States of America and proceeded to observe that the Court must, therefore, apply itself to consider each work at a time. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter 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 book is likely to fall. The interests of the contemporary society and particularly the influence of the book etc. on it must not be overlooked. Then the court stated:-

> "A number of considerations may here enter which it is not necessary to enumerate, but we must draw attention to one fact. Today our National and Regional Languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true Art finds little popular support. Only an obscurent will deny the need for such caution. This consideration marches with all law and precedent and this subject and so considered we can only say that where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with

> sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our National standards and considered likely to pander to lascivious. prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way." [Emphasis supplied]
>
> Eventually, the Court opined:-
>
> "22.....In our opinion, the test to adopt in our country regard being had to our community *mores*) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case."

40. Thereafter, the court proceeded to scan the various passages of the book, namely, Lady Chatterley's Lover and ruled that:-

> "29.....When everything said in its favour we find that in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to

> preponderate, we must hold the book to satisfy the test we have indicate above."

41. In ***Chandrakant Kalyandas Kakodkar v. State of Maharashtra***[43]**,** the appellant was the author of a short story. He faced a criminal charge under Section 292 IPC along with the printer, publisher and the selling agent. The three-Judge Bench referred to the Constitution Bench in ***Ranjit D. Udeshi*** (supra) and thereafter the Court referred to the plots and sub-plots narrated in the story, adverted to the emotional thread running in the story and eventually came to hold that none of the passages was offending Section 292 IPC and accordingly acquitted the accused persons. In that context the Court observed:-

> "**12.** The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the

[43] (1969) 2 SCC 687

> adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expression to their ideas, and emotions and objective with full freedom except that it should not fall within the definition of "obscene" having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in *Udeshi* (supra) if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect."

From the aforesaid passage it is clear that the court considered three facets, namely, "morals of contemporary society", the fast changing scenario in our country and the impact of the book on a class of readers but not an individual.

42. In ***K.A. Abbas v. Union of India and another***[44], the

[44] (1970) 2 SCC 780

petitioner sought a declaration against the Union of India and the Chairman, Central Board of Film Censors that the provisions of Part II of the Cinematograph Act, 1952 together with the rules prescribed by the Central Government, February 6, 1960, in the purported exercise of the powers under Section 5-B of the Act are unconstitutional and void and consequently sought a writ of Mandamus or any other appropriate writ, direction or order for quashing the direction contained in letter dated July 3, 1969, for deletion of certain shots from a documentary film titled 'A Tale of Four Cities' produced by him for unrestricted public exhibition. The said certificate was declined and the petitioner was issued a letter that the film was suited for exhibition restricted to adults. The petitioner was given a chance to give explanation, but he did not change his decision. On an appeal, the Central Government opined that it could be granted 'U' certificate subject to certain cuts being made in the film. At that juncture, the petitioner preferred a petition before this Court. The Court viewed the film and still the stand of the Central Government was same. The petitioner thereafter amended the petition to challenge the pre-censorship

itself as offensive to freedom of speech and expression and alternatively the provisions of the Act and the Rules, orders and directions under the Act as vague, arbitrary and indefinite. The prayer for amendment was allowed. The two fundamental contentions that were raised before this Court were firstly, the pre-censorship itself cannot be tolerated under the freedom of speech and expression and secondly, even if it were a legitimate restraint on the freedom, it must be exercised on very definite principles which leave no room for arbitrary action. The Court referred to the Khosla Committee that had addressed and examined history of development of film censorship in India. The Court adverted to various provisions of the Act and in that context observed that it has been almost universally recognised that treatment of motion pictures must be different from that of other forms of art and expression. The Court referred to the decision in ***Roth*** (supra), wherein three tests have been laid down as under:

> "(*a*) that the dominant theme taken as a whole appeals to prurient interests according to the contemporary standards of the average man;

> (*b*) that the motion picture is not saved by any redeeming social value; and
>
> (*c*) that it is patently offensive because it is opposed to contemporary standards."

The court observed that Hicklin test in ***Regina*** (supra) was not accepted in the said case. The Court also referred to ***Freadman v. Maryland***[45], which considered procedural safeguards and thereafter the judgment in ***Teital Film Corp. v. Cusak***[46] and observed that fight against censorship was finally lost in ***Times Film Corporation v. Chicago***[47], but only by the slender majority. Thereafter, the Court referred to later decisions and observed:-

> "33. To summarize. The attitude of the Supreme Court of the United States is not as uniform as one could wish. It may be taken as settled that motion picture is considered a form of expression and entitled to protection of First Amendment. The view that it is only commercial and business and, therefore, not entitled to the protection as was said in *Mutual Film Corpn*[48]. is not now accepted."

43. The Court further referred to the majority judgments in many cases and observed that judges in America have tried to read the words 'reasonable restrictions' into the First

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[45] (1965) 380 US 51
[46] (1968) 390 US 149
[47] (1961) 365 US 43
[48] (1915) 236 US 230

Amendment and thus to make the rights it grants subject to reasonable regulation. The Court further observed that the American Courts in their majority opinions, therefore, clearly support a case for censorship. Proceeding further, the Court opined that the task of the censor is extremely delicate and its duties cannot be the subject of an exhaustive set of commands established by prior ratiocination. In that context, the Court ruled:-

> "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 of its foibles along with what is good. We must not look upon such human relationships as banned in to and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form 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 seas a woman's legs in everything, it cannot be helped. In our scheme of things 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, how-

> ever, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censor's scissors. Thus audiences in India can be expected to view with equanimity the story of Oedipus son of Latius who committed patricide and incest with his mother. When the seer Tiresias exposed him, his sister Jocasta committed suicide by hanging herself and Oedipus put out his own eyes. No one after viewing these episodes would think that patricide or incest with one's own mother is permissible or suicide in such circumstances or tearing out one's own eyes is a natural consequence. And yet if one goes by the letter of the directions the film cannot be shown. Similarly, scenes depicting leprosy as a theme in a story or in a documentary are not necessarily outside the protection. If that were so Verrier Elwyn's Phulmat of the Hills or the same episode in Henryson's Testament of Cressaid (from where Verrier Elwyn borrowed the idea) would never see the light of the day. Again carnage and bloodshed may have historical value and the depiction of such scenes as the Sack of Delhi by Nadirshah may be permissible, if handled delicately and as part of an artistic portrayal of the confrontation with Mohammad Shah Rangila. If Nadir Shah made golgothas of skulls, must we leave them out of the story because people must be made to view a historical theme without true history? Rape in all its nakedness may be objectionable but Voltaire's Candide would be meaningless without Cunegonde's episode with the soldier and the story of Lucrece could never be depicted on the screen."
>
> [Emphasis supplied]

44. The aforesaid passage, we must candidly state, is a lucid expression of artistic freedom regard being had to thematic

context and the manner of delicate and subtle delineation in contradistinction to gross, motivated and non-artistic handling. It is also graphically clear that the court has opined that sex and obscenity are not always synonymous and that is why the court has given example of Oedipus which is known in the field of psychology as Oedipus complex. Be it noted, in the field of literature there are writing which pertain, as psychology would christen them as 'Electra' complex and 'Lalita' complex. As is manifest from the judgment, the Court has taken pains to refer to certain situations from certain novels and the ideas from the plays and also emphasised on delicate depiction of a situation in a theme-oriented story. The Court has made a distinction between a historical theme without true history and portrayal of an artistic scene. Be it noted, in the said case, the Court opined that the test in ***Ranjit D. Udeshi*** (supra) would apply even to film censorship.

45. In ***Raj Kapoor and Others v. State and Others***[49], the High Court had refused the exercise of inherent power under Section 482 of the Criminal Procedure Code because the High Court felt the subject fell under its revisional power under

[49] (1980) 1 SCC 43

Section 397 of the CrPC. The prosecution was launched by the president of a youth organisation devoted to defending Indian cultural standards, inter alia, against the unceasing waves of celluloid anti-culture, arraigning, together with the theatre owner, the producer, actors and photographer of a sensationally captioned and loudly publicised film by name *Satyam, Sivam, Sundaram*, under Sections 292, 293 and 34 of the IPC for alleged punitive prurience, moral depravity and shocking erosion of public decency. The trial court examined a few witnesses and thereafter issued notices to the petitioners who rushed to the High Court but faced refusal on a technical foundation. This Court formulated two questions – one of jurisdiction and consequent procedural compliance, the other of jurisprudence as to when, in the setting of the Penal Code, a picture to be publicly exhibited can be castigated as prurient and obscene and violative of norms against venereal depravity. The Court in that context observed:-

> "8. .....Art, morals and law's manacles on aesthetics are a sensitive subject where jurisprudence meets other social sciences and never goes alone to bark and bite because State-made strait-jacket is an inhibitive prescription for a free country unless enlightened

> society actively participates in the administration of justice to aesthetics.
>
> 9. The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and proscribe heterodoxies. It is plain that the procedural issue is important and the substantive issue portentous."

46. It is worthy to note that a contention was raised that once a certificate under the Cinematograph Act is granted, the homage to the law of morals is paid and the further challenge under the Penal Code is barred. Dealing with the same, the Court opined that:-

> "Jurisprudentially speaking, law, in the sense of command to do or not to do, must be a reflection of the community's cultural norms, not the State's regimentation of aesthetic expression or artistic creation. Here we will realise the superior jurisprudential value of *dharma*. which is a beautiful blend of the sustaining sense of morality, right conduct, society's enlightened consensus and the binding force of norms so woven as against positive law in the Austinian sense, with an awesome halo and barren autonomy around the legislated text is fruitful area for creative exploration. But morals made to measure by statute and court is risky operation with portentous impact on fundamental freedoms, and in our constitutional order the root principle is liberty of expression and its reasonable control with the limits of "public order, decency or

> morality". Here, social dynamics guides legal dynamics in the province of "policing" art forms."

Krishna Iyer, J. while stating thus opined that once a certificate under the Cinematograph Act is issued the Penal Code, pro tanto, will not hang limp. The court examined the film and dealt with the issue whether its public display, in the given time and clime, would breach the public morals or deprave basic decency as to offend the penal provisions. In that context, the learned Judge observed thus:-

> "15. .....Statutory expressions are not petrified by time but must be updated by changing ethos even as popular ethics are not absolutes but abide and evolve as community consciousness enlivens and escalates. Surely, the *satwa* of society must rise progressively if mankind is to move towards its timeless destiny and this can be guaranteed only if the ultimate value-vision is rooted in the unchanging basics, Truth — Goodness — Beauty, *Satyam, Sivam, Sundaram*. The relation between Reality and Relativity must haunt the .Court's evaluation of obscenity, expressed in society's pervasive humanity, not law's penal prescriptions. Social scientists and spiritual scientists will broadly agree that man lives not alone by mystic squints, ascetic chants and austere abnegation but by luscious love of Beauty, sensuous joy of companionship and moderate non-denial of normal demands of the flesh. Extremes and excesses boomerang although, some crazy artists and film directors do practise Oscar Wilde's observation: "Moderation is a fatal thing. Nothing succeeds like excess."

> **16.** All these add up to one conclusion that finality and infallibility are beyond courts which must interpret and administer the law with pragmatic realism, rather than romantic idealism or recluse extremism."

Pathak, J. (as His Lordship then was) in his concurring opinion, opined that there is no difficulty in laying down that in a trial for the offence under Sections 292 and 293 of the Indian Penal Code, a certificate granted under Section 6 of the Cinematograph Act by the Board of Censors does not provide an irrebuttable defence to accused who have been granted such a certificate, but it is certainly a relevant fact of some weight to be taken into consideration by the criminal court in deciding whether the offence charged is established.

47. Thus, from the view expressed by Krishna Iyer, J., it is vivid that the Court laid emphasis on social dynamics and the constitutional order which postulates the principle of liberty of expression and the limits of 'public order', 'decency' and 'morality'. The learned Judge has discarded the extremes and excesses for they boomerang and did not appreciate the observation of Oscar Wilde which pertains to the statement

"moderation is a fatal thing".

48. In ***Samresh Bose & Anr. v. Amal Mitra & Anr.***[50], the appellants were the author and the publisher of a novel. The appellant No.1 was the author of a novel which under the caption "Prajapati" that came to be published "Sarodiya Desh". The application was filed before the Chief Presidency Magistrate, Calcutta complaining that the said novel "Prajapati" was obscene and both the accused persons had sold, distributed, printed and exhibited the same which has a tendency to corrupt the morals of those in whose hands the said "Sarodiya Desh" may fall, and accordingly they faced trial under Section 292, IPC and eventually stood convicted. The accused persons assailed their conviction in an appeal before the High Court and the complainant filed a criminal revision seeking enhancement of sentence. The High Court by common judgment dismissed the appeal and affirmed the sentence. A question arose before this Court whether the accused persons had committed the offence under Section 292, IPC and the Court observed the said question would be depending on the finding, whether the novel is obscene or not. A two-Judge

[50] (1985) 4 SCC 289

Bench scanned the evidence on record in great detail, for it was essential for the Court to evaluate the evidence on record inasmuch as some of the witnesses had compared the plot in the novel to that of the novel “Chokher Bali” one of the works of Ravindra Nath Tagore. Shri Budhadeo Bose, who was a whole time writer and Chairman of Comparative Literature of Jadavpur University for a number of years, was cited as a witness on behalf of the accused. While facing the cross-examination, when asked to cite example of a writing vividly describing a sexual act and sexual perversity, Shri Bose answered that anyone who knows the works of Ravindra Nath Tagore knows that for his whole life he was a great advocate of social and sexual freedom. He referred to novel “Chokher Bali” where Tagore described a love relationship between a young Hindu widow and a young man. He also referred to ‘Ghare Baire’ where a highly respected married woman falls in love with her husband’s friend. The witness also cited Tagore’s another novel “Chaturanga” where an actual sexual act has been described in a very poetic and moving language. The said witness deposed that the novel has great social and moral

value.

49. The Court proceeded to deal with many other witnesses at length and the view expressed by the Chief Presidency Magistrate and the learned Single Judge. We notice that this Court copiously quoted from the order of the learned Single Judge and thereafter proceeded to deal with the contentions. The Court referred to Section 292 as it stood at the time of initiation of the proceeding, referred to the decisions in ***Ranjit D. Udeshi*** (supra), ***Chandrakant Kakodar*** (supra) and thereafter observed that the novel "Lady Chatterley's Lover" which came to be condemned as obscene in India by this Court, was held to be not obscene in England by the Central Criminal Court. The two-Judge Bench reproduced a passage from ***Penguin Books Ltd.*** (supra). The Court referred to the obscenity test which rests with jury in England but with judges in India. In that context, the Court proceeded to state thus:-

> "In deciding the question of obscenity of any book, story or article the court whose responsibility it is to adjudge the question may, if the court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the court must necessarily be on an

objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The court must take an overall view of the matter complained of as obscene in the setting of the whole work, .but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the viewpoint of the author the Judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall

> and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers."

Thereafter, the Court proceeded to analyse the story of the novel and noted thus:-

> "If we place ourselves in the position of readers, who are likely to read this book, — and we must not forget that in this class of readers there will probably be readers of both sexes and of all ages between teenagers and the aged, — we feel that the readers as a class will read the book with a sense of shock, and disgust and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness. It is quite possible that they come across such characters and such situations in life and have faced them or may have to face them in life. On a very anxious consideration and after carefully applying our judicial mind in making an objective assessment of the novel we do not think that it can be said with any assurance that the novel is obscene merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language. Some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescents any suggestion which is depraving or lascivious."

50. The aforesaid analysis shows that the court has to take an overall view of the matter; that there has to be an objective assessment and the Judge must in the first place put himself in the position of the author and, thereafter, in the position of reader of every case and must eliminate the subjective element or personal preference; a novel cannot be called obscene usually because of slang and unconventional words in it; the court has to see that the writing is of such that it cannot bring home to the adolescences any suggestion which is depraving or lascivious and that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries.

51. In ***Director General, Directorate General of Doordarshan and others v. Anand Patwardhan and another***[51], the respondent had produced film titled *Father, Son and Holy War* and had submitted the same to the Doordarshan for telecast, but the Doordarshan refused to telecast the documentary film despite handing over a copy of U-matic certificate. He preferred a writ petition before the Bombay High

[51] (2006) 8 SCC 433

Court against the refusal by Doordarshan to telecast the documentary film which was disposed by the Division Bench by directing Doordarshan to take a decision on the application within a period of six weeks. A Selection Committee was constituted and it declined the prayer of the applicant on the foundation that it depicted the rise of Hindu fundamentalism and male chauvinism without giving any solution how it could be checked and it portrayed violence and hatred. The decision of Select Committee was communicated to the respondent who challenged the same in the High Court of Bombay which directed the Doordarshan to telecast the documentary film within the period of six weeks in the evening slot. The same being challenged in a special leave petition, this court directed for constitution of a new committee in accordance with the Guidelines of Doordarshan to consider the proposal of the respondent. The committee constituted in pursuance of order of this court observed that the film has a secular message relevant to our times and our society, however the film contains scenes and speeches which can influence negative passions and therefore the committee would like a larger

committee to see the film and form an opinion before it is open to public viewing. Therefore, the Prasar Bharti Board previewed the documentary film and formed opinion that its production quality was unsatisfactory and its telecast would be violative of the policy of Doordarshan. The Court placing reliance on ***K.A. Abbas*** (supra) and other authorities did not accept the stand of the Doordarshan and dismissed the appeal.

52. In ***Ajay Goswami v. Union of India and others***[52] the petitioner agitated that the grievance of freedom of speech and expression enjoyed by the newspaper industry is not keeping balance with the protection of children from harmful and disturbing material. The further prayer made was to command the authorities to strike a reasonable balance between the fundamental right of freedom of speech and expression enjoyed by the press and the duties of the Government, being signatory of the United Nations Convention on the Rights of Child, 1989 and Universal Declaration of Human Rights, to protect the vulnerable minor from abuse, exploitation and harmful effects of such expression. The further prayer was the authorities concerned should provide for classification or introduction of a

[52] (2007) 1 SCC 143

regulatory system for facilitating climate of reciprocal tolerance which should include an acceptance of other people's rights to express and receive certain ideas and actions; and accepting that other people have the right not to be exposed against their will to one's expression of ideas and actions. The first question that the court posed "is the material in newspaper really harmful for the minors". In that context, the court observed that the moral value should not be allowed to be sacrificed in the guise of social change or cultural assimilation. The court then posed whether the minors have got any independent right enforceable under Article 32 of the Constitution. In the course of discussion, the court referred to earlier authorities pronounced by this court, referred to Section 13 (2) of the Press Council Act 1978, Section 292 of the IPC and Section 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986 (for short 'the 1986 Act') and thereafter proceeded to deal with test of obscenity and in that context observed as follows:-

> "67. In judging as to whether a particular work is obscene, regard must be had to contemporary mores and national standards. While the Supreme Court in India held *Lady Chatterley's Lover* to be

> obscene, in England the jury acquitted the publishers finding that the publication did not fall foul of the obscenity test. This was heralded as a turning point in the fight for literary freedom in UK. Perhaps "community mores and standards" played a part in the Indian Supreme Court taking a different view from the English jury. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with the click of a mouse."

After so stating the court reproduced a passage from ***Samresh Bose*** (supra) and also a passage from ***K.A. Abbas*** (supra) and eventually held that:-

> "76. The term obscenity is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality. On the other hand, the Constitution of India guarantees the right to freedom of speech and expression to every citizen. This right will encompass an individual's take on any issue. However, this right is not absolute, if such speech and expression is immensely gross and will badly violate the standards of morality of a society. Therefore, any expression is subject to reasonable restriction. Freedom of expression has contributed much to the development and well-being of our free society.
>
> 77. This right conferred by the Constitution has triggered various issues. One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and ideas."

And again:-

> "79. We are also of the view that a culture of "responsible reading" should be inculcated among the readers of any news article. No news item should be viewed or read in isolation. It is necessary that a publication must be judged as a whole and news items, advertisements or passages should not be read without the accompanying message that is purported to be conveyed to the public. Also the members of the public and readers should not look for meanings in a picture or written article, which are not conceived to be conveyed through the picture or the news item.
>
> 80. We observe that, as decided by the U.S. Supreme Court in United States v. Playboy Entertainment Group, Inc.[53] that,
>
> > "in order for the State … to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint".
>
> Therefore, in our view, in the present matter, the petitioner has failed to establish his case clearly. The petitioner only states that the pictures and the news items that are published by Respondents 3 and 4 "leave much for the thoughts of minors"."

The aforesaid decision, as it appears to us, lays down the guarantee given under the Constitution on the one hand pertaining to right to freedom of speech and expression to every

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[53] 529 US 803 : 120 SCt 1878 : 146 L Ed 2d 865 (2000)

citizen and the right of an individual expressing his views on any issue and simultaneously the observance of the right is not absolute if such speech and expression is immensely gross and will badly violate standards of morality of a society and hence, any expression is subject to reasonable restriction.

53. At this juncture, we may refer to the pronouncement in ***Bobby Art International v. Om Pal Singh Hoon and Others***[54], popularly known as "Bandit Queen case", because the film dealt with the life of Phoolan Devi and it was based on a true story. The appellant had approached this Court assailing the order passed by the Division Bench of the High Court of Delhi in Letters Patent Appeal affirming the judgment of the learned Single Judge, who had quashed the certificate granted to the film and directed the Censor Board to consider the grant of 'A' Certificate after certain excisions and modifications in accordance with the order that has been passed by the Court. The Court referred in extenso to the authorities in ***K.A. Abbas*** (supra), ***Raj Kapoor*** (supra), ***Samresh Bose*** (supra), ***State of Bihar v. Shailabala Devi***[55],

[54] (1996) 4 SCC 1
[55] AIR 1952 SC 329

narrated the story of the film which is a serious and sad story of a village born female child becoming a dreaded dacoit. The Court observed that an innocent woman had turned into a vicious criminal because lust and brutality had affected her psyche. The Court referred to the various levels of the film accusing the members of the society who had tormented her and driven her to become a dreaded dacoit filled with the desire to avenge. The Court expressed that in the light of the said story, the individual scenes are to be viewed. Thereafter, the Court ruled that:-

> "First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film "Schindler's List" was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they

> about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow-feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. "Bandit Queen" tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her."

The decision rendered in the said case requires to be appropriately appreciated. It is seemly to notice that the Court has gone by the true live incidents, the sincerity in depiction by the film maker, the necessity for such depiction and the emotions that are likely to be invoked. Emphasis was on the central theme of suffering. It has also taken note of the fact that sex had not been glorified in the film. It has also been observed that a few swear words, the like of which can be heard everyday in every city, town and village street, would not tempt any adult to use them because they are used in this film.

54. In this context, the learned senior counsel has commended us to a two-Judge Bench decision in ***Ramesh s/o***

Chhote Lal Dalal v. Union of India and others[56] wherein the Court declined to interfere to issue a writ in the nature of prohibition or any other order restraining Doordarshan and the producer Govind Nihlani from telecasting or screening the serial titled "Tamas". The Court referred to the view of Vivian Bose, J. as he then was in the Nagpur High Court in the case of ***Bhagwati Charan Shukla v. Provincial Government***[57] and ***K.A. Abbas*** (supra), ***Raj Kapoor*** (supra) and observed thus:-

> ".....the potency of the motion picture is as much for good as for evil. If some scenes of violence, some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interests, scenes depicting mutual respect and tolerance, scenes showing comradeship, help and kindness which transcend the barriers of religion. Unfortunately, modern developments both in the field of cinema as well as in the field of national and international politics have rendered it inevitable for people to face the realities of internecine conflicts, inter alia, in the name of religion. Even contemporary news bulletins very often carry scenes of pitched battle or violence. What is necessary sometimes is to penetrate behind the scenes and analyse the causes of such conflicts. The attempt of the author in this film is to draw a lesson from our country's

[56] (1988) 1 SCC 668
[57] AIR 1947 Nag 1

> past history, expose the motives of persons who operate behind the scenes to generate and foment conflicts and to emphasise the desire of persons to live in amity and the need for them to rise above religious barriers and treat one another with kindness, sympathy and affection. It is possible only for a motion picture to convey such a message in depth and if it is able to do this, it will . be an achievement of great social value."
>
> (Emphasis supplied)

55. In ***Gandhi Smaraka Samithi, v. Kanuri Jagadish Prasad***[58], the appellant filed a complaint against the publication of a novel titled "Kamotsav", written by accused no.3 therein, published in a weekly, namely, Andhra Jyothi. The novel showed two characters in nude one over the other in a bathroom. The allegation was that the characters of the novel would undermine the social values and the cultural heritage of the society and the moral values of the individuals. The accused faced trial under Section 292 and 293 IPC as well as under Section 6 and 7 of the 1986 Act, but it ended in an acquittal. In the appeal preferred by the complainant assailing the judgment of acquittal, the learned Single Judge referred to the meaning of "obscene", dwelt upon the theme projected by the author relating to the present day society and

[58] [(1993) 2 APLJ 91 (SN)]

how members of the high class society behave and how they indulge in free sex and how they are addicted to drunkenness. The Court observed that the object of the writer is only to create some fear in the minds of the readers. The Court opined that the portions appearing on the pages, which was found objectionable by the learned counsel for the appellants, if analysed in the context of the theme of the novel, in the strict sense, may not answer the definition of obscene. The Court in that context proceeded to observe:-

> "5. ..... In order that an article should be obscene, it must have the tendency to corrupt the morals of those in whose hands the article may fall. The idea as to what is deemed as obscene of course varies from age to age and from region to region depending upon particular social conditions prevailing. Anything calculated to inflame the passions is 'obscene'. Anything distinctly calculated to incite a reader to indulge in acts of indecency or immorality is obscene. A book may be obscene although it contains a single obscene passage. A picture of a woman in the nude is not *per se* obscene. For the purpose of deciding whether a picture is obscene or not, one has to consider to a great extent the surrounding circumstances, the suggestive element in the picture and the person or persons in whose hands it is likely to fall. It is the duty of the Court to find out where there is any obscenity or anything in the novel which will undermine or take away or influence the public in general and the readers in particular."

56. The High Court referred to its decision in ***Promilla kapur v. Yash Pal Bhasin***[59], wherein it has been observed thus:-

> "It is true that prostitution has been always looked down upon with hatred throughout the ages by the society and particularly "sex" has been considered an ugly word and any talk about sex in our conservative society was considered a taboo not many years ago but with this country progressing materially and with the spread of education and coming of western culture, the society has become more open. It is indeed obvious that the phenomenon of call girls has peaked in our country amongst the affluent section of the society. The society is changing vastly with spiritual thinking taking a back seat and there is nothing wrong if a sociologist makes a research on the subject of call girls in order to know the reasons as to why and how the young girls fall in this profession of call girls and what society could do in order to eradicate or at least minimize the possibility of young budding girls joining this flesh trade. As a whole the book appears to be a serious study done on the subject of call girls. Mere fact that some sort of vulgar language has been used in some portions of the book in describing the sexual intercourse would not, in the overall setting of the book, be deemed to be obscene. If some portions of the book are taken in isolation, those portions may have the effect of giving lustful thoughts to some young adolescent minds but for that reason alone it would not be in the interests of justice to declare this book as obscene."

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[59] 1989 Cr.L.J. 1241

The High Court also referred to an earlier decision of the said Court in ***B.K. Adarsh v. Union of India***[60], wherein it was observed that decency or indecency of a particular picture, sequence or scene cannot depend upon the nature of the subject matter, but the question is one of the manner of handling of the subject-matter and sociological or ethical interest or message which the film conveys to the reasonable man, and that the approach of the Court would be from the perspective of social pathological phenomenon with a critical doctor keeping the balance between the felt necessities of the time and social consciousness of a progressive society eliminating the evils and propagating for the cultural evolution literary taste and pursuit of happiness in social relations, national integration and solidarity of the nation and the effect of the film thereon. In the said case, it was also observed that the sense of decency or indecency have to be kept in view in adjudging whether the motion picture would stand to the test of satisfying a reasonable man in the society that it would not deprave or debase or corrupt his moral standards or induce lewdness, lasciviousness or lustful thoughts.

[60] AIR 1990 AP 100

57. In ***S. Khushboo v. Kanniammal and another***[61] the appellant, a well known actress had approached this court seeking quashment of the criminal proceeding registered against her for offences punishable under Sections 499, 500, 509 IPC and Sections 4 and 6 of the 1986 Act. The controversy arose as India Today, a fortnightly magazine, had conducted a survey on the subject of sexual habits of people residing in the bigger cities of India. One of the issues discussed as part of the said survey was increasing incidence of pre-marital sex. As a part of this exercise the magazine had gathered and published the views expressed by several individuals from different segments of society, including those of the appellant. In her personal opinion, she had mentioned about live-in relationships and called for the societal acceptance of the same. She had qualified her remarks by observing that girls should take adequate precautions to prevent unwanted pregnancies and transmission of venereal diseases. Subsequent to the publication in India today *Dhina Thanthi*, a Tamil daily carried a news item which first quoted the appellant's statement published in *India Today* and then

[61] (2010) 5 SCC 600

opined that it had created a sensation all over the State of Tamil Nadu. The news item also reported a conversation between the appellant and a correspondent of *Dhina Thanthi* wherein the appellant had purportedly defended her views. However, soon after publication in *Dhina Thanthi* the appellant sent a legal notice categorically denying that she had made the statement as had been reproduced in *Dhina Thanthi* and required to publish her objection prominently within three days. The publication of the statements in *India Today* and *Dhina Thanthi* drew criticism from some quarters and several persons and organizations filed criminal complaints against the appellant. The appellant approached the High Court for quashment of the criminal proceeding but as the High Court declined to interfere, this court was moved in a special leave petition. The court perused the complaints which revealed that most of the allegations pertained to offences such as defamation, obscenity, indecent representation of women and incitement among others. While dealing with the section 292 IPC, the court held thus:-

> "24. Coming to the substance of the complaints, we fail to see how the appellant's remarks amount

> to "obscenity" in the context of Section 292 IPC. sub-section (1) of Section 292 states that the publication of a book, pamphlet, paper, writing, drawing, painting, representation, figure, etc. will be deemed obscene, if—
>
> • It is lascivious (i.e. expressing or causing sexual desire); or
>
> • Appeals to the prurient interest (i.e. excessive interest in sexual matters); or
>
> • If its effect, or the effect of any one of the items, tends to deprave and corrupt persons, who are likely to read, see, or hear the matter contained in such materials.
>
> In the past, authors as well as publishers of artistic and literary works have been put to trial and punished under this section."

Thereafter, the court referred to the authorities in ***Ranjit D. Udeshi*** (supra) and ***Samresh Bose*** (surpa) and proceeded to observe:-

> "45. Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as "decency and morality" among others, we must lay stress on the need to tolerate unpopular views in the sociocultural space. The Framers of our Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes

to societal attitudes.

46. Admittedly, the appellant's remarks did provoke a controversy since the acceptance of premarital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant . number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not coextensive.

47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the "freedom of speech and expression".

xxx xxx xxx

50. Thus, dissemination of news and views for popular consumption is permissible under our constitutional scheme. The different views are allowed to be expressed by the proponents and

> opponents. A culture of responsible reading is to be inculcated amongst the prudent readers. Morality and criminality are far from being coextensive. An expression of opinion in favour of non-dogmatic and non-conventional morality has to be tolerated as the same cannot be a ground to penalise the author."

The aforesaid authority, thus, emphasises on the need for tolerance of unpopular views in the socio-cultural space. It also takes note of the fact that notions of social morality are inherently subjective; and morality and criminality are not co-extensive. It is apt to note here that in the said case, the Court has also held that by the statement of the appellant therein no offence was committed. The Court recognised that free flow of notions and ideas is essential to sustain the collective lives of the citizenry.

58. Recently in ***Aveek Sarkar and another v. State of West Bengal and others***[62], the Court was dealing with the fact situation where Boris Becker, a world renowned tennis player, had posed nude with his dark-skinned fiancée by name Barbara Feltus, a film actress. Both of them spoke freely about their engagement, their lives and future plans. The article projected Boris Becker as a strident protester of the pernicious

[62] (2014) 4 SCC 257

practice of "Apartheid" and the purpose of the photograph was also to signify that love champions over hatred. The article was published in the German magazine by name *"Stern"*. *"Sports World"*, a widely circulated magazine had reproduced the photograph and the article as cover story. "Anandabazar Patrika", a newspaper having wide circulation in Kolkata, also published in the second page of the newspaper the photograph as it appeared in *Sports World*. A lawyer claiming to be a regular reader of *Sports World* as well as *Anandabazar Patrika* filed a complaint under Section 292 of IPC against the appellants therein, the Editor, the Publisher and Printer of the newspaper and also against the Editor of *Sports World*, former Captain of Indian Cricket Team, Late Mansoor Ali Khan Pataudi. The learned Magistrate took cognizance and issued summons under Section 292, IPC and also under Section 4 of the 1986 Act. The appellants approached the High Court for quashing the criminal proceeding but the High Court declined to exercise the jurisdiction under Section 482 CrPC. It was contended before this Court that obscenity has to be judged in the context of contemporary social mores, current socio-moral

attitude of the community and the prevalent norms of acceptability/susceptibility of the community, in relation to matters in issue. Reliance was placed on the Constitution Bench decision in ***Ranjit D. Udeshi*** (supra) and ***Chandrakant Kalyandas Kakodkar*** (supra). The two-Judge Bench referred to the principles stated in the aforesaid two decisions and the principles stated in ***Samresh Bose*** (supra). While quoting a passage from ***Samresh Bose*** (supra), the Court observed that the view expressed therein was the contemporary social standards in the year 1985. The Court further observed that while judging a particular photograph, and the article of the newspaper as obscene in 2014, regard must be had to the contemporary mores and the national standards and not the standards of a group of susceptible or sensitive persons. The Court referred to the pronouncement in ***Hicklin*** (supra) the majority view in ***Brody v. R***[63]***,*** and the pronouncement in ***R. v. Butler***[64] and opined thus:-

> "23. We are also of the view that Hicklin test[65] is not the correct test to be applied to determine "what is obscenity". Section 292 of the Penal Code,

[63] 1962 SCR 681 (Can SC)
[64] (1992) 1 SCR 452 (Can SC)
[65] (1868) LR 3 QB 360

of course, uses the expression "lascivious and prurient interests" or its effect. Later, it has also been indicated in the said section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, . having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than the "Hicklin test" to determine what is "obscenity". A bare reading of sub-section (1) of Section 292, makes clear that a picture or article shall be deemed to be obscene

(i) if it is lascivious;

(ii) it appeals to the prurient interest; and

(iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene.

Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in the section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse the feeling of or revealing an overt sexual desire. The picture should be suggestive of deprave mind 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."

The Court also referred to ***Bobby Art International*** (supra), ***Ajay Goswami*** (supra) and held that applying the community tolerance test, the photograph was not suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them. The Court further proceeded to state that the photograph has no tendency to deprave or corrupt the minds of the people because the said picture has to be viewed in the background in which it was shown and the message it has to convey to the public and the world at large. The Court observed that Boris Becker himself in the article published in the German magazine, spoke of the racial discrimination prevalent in Germany and the article highlighted Boris Becker's protest against racism in Germany. Proceeding further, the Court ruled that:-

> "The message, the photograph wants to convey is that the colour of skin matters little and love champions over colour. The picture promotes love affair, leading to a marriage, between a white-skinned man and a .black-skinned woman. We should, therefore, appreciate the photograph and the article in the light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white-skinned man and a

> black-skinned woman. When viewed in that angle, we are not prepared to say that the picture or the article which was reproduced by *Sports World* and the *Anandabazar Patrika* be said to be objectionable so as to initiate proceedings under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986."

Thus, the aforesaid decision applies the "contemporary community standards test" and rules that the factum of obscenity has to be judged from the point of view of an average person.

59. Very recently, in ***Shreya Singhal v. Union of India***[66], a two-Judge Bench of this Court, while dealing with the concept of obscenity, has held that:-

> "45. This Court in *Ranjit Udeshi* (supra) took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in Hicklin's case which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into who hands a publication of this sort may fall. Great strides have been made since this decision in UK, United States, as well as in our country. Thus, in Director General of *Doordarshan v. Anand Patwardhan*[67], this Court notice the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards

[66] 2015 (4) SCALE 1
[67] (2006) 8 SCC 433

> would find that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value (see para 31).
>
> 46. In a recent judgment of this Court, *Aveek Sarkar* (supra), this Court referred to English, U.S. and Candadian judgments and moved away from the Hicklin test and applied the contemporary community standard test."

From the development of law in this country, it is clear as day that the prevalent test in praesenti is the contemporary community standards test.

60. We have referred to the concept of obscenity as has been put forth by the learned senior counsel for the appellant, the prevalent test in United Kingdom, United States of America and the test formulated by the European Courts. We have extensively dealt with the test adopted in this country. On the studied scrutiny and analysis of the judgments, there can be no shadow of doubt that this Court has laid down various guidelines from time to time and accepted the contemporary community standards test as the parameter and also observed that the contemporary community standards test would vary from time to time, for the perception, views, ideas and ideals

can never remain static. They have to move with time and development of culture. Be it noted, it has become more liberal with the passage of time. Though Mr. Gopal Subramanium, learned senior counsel has emphasised on the comparables test and in that context, has referred to the judgment passed by the Kolkata High Court in ***Kavita Phumbhra*** (supra), we notice, as far as the authorities of this Court are concerned, the Court has emphatically laid down that the test as contemporary community standards test, and it would, of course, depend upon the cultural, attitudinal and civilisational change. There has also been stress on the modernity of approach and, the artistic freedom, the progression of global ideas and the synchronisation of the same into the thinking of the writers of the age. In ***Samresh Bose*** (supra), in 1985, the Court analysed the theme of the novel and dwelt upon the description in the various parts of the book and found that there was no obscenity. In 2014, in ***Aveek Sarkar*** (supra), the Court has observed that was the contemporary community standards test in 1985 and there has been a change with the passage of time. We respectfully concur with the said view and

hold that contemporary community standards test is the main criterion and it has to be appreciated on the foundation of modern perception, regard being had to the criterion that develops the literature. There can neither be stagnation of ideas nor there can be staticity of ideals. The innovative minds can conceive of many a thing and project them in different ways. As far as comparables test is concerned, the Court may sometimes have referred to various books on literature of the foreign authors and expressed the view that certain writings are not obscene, but that is not the applicable test. It may at best reflect what the community accepts.

Right to Freedom of Speech and Expression under the Constitution

61. Having stated about the test that is applicable to determine obscenity we are required to dwell upon the right to freedom of speech and expression. The words, freedom of speech and expression find place in the association words "liberty of thought, expression, belief, faith and worship", which form a part of the Preamble of the Constitution. Preamble has its own sanctity and the said concepts have been enshrined in

the Preamble.

62. First, we shall deal with the approach of this Court pertaining to freedom of speech and expression. Article 19(1) (a) and 19(2) of the Constitution are reproduced below:

> "***19. Protection of certain rights regarding freedom of speech etc.*** – (1) All citizens shall have the right -
>
> (a) to freedom of speech and expression;
>
> ...
>
> (2) Nothing in sub clause (a) to clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

63. Learned senior counsel for the appellant has drawn inspiration from the Constituent Assembly Debates especially the amendment that was introduced by Prof. K.T. Shah. He has reproduced the following excerpts from the Constituent Assembly Debates:-

> ".....my purpose in bringing forward this amend-
> ment is to point out that, if all the freedoms enu-

merated in this article are to be in accordance with only the provisions of this article, or are to be guaranteed subject to the provisions of this article only, then they would amount more to a negation of freedom than the promise or assurance of freedom, because in everyone of these clauses the exceptions are much more emphasised than the positive provision. In fact, what is given by one right hand seems to be taken away by three or four or five left hands; and therefore the article is rendered negatory in any opinion.

I am sure that was not the intention or meaning of the draftsmen who put in the other articles also. I suggest therefore that instead of making it subject to the provisions of this article, we should make it subject to the provisions of this Constitution. That is to say, in this Constitution this article will remain. Therefore if you want to insist upon these exceptions, the exceptions will also remain. But the spirit of the Constitution, the ideal under which this Constitution is based, will also come in, which I humbly submit, would not be the case, if you emphasise only this article. If you say merely subject to the provisions of this article, then you very clearly emphasise and make it necessary to read only this article by itself, which is more restrictive than necessary.

.....The freedoms are curtly enumerated in 5, 6 or 7 items in one sub-clause of the article. The exceptions are all separately mentioned in separate sub-clauses. And their scope is so widened that I do not know what cannot be included as exception to these freedoms rather than the rule. In fact, the freedoms guaranteed or assured by

> this article become so elusive that are would find it necessary to have a microscope to discover where these freedoms are, whenever it suits the State or the authorities running it to deny them. I would, therefore, repeat that you should bring in the provisions of the whole Constitution, including its preamble, and including all other articles and chapters where the spirit of the Constitution should be more easily and fully gathered than merely in this article, which, in my judgment, runs counter to the spirit of the Constitution....
>
> I also suggest that it would not be enough to enumerate these freedoms, and say the citizen shall have them. I would like to add the words also that by this Constitution these freedoms are guaranteed. That is to say, any exception which is made, unless justified by the spirit of the Constitution, the Constitution as a whole and every part of it included, would be a violation of the freedoms guaranteed hereby.
>
> (December 1, 1948)"

64. It is true that Article 19(1)(a) has to be interpreted in a manner by which the fundamental right to "freedom of speech and expression" is nourished. Elaborating the concept, it is urged by Mr. Subramanium that when two interpretations of Article 19(1)(a), one a traditional or restrictive approach and the other a modern/liberal approach are possible, the latter should be adopted, for by adopting the said approach, the

fundamental right to freedom of speech and expression is guarded and any attempt to overreach the same is kept in check.

65. Now, we shall refer to the Preamble as it uses the words "liberty of thought and expression" In ***Kesavanada Bharti v. State of Kerala and Others***[68], emphasis has been laid on the preamble of the Constitution and its objectives. Sikri, C.J. in ***Kesavanada Bharti*** (supra) observed thus:-

> "15. I need hardly observe that I am not interpreting an ordinary statute, but a Constitution which apart from setting up a machinery for Government, has a noble and grand vision. The vision was put in words in the preamble and carried out in part by conferring fundamental rights on the people. The vision was directed to be further carried out by the application of directive principles."

66. Shelat and Grover JJs in their judgment in the said case ruled:-

> **"506.** The Constitution-makers gave to the Pre-amble the pride of place. It embodied in a solemn form all the ideals and aspirations for which the country had struggled during the British regime and a Constitution was sought to be enacted in accordance with the genius of the Indian people. It certainly represented an amalgam of schemes and ideas adopted from the Constitutions of other countries. But the constant strain which

[68] (1973) 4 SCC 225

> runs throughout each and every article of the Constitution is reflected in the Preamble which could and can be made sacrosanct. It is not without significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the Constituent Assembly. The Preamble was, therefore, meant to embody in a very few and well-defined words the key to the understanding of the Constitution.
>
> **513.** The history of the drafting and the ultimate adoption of the Preamble shows—
>
> (1) that it did not "walk before the Constitution" as is said about the Preamble to the United States Constitution;
>
> (2) that it was adopted last as a part of the Constitution;
>
> (3) that the principles embodied in it were taken mainly from the Objectives Resolution;
>
> (4) the Drafting Committee felt, it should incorporate in it "the essential features of the new State";
>
> (5) that it embodied the fundamental concept of sovereignty being in the people."

67. Interpreting Article 19(1)(a) of the Constitution, the test is always to see the said Article in aid of the Preambular objectives which form a part of the basic structure of the Constitution. Article 19(1)(a) is intrinsically linked with the

Preambular objectives and it is the duty of the Court to progressively realise the values of the Constitution. In ***Maneka Gandhi v. Union of India***[69], it has been held:-

> "5.....It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression "personal liberty" as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in *R.C. Cooper case*[70] and our approach in the interpretation of the fundamental rights must now be in tune with this wavelength. We may point out even at the cost of repetition that this Court has said in so many terms in R.C. Cooper case that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have...."

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[69] (1978) 1 SCC 248
[70] (1970) 2 SCC 298

Krishna Iyer, J. in his concurring opinion has observed thus:-

> "96. A thorny problem debated recurrently at the bar, turning on Article 19, demands some juristic response although avoidance of overlap persuades me to drop all other questions canvassed before us. The Gopalan verdict, with the cocooning of Article 22 into a self-contained code, has suffered suppression at the hands of *R.C. Cooper* (supra). By way of aside, the fluctuating fortunes of fundamental rights, when the proletarist and the proprietarist have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of sub-conscious forces in judicial noesis when the cycloramic review starts from Gopalan, moves on to *In re Kerala Education Bill*[71] and then on to *All-India Bank Employees' Association*[72], next to *Sakal Papers*[73], crowning in Cooper and followed by *Bennett Coleman*[74] and *Shambhu Nath Sarkar*[75]. Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached.
>
> **97.** We may switch to Article 19 very briefly and travel along another street for a while. Is freedom

[71] 1959 SCR 995
[72] 1962 3 SCR 269
[73] (1962) 3 SCR 842
[74] (1973) 2 SCR 757
[75] (1973) 1 SCC 856

of extra-territorial travel to assure which is the primary office of an Indian passport, a facet of the freedom of speech and expression, of profession or vocation under Article 19? My total consensus with Shri Justice Bhagwati jettisons from this judgment the profusion of precedents and the mosaic of many points and confines me to some fundamentals confusion on which, with all the clarity on details, may mar the conclusion. It is a salutary thought that the summit Court should not interpret constitutional rights enshrined in Part III to choke its life-breath or chill its *elan vital* by processes of legalism, overruling the enduring values burning in the bosoms of those who won our independence and drew up our founding document. We must also remember that when this Court lays down the law, not *ad hoc* tunes but essential notes, not temporary tumult but transcendental truth, must guide the judicial process in translating into authoritative notation and mood music of the Constitution."

Beg, J. has stated that:-

"202. Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not Only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups, and classes) and of Fraternity (assuring dignity of the individual and

> the unity of the nation), which our Constitution visualizes. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection."

68. In ***Maneka Gandhi*** (supra), while interpreting Article 19(1)(a), it has been ruled that what the said Article does is to declare freedom of speech and expression as a fundamental right and to protect it against State action. The State cannot bind any legislative or executive action interfere with the exercise of the said right, except insofar as permissible under Article 19(2).

69. In ***Gajanan Visheshwar Birjur v. Union of India***[76], this Court was dealing with the order of confiscation of books containing the Marxist literature. The Court referring to the supremacy of the fundamental right to freedom of speech and expression, observed that the Constitution of India permits a free trade in ideas and ideologies and guarantees freedom of thought and expression, the only limitation being a law in terms of Clause (2) of Article 19 of the Constitution. The Court further observed that thought control is alien to our constitutional scheme and referred to the observations of

[76] (1994) 5 SCC 550

Robert Jackson, J. in ***American Communications Association v. Douds***[77] with reference to the US Constitution wherein it was stated that thought control is a copyright of totalitarianism, and it was unacceptable. The Court finally stated that it is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.

70. More important and relevantly lucid are observations in ***Sahara India Real Estate Corpn. Ltd. v. SEBI***[78], where while dealing with the freedom of speech, the Constitution Bench held:-

> "Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the Government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend ,or shock any section of the population. It also includes the

[77] 339 US 382
[78] (2012) 10 SCC 603

> right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, *but in ways which sometimes conflict*. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of *freedom of expression* as it is for other values."

71. In ***State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools***[79], while dealing with the freedom under Article 19(1)(a), the Constitution Bench opined:-

> **"36.** The word "freedom" in Article 19 of the Constitution means absence of control by the State and Article 19(1) provides that the State will not impose controls on the citizen in the matters mentioned in sub-clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*g*) of Article 19(1) except those specified in clauses (2) to (6) of Article 19 of the Constitution. In all matters specified in clause (1) of Article 19, the citizen has therefore the liberty to choose, subject only to restrictions in clauses (2) to (6) of Article 19. One of the reasons for giving this liberty to the citizens is con-

[79] (2014) 9 SCC 485

tained in the famous essay "*On Liberty*" by John Stuart Mill. He writes:

> "… Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."

According to Mill, therefore, each individual must in certain matters be left alone to frame the plan of his life to suit his own character and to do as he likes without any impediment and even if he decides to act foolishly in such matters, society or on its behalf the State should not interfere with the choice of the individual. Harold J. Laski, who was not prepared to accept Mill's attempts to define the limits of State interference, was also of the opinion that in some matters the individual must have the freedom of choice. To quote a passage from *A Grammar of Politics* by Harold J. Laski:

> "… My freedoms are avenues of choice through which I may, as I deem fit, construct for myself my own course of conduct. And the freedoms I must possess to enjoy a general liberty are those which, in their sum, will constitute the path through which my best self is capable of attainment. That is not to say it will be attained. It is to say only that I alone can make that best self, and that without those freedoms I have not the means of manufacture at my disposal."

37. Freedom or choice in the matter of speech and expression is absolutely necessary for an individual to develop his personality in his own way and this is

> one reason, if not the only reason, why under Article 19(1)(*a*) of the Constitution every citizen has been guaranteed the right to freedom of speech and expression.
>
> **38.** This Court has from time to time expanded the scope of the right to freedom of speech and expression guaranteed under Article 19(1)(*a*) of the Constitution by consistently adopting a very liberal interpretation. In *Romesh Thappar* v. *State of Madras*[80], this Court held that freedom of speech and expression includes freedom of propagation of ideas which is ensured by freedom of circulation and in *Sakal Papers (P) Ltd.* v. *Union of India*[81], this Court held that freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views. In *Bennett Coleman & Co.* v. *Union of India*[82], this Court also held that the freedom of press means right of citizens to speak, publish and express their views as well as right of people to read and in *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana*[83], this Court has further held that freedom of speech and expression includes the right of citizens to exhibit films on Doordarshan."

72. Presently, we shall refer to the decision in ***Shreya Singhal*** (supra). Mr. Gopal Subramanium, while giving immense emphasis on the said authority, has submitted that while striking down Section 66A of the IT Act, 2000 as unconstitutional, the Court has really elevated the concept of freedom of speech and expression to a great height. We have

[80] AIR 1950 SC 124
[81] AIR 1962 SC 305
[82] (1972 2 SCC 788
[83] (1988) 3 SCC 410

already referred to certain passages of the said decision in the context of test for obscenity. Mr. Nariman, learned senior counsel would submit that the said decision has to be read in its context and as it relates to the field of internet and in the present case, we are concerned with the obscenity test, as understood by this Court in the context of Section 292 IPC. In the said case, the two-Judge Bench, while dealing with the content of freedom of expression, opined that:-

> "There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity or India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order."
>
> And again:-
>
> "47. What has been said with regard to public order and incitement to an offence equally applies here.

> Section 66A cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality' in that what may be grossly offensive or annoying under the Section need not be obscene at all - in fact the word 'obscene' is conspicuous by its absence in Section 66A."

We have referred to the said passages only to understand that the two-Judge Bench has succinctly put what freedom of speech and expression mean. The Court has referred to certain judgments which we have already referred in that context. The Court was really not dealing with the obscenity test within the ambit and sweep of Section 292 IPC. The Court has opined that Section 66A of the IT Act, 2000 violates Article 19(1)(a) of the Constitution. There can be no doubt that there has been elevation of the concept in a different way, but it cannot form the foundation or base to sustain the argument of Mr. Subramanium that the freedom has to be given absolute and uncurtailed expanse without any boundaries of exceptions. We accept the proposition that there should not be narrow or condensed interpretation of freedom of speech and expression, but that does not mean that there cannot be any limit. Constriction is permissible under Article 19(2) of the Constitution and in ***Ranjit D. Udeshi*** (supra), the Constitution

Bench has upheld the constitutional validity of Section 292 IPC.

Mahatma Gandhi as perceived by this Court and certain authors

73. To appreciate the prevalent test in this country as regards obscenity and the conceptual definition of poetry and what is really understood by poetic license, we have to reflect on the question that had been framed by this Court. We have used the expression 'historically respected personalities'. It is true that the Constitution does not recognize any personality whether historically or otherwise as far as Article 19(1)(a) is concerned. But it would be incorrect to submit that if the concept of personality test is applied, a new ingredient to Section 292 IPC would be added which is in the realm of legislature and this Court should refrain from doing the same. At this juncture, it is seemly to state that Section 292 IPC uses the term 'obscene'. While dealing with the facet of obscenity, this Court has evolved the test. The test evolved by this Court, which holds the field today is the 'contemporary community standards test'. That does not really create an offence or add

an ingredient to the offence as conceived by the legislature under Section 292 IPC. It is a test thought of by this Court to judge obscenity. The said test has been evolved by conceptual hermeneutics. We appreciate the anxiety of Mr. Subramanium, learned senior counsel appearing for the appellant, and we are also absolutely conscious that this Court cannot create an offence which is not there nor can it add an ingredient to it.

74. Keeping this in view, we shall now proceed to deal with the 'historically respected persons'. Though the question uses the words 'historically respected persons', contextually, in this case it would mean Mahatma Gandhi, the Father of the Nation. Though some may think it is patently manifest or known that Mahatma Gandhi is the Father of the Nation and the most respected historical personality in this country, yet we are obliged to reflect on Mahatma Gandhi to know how this Court has spoken about Mahatma Gandhi and how others have perceived the life of 'Mahatma Gandhi' and 'Gandhian thought'. Mr. Subramanium, learned senior counsel, in the course of hearing has referred to certain passages from the text books which are critical of Mahatma Gandhi, his life and his

thoughts. We shall refer to the books at a subsequent stage.

75. As mentioned earlier, we think at this stage we should refer to certain decisions of this Court where Mahatma Gandhi or Gandhian thought have been reflected.

76. In ***Kesavananda Bharati*** (supra), S.N. Dwivedi, J, has stated that the Constitution bears the imprint of the philosophy of our National Movement for Swaraj. The Court also stated that Mahatma Gandhi gave to the Movement the philosophy of "Ahimsa". Two essential elements of his Ahimsa are: (1) equality; and (2) absence of the desire of self-acquisition (Aparigrah) and he declared that "to live above the means befitting a poor country is to live on stolen food."

And he further observed that:-

> "The philosophy of Mahatma Gandhi was rooted in our ancient tradition; the philosophy of Jawaharlal Nehru was influenced by modern progressive thinking. But the common denominator in their philosophies was humanism. The humanism of the Western Enlightenment comprehended mere political equality; the humanism of Mahatma Gandhi and Jawaharlal Nehru was instinct with social and economic equality. The former made man a political citizen; the latter aims to make him a 'perfect' citizen. This new humanist philosophy became the catalyst of the National Movement for Swaraj."

77. In ***K. Karunakaran v. T.V. Eachara Warrier,***[84] this Court observed that lies are resorted to by the high and the low being faced with inconvenient situations which require a Mahatma Gandhi to own up Himalayan blunders and unfold unpleasant truths truthfully.

78. In ***Maneka Gandhi*** (supra), this Court observed thus:-

> "22. …These rights represent the basic values of a civilised society and the constitution-makers declared that they shall be given a place of pride in the Constitution and elevated to the status of fundamental rights. The long years of the freedom struggle inspired by the dynamic spiritualism of Mahatma Gandhi and in fact the entire cultural and spiritual history of India formed the background against which these rights were enacted and consequently, these rights were conceived by the constitution-makers not in a narrow limited sense but in their widest sweep, for the aim and objective was to build a new social order where man will not be a mere plaything in the hands of the State or a few privileged persons but there will be full scope and opportunity for him to achieve the maximum development of his personality and the dignity of the individual will be fully assured."

79. In ***Bangalore Water Supply & Sewerage Board v. A. Rajappa***[85], this Court observed:-

> "There is no degrading touch about "industry",

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[84] (1978) 1 SCC 18
[85] (1978) 2 SCC 213

> especially in the light of Mahatma Gandhi's dictum that 'Work is Worship". Indeed .the colonial system of education, which divorced book learning from manual work and practical training, has been responsible for the calamities in that field. For that very reason, Gandhiji and Dr Zakir Hussain propagated basic education which used work as modus operandus for teaching. We have hardly any hesitation in regarding education as an industry."

80. In ***Minerva Mills Ltd. v. Union of India***[86], the Court noted thus:-

> "53. .... The emergence of Mahatma Gandhi on the political scene gave to the freedom movement a new dimension: it ceased to be merely anti-British; it became a movement for the acquisition of rights of liberty for the Indian Community.
>
> 103. ..... Mahatma Gandhi, the father of the nation, said in his inimitable style in words, full of poignancy:
>
> > "Economic equality is the master key to non-violent independence. A non-violent system of government is an impossibility so long as the wide gulf between the rich and the hungry millions persists. The contrast between the palaces of New Delhi and the miserable hovels of the poor labouring class cannot last one day in a free India in which the poor will enjoy the same power as the rich in the land. A violent and bloody revolution is a certainty one day, unless there is voluntary abdication of riches and the power that riches give and sharing them

[86] (1980) 3 SCC 625

for common good."

81. In ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India***[87], there is an observation which reads thus:-

> "13. ...There was the Everest presence of Mahatma Gandhi, the Father of the Nation, who staked his life for the *harijan* cause. There was Baba Saheb Ambedkar — a *mahar* by birth and fighter to his last breath against the *himalayan* injustice to the *harijan* fellow millions stigmatised by their genetic handicap — who was the Chairman of the drafting committee of the Constituent Assembly."

82. In ***People's Union for Democratic Rights v. Union of India***[88], it has been stated:-

> "Mahatma Gandhi once said to Gurudev Tagore, "I have had the pain of watching birds, who for want of strength could not be coaxed even into a flutter of their wings. The human bird under the Indian sky gets up weaker than when he pretended to retire. For millions it is an eternal vigil or an eternal trance."

83. In ***Bachan Singh v. State of Punjab***[89], the Court noted:-

> "22. ...Mahatma Gandhi also wrote to the same effect in his simple but inimitable style:
>
> "Destruction of individuals can never be a

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[87] (1981) 1 SCC 246
[88] (1982) 3 SCC 235
[89] (1982) 3 SCC 24

> virtuous act. The evil-doers cannot be done to death. Today there is a movement afoot for the abolition of capital punishment and attempts are being made to convert prisons into hospitals as if they are persons suffering from a disease.""

84. In ***Kailash Sonkar v. Maya Devi***[90], ***(1984) 2 SCC 91***, the observation is:-

> "4**.** As Mahatma Gandhi, father of the nation, said "India lives in villages" and so do the backward classes, hence the primary task was to take constructive steps in order to boost up these classes by giving them adequate concessions, opportunities, facilities and representation in the services and, last but not the least, in the electorate so that their voices and views, grievances and needs in the Parliament and State legislatures in the country may be heard, felt and fulfilled."

85. In ***Pradeep Jain v. Union of India***[91], emphasising on formation of one nation, the Court observed:-

> "This concept of one nation took firm roots in the minds and hearts of the people during the struggle for independence under the leadership of Mahatma Gandhi. He has rightly been called the Father of the Nation because it was he who awakened in the people of this country a sense of national consciousness and instilled in them a high sense of patriotism without which it is not possible to build a country into nationhood."

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[90] (1984) 2 SCC 91
[91] (1984) 3 SCC 654

86. In ***Indra Sawhney v. Union of India***[92] and ors. the Court observed that it is Mahatma Gandhi, who infused secular spirit amongst the people of India.

87. In ***S.R. Bommai and others v. Union of India and others***[93] speaking on statesmanship, the larger Bench noted:-

> "24. Mahatma Gandhi and other leaders of modern times advocated to maintain national unity and integrity. It was with the weapons of secularism and non-violence that Mahatma Gandhi fought the battle for independence against the mightly colonial rulers. As early as 1908, Gandhiji wrote in Hind Swaraj:
>
> > India cannot cease to be one nation, because people belonging to different religions live in it....In no part of the world are on nationality and on religion synonymous terms; nor has it ever been so in India."

88. In ***T.N. Godavarman Thirumulpad v. Union of India***[94], while making a reference to fundamental duties, the Court found that:-

> "35. The Father of the Nation Mahatma Gandhi has also taught us the same principle and all those concepts find their place in Article 51-A(*g*) as well."

89. In **Dalip Singh Vs. State of U.P. and Ors.**[95], while

[92] (1992) Supp. 3 SCC 217
[93] (1994) 3 SCC 1
[94] (2012) 4 SCC 362
[95] (2010) 2 SCC 114

discussing on values of life, the Court opined that Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral Dart of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences.

90. Apart from these authorities, there are so many other decisions where the name of Mahatma Gandhi has been referred to with reverence and elaborating on various facets of life of Gandhi and Gandhian thought. There are also certain eminent persons who have referred to Mahatma Gandhi in their speech and articles. Justice H.R. Khanna, in one of his lectures has spoken:-

> "We, in India, were fortunate to have been led during the struggle for Independence by one, who, apart from being an astute political leader, was also a great moral crusader who has his place in history along with the Buddha and Christ. Fro him, means were no less important than the ends. There was in the personality of the Mahatma a subtle, indescribable, magic touch, for all the different persons who came in close contact with him were turned into men of gold, be it Nehru or Patel, Azad or Rajendra Prasad, Rajaji or J.P. Narayan. Since the death of Mahatma, except for observing his birthday as a national holiday, we have remembered him in

> no better way than by riding roughshod over the principles of truth and moral values that he propagated all his life."

91. Having referred to the decisions of this Court and also a part of lecture, we think it condign to refer to certain books of Mahatma Gandhi. Mr. Subramanium, learned senior counsel also referred to certain books indicating that there are many critical passages about Mahatma Gandhi. The books referred to by him are "Great Soul: Mahatma Gandhi and his struggle India"[96] and "Sex and Power"[97]. In this regard we may also refer to *Mahatma Gandhi The Early Phase Vol.I*[98], *Gandhian Constitution for Free India*[99], *Gandhi's Philosophy of Law*[100], *Mahatma Gandhi*[101], *The Myth of the Mahatma*[102], *Gandhi Before India*[103], *In Search of Gandhi*[104], *Gandhi's View of Legal Justice*[105], *Gandhi, Soldier of Non-Violence: An Introduction*[106], *Trial of Mr. Gandhi*[107], *Gandhi and Civil Disobedience*

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[96] Lelyveld Joseph, Great Soul: Mahatma Gandhi and his struggle with India, Harpr Collins, 2011; page
[97] Banerjee Rita, Sex and Power: Defining History, Shaping Societies, Penguin, 2008; page 274
[98] Pyarelal, Navajivan Publishing House, 1965
[99] Shriman Narayan Agarwal, Kitabistan, 1946
[100] V.S. Hegde, Concept Publishing Company, 1983
[101] Sankar Ghose, Allied Publishers Limited, 1991
[102] MMichael Edwardes, UBS Publishers' distributors Ltd., 1986
[103] Ramachandra Guha, Penguin Books, 2013
[104] Richard Attenborough, B.I. Publications, 1982
[105] Ajit Atri, Deep & Deep Publications Pvt. Ltd., 2007
[106] Calvin Kytle, Seven Locks Press, 1983
[107] Francis Watson, Macmillan and Co., 1969

Movement[108], *Tilak, Gandhi and Gita*[109], *Studies in Modern Indian Political thought: Gandhi an Interpretation*[110], *Gandhi and the Partition of India*[111], *Gandhi in London*[112], *Mahatma Gandhi Contribution to Hinduism*[113], *Life of Mahatma Gandhi*[114], *Moral and Political Thought of Mahatma Gandhi*[115], *Gandhi and Social Action Today*[116], *Gandhi: The Man and the Mahatma*[117], *Gandhi and Ideology of Swadeshi*[118], *Gandhi's Khadi: History of Contention and Conciliation*[119], *Mahatma Gandhi and Jawarhal Nehru: A Historic Partnership Vol.1 (1916-1931)*[120], *Gandhi: Prisoner of Hope*[121], *Mahatma Gandhi and His Apostles*[122], *Gandhi and Status of Women*[123], *Philosophy of Gandhi: A Study of His Basic Ideas*[124], *Gandhi Naked Ambition*[125], *Meera and the Mahatma*[126], and *The Men Who Killed Gandhi*[127].

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108 S.R. Bakshi, Gitanjali Publishing House, 1985
109 D.K. Gosavi, Bharatiya Vidya Bhavan, 1983
110 O.P. Goyal, Kitab Mahal Pvt. Ltd., 1964
111 Sandhya Chaudhri, Sterling Publishers Pvt. Ltd., 1984
112 James D Hunt, Promilla & Co., 1978
113 K.K. Lal Karna, Classical Publishing Co., 1981
114 Louis Fisher, Granada, 1982
115 Raghavan N. Iyer, Oxford University Press, 1973
116 Mery Kappen (Ed.), Sterling Publishers Pvt. Ltd., 1990
117 Ram Sharma, Rajan, 1985
118 S.R. Bakshi, Reliance Publishing House, 1987
119 Rahul Ramagundam, Orient Longman Pvt. Ltd., 2008
120 Madhu Limaye, B.R. Publishing Corporation, 1989
121 Judith M. Brown, Oxford University Press, 1990
122 Ved Mehta, Indian Book Company, 1977
123 S.R. Bakshi, Criterion Publications, 1987
124 Glyn Richards, Rupa & Co., 1991
125 Jad Adams, Quercus, 2010
126 Sudhir Kakar, Yiking – Penguin, 2004
127 Manohar Malgonkar, Roli Books, 2008

92. Some of these books praise Gandhi, analyse Gandhian thoughts, criticise Gandhian philosophy, express their dissent, disagree with his political quotient and also comment on his views on "Brahamcharya". On reading of the said books, one can safely say they are the views of the authors in their own way and there is no compulsion to agree with the personality or his thoughts or philosophy. We are reminded of what Voltaire said, "*I do not agree with what you have to say, but I'll defend to the death your right to say it*" or for that matter what George Orwell said, "*If liberty means anything at all, it means the right to tell people what they do not want to hear*".

93. There can be no two opinions that one can express his views freely about a historically respected personality showing his disagreement, dissent, criticism, non-acceptance or critical evaluation.

94. If the image of Mahatma Gandhi or the voice of Mahatma Gandhi is used to communicate the feelings of Gandhiji or his anguish or his agony about any situation, there can be no difficulty. The issue in the instant case, whether in the name of artistic freedom or critical thinking or generating the idea of

creativity, a poet or a writer can put into the said voice or image such language, which may be obscene. We have already discussed at length about the concept of 'poetic license' and 'artistic freedom'. There can be "art for art's sake" which would include a poem for the sake of thought or expression or free speech and many a concept.

Concept of poetry

95. We do not intend to say that a poem should conform to the definition or description as many authors have thought of. According to Dr. Samuel Johnson, "Poetry is 'metrical composition'; it is 'the art of uniting pleasure with truth by calling imagination to the help of reason'; and its 'essence' is 'invention'."

96. Mill's point of view "poetry is, but the thought and words in which emotion spontaneously embodies itself." Macaulay understands poetry as "we mean the art of employing words in such a manner as to produce an illusion on the imagination, the art of doing by means of words what the painter does by means of colours".[128]

[128] Essay on Milton

97. Carlyle assumed that poetry is "we will call Musical Thought".[129] Shelley states, "in a general sense may be defined as the expression of the imagination".[130] Hazlitt defines poetry as "it is the language of the imagination and the passions".[131]

98. Leigh Hunt declares poetry as "the utterance of a passion for truth, beauty, and power, embodying and illustrating its conceptions by imagination and fancy, and modulating its language on the principle of variety in unity".[132]

99. S.T. Coleridge's has expressed that poetry is the anti-thesis of science, having for its immediate object pleasure, not truth.[133] German philosopher Hegel has thought that the use of verse in a given piece of literature serves in itself to lift the mankind into a world quite different from that of prose or everyday life. Emerson says that the great poets are judged by the frame of mind they induce.[134] There is no difficulty in saying that the definition or understanding of concept of poetry of any high authority can be ignored. That is the freedom of the poem.

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[129] Heroes and Hero-Worship, Lecture iii
[130] Defence of Poetry
[131] Lectures on the English Poets, i
[132] Imagination and Fancy, i.
[133] Lectures and Notes on Shakespeare and other English Poets, and Biographia Literaria, chapter xiv.
[134] Preface to Parnassus

The poem in issue

100. Presently, to the poem in question we are referring to the same solely for the purpose of adjudging whether the order of framing of charge under Section 292 IPC is sustainable, regard being had to the law pertaining to charge, and whether the High Court has correctly applied the principle. The High Court has categorically opined that there is a prima facie case for proceeding against the accused under Section 292 IPC. It is submitted by Mr. Subramanium, learned senior counsel appearing for the appellant that the poem does not use obscene words and it does not come within the ambit and sweep of Section 292 IPC and the poet has expressed himself as he has a right to express his own thoughts in words. It is his further submission that the poem actually expresses the prevalent situation in certain arenas and the agony and anguish expressed by the poet through Gandhi and thus, the poem is surrealistic presentation. That apart, contends Mr. Subramanium, that the poem, as one reads as a whole, would show the image or the surrealistic voice of Mahatma Gandhi, is reflectible. Learned senior counsel would submit that apart

from two to three stanzas, all other stanzas of the poem uses Gandhi, which may not have anything to do with the name of Mahatma Gandhi.

101. Mr. Nariman, learned amicus curiae, per contra, would submit that the poem refers singularly and exclusively to Mahatma Gandhi in every stanza. The learned friend of the Court has referred to certain stanzas of the poem. We do not intend to reproduce them in their original form. But we shall reproduce them with some self-caution. Some of them are:-

"(i) I met Gandhi on the road
_____ in the name of _____"

xxxx xxxx xxxx

"(ii) I met Gandhi
In Tagore's Geetanjali,
He was writing a poem
On _____"

xxxx xxxx xxxx

"(iii) When I met Gandhi
On earth which is the property of the common man
Playing husband-and-wife games with orphan children,
He said ==
Nidharmi Bharat ka kya pahchan?
_____"

We have left the spaces blank as we have not thought it

appropriate to reproduce the words. There are other stanzas also which have their own reflection. Whether the poem has any other layer of meaning or not, cannot be gone into at the time of framing of charge. The author in his own understanding and through the process of trial can put his stand and stance before the learned trial Judge.

102. Submission of Mr. Nariman, learned amicus curiae is that the words that have been used in various stanzas of the poem, if they are spoken in the voice of an ordinary man or by any other person, it may not come under the ambit and sweep of Section 292 IPC, but the moment there is established identity pertaining to Mahatma Gandhi, the character of the words change and they assume the position of obscenity. To put it differently, the poem might not have been obscene otherwise had the name of Mahatma Gandhi, a highly respected historical personality of this country, would not have been used. Mr. Nariman would emphatically submit that the poem distinctly refers to Mahatma Gandhi because the sketch of Gandhiji is there figuratively across the entire page in his customary garb, stature and gait. According to him, the poem does not subserve

any artistic purpose and is loathsome and vulgar and hence, it comes within the sweep of Section 292 IPC. The learned amicus curiae would submit that the use of the name of Mahatma Gandhi enhances the conceptual perception of obscenity as is understood by this Court.

103. Mr. Subramanium would submit that the free speech is a guaranteed human right and it is in fact a transcendental right. The recognition of freedom of thought and expression cannot be pigeon-holed by a narrow tailored test. The principle pertaining to the freedom of speech has to be interpreted on an extremely broad canvas and under no circumstances, any historical personality can cause an impediment in the same. It is urged that the Constitution of India is an impersonalised document and poetry which encourages fearlessness of expression, cannot be restricted because of use of name of a personality. Learned senior counsel has further submitted that freedom to offend is also a part of freedom of speech. Poetry, which is a great liberator, submits Mr. Subramanium, can be composed through a merely voice explaining plurality of thought. He would submit

the instant poem is one where there is "transference of consciousness" that exposes the social hypocrisy and it cannot be perceived with a conditioned mind.

104. The principle that has been put forth by Mr. Subramanium can be broadly accepted, but we do not intend to express any opinion that freedom of speech gives liberty to offend. As far as the use of the name of historically respected personality is concerned, learned senior counsel, while submitting so, is making an endeavour to put the freedom of speech on the pedestal of an absolute concept. Freedom of speech and expression has to be given a broad canvas, but it has to have inherent limitations which are permissible within the constitutional parameters. We have already opined that freedom of speech and expression as enshrined under Article 19(1)(a) of the Constitution is not absolute in view of Article 19(2) of the Constitution. We reiterate the said right is a right of great value and transcends and with the passage of time and growth of culture, it has to pave the path of ascendancy, but it cannot be put in the compartment of absoluteness. There is constitutional limitation attached to it. In the context of

obscenity, the provision enshrined under Section 292 IPC has its room to play. We have already opined that by bringing in a historically respected personality to the arena of Section 292 IPC, neither a new offence is created nor an ingredient is interpreted. The judicially evolved test, that is, "contemporary community standards test" is a parameter for adjudging obscenity, and in that context, the words used or spoken by a historically respected personality is a medium of communication through a poem or write-up or other form of artistic work gets signification. That makes the test applicable in a greater degree. To understand the same, a concrete example can be given. A playwright conceives a plot where Mahatma Gandhi, Vishwakavi Rabindra Nath Tagore, Sardar Vallabh Bhai Patel meet in heaven and they engage themselves in the discussion of their activities what they had undertaken when they lived in their human frame. In course of discussion, their conversation enters into the area of egoism, thereafter slowly graduates into the sphere of megalomania and eventually they start abusing each other and in the abuses they use obscene words. The question would be whether the

dramatist can contend that he has used them as symbolic voices to echo the idea of human fallacy and it's a creation of his imagination; and creativity has no limitation and, therefore, there is no obscenity. But, there is a pregnant one, the author has chosen historically respected persons as medium to put into their mouth obscene words and, ergo, the creativity melts into insignificance and obscenity merges into surface even if he had chosen a "target domain". He in his approach has travelled into the field of perversity and moved away from the permissible "target domain", for in the context the historically respected personality matters.

Conclusion

105. When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in. To elaborate, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standards test for use of the same language, it would not be so, if the name of

Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene. While so concluding, we leave it to the poet to put his defense at the trial explaining the manner he has used the words and in what context. We only opine that view of the High Court pertaining to the framing of charge under Section 292 IPC cannot be flawed.

106. Coming to the case put forth by the appellant-publisher, it is noticeable that he had published the poem in question, which had already been recited during the Akhil Bhartiya Sahithya Sammelan at Amba Jogai in 1980, and was earlier published on 2.10.1986 by others. The appellant has published the poem only in 1994. But immediately after coming to know about the reactions of certain employees, he tendered unconditional apology in the next issue of the 'Bulletin'. Once he has tendered the unconditional apology even before the inception of the proceedings and almost more than two decades have passed, we are inclined to quash the charge framed against him as well as the printer. We are disposed to quash the charge against the printer, as it is

submitted that he had printed as desired by the publisher. Hence, they stand discharged. However, we repeat at the cost of repetition that we have not expressed any opinion as to the act on the part of the author of the poem, who is co-accused in the case, and facing trial before the Magistrate in respect of the offence punishable under Section 292 IPC. It shall be open for him to raise all the pleas in defence, as available to him under the law. At this juncture, we are obliged to mention that Mr. Nariman, learned friend of the Court also in course of hearing, had submitted that the appellant having offered unconditional apology immediately and regard being had to the passage of time, he along with the printer should be discharged.

107. Before we part with the case, we must candidly express our unreserved and uninhibited appreciation for the distinguished assistance rendered by Mr. Fali S. Nariman, learned amicus curiae. We also record our appreciation for the sustained endeavour put forth by Mr. Subramanium, learned senior counsel for the appellant, for it has been of immense value in rendering the judgment.

108. Consequently, the appeal stands disposed of in above terms.

.....J.
[Dipak Misra]

.....J.
[Prafulla C. Pant]

New Delhi
May 14, 2015