

Obscenity under the law

A review of significant cases

1. Ranjit D. Udeshi v. State of Maharashtra

Citation: AIR 1965 SC 881

Judges: M. Hidayatullah, P.B. Gajendragadkar, K.N. Wancho, J.C. Shah, N. Rajagopala Ayyangar

Facts: The appellant was prosecuted along with the other partners of a bookstall which was found to be in possession (for the purposes of sale) of the unexpurgated edition of the book, *Lady Chatterley's Lover*. The partners were charged under Section 292, Indian Penal Code (IPC)¹ for certain obscene passages in the book. During the trial, the accused

¹ 292. 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 persons 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, reduces 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

produced as witness Mr. Mulk Raj Anand, a writer and art critic, who presented a detailed analysis of the novel and opined that the novel was a classic work of considerable literary merit and not obscene. Nonetheless the Trial Court found the appellant guilty; the Bombay High Court upheld the verdict. Hence the appeal.

Issue: Whether S. 292, IPC was constitutionally valid; if so, whether or not it could be invoked in the present case.

Arguments: The prosecution contended that the law regarding obscenity in India had its underpinnings in the Hicklin test (which laid emphasis on the potential of the impugned object to deprave and corrupt by immoral influences) and that the book failed the test.

The appellant argued that S. 292 of the IPC was void as an impermissible and vague restriction on the freedom of speech and expression; that even if the Section were valid, if it was properly construed and the book was considered as a whole, the book would not be found obscene; and that for possession or sale to be punishable under the Section it must be with the intention of corrupting the public in general and the purchasers in particular.

On the subject of obscenity, the appellant contended that the standard should not be that of an immature teenager or a person who is abnormal but of one who is normal, that is to say, with a *mens sana* in *corporis sana*. That, if valid, the section must apply only to cases of intentional lewdness/hardcore pornography, libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse sexual feelings.

Decision: The Court dismissed the appeal with the following assertions:

(1) “Where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity must be so trivial and insignificant that it can have no effect and may be overlooked. In other words, treatment of sex in a manner offensive to public decency and, judged by our national standards, considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result.”

(2) “The test to adopt in India is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treatment of sex in a manner appealing to the carnal sides of human nature, or having that tendency.”

(3) “The law seeks to protect not those who can protect themselves but those whose

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.

prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treatment of sex by an artist and hence there is some poetry even in the ugliness of sex. The book is probably an unfolding of the author's philosophy of life and of the urges of the unconscious but these are unfolded in his other books. Therefore, there is no loss to society if there was a message in the book. The divagations (sic) with sex are not a legitimate embroidery but they are the only attractions to the common man."

2. **Samaresh Bose and Another v Amal Mitra and Another**

Citation: AIR 1986 SC 967, (1985) 4 SCC 289

Judges: Amarendra Nath Sen, R.S. Pathak

Facts: Samaresh Bose, the first appellant, is a well-known writer of Bengali novels and stories, and the author of a novel called *Prajapati*, which was published in Sarodiya Desh, a journal of Bengali literature with wide circulation. Sitangshu Kumar Dasgupta, the second appellant, was the publisher and the printer of the journal at the relevant time.

On 2 February 1968, Amal Mitra, a young advocate, made an application in the Court of the Chief Presidency Magistrate at Calcutta complaining that the novel, *Prajapati*, "contains matters which are obscene and both the accused persons have sold, distributed, printed and exhibited the same which has the tendency to corrupt the morals of those in whose hands the said Sarodiya Desh may fall." Both the accused persons were said to have committed an offence punishable under Section 292 of the Indian Penal Code and under Section 292 read with Section 109 IPC (abetment).

Both the accused persons were convicted of charges under Section 292 by the Chief Presidency Magistrate at Calcutta. The Magistrate ordered that the offending portions in the journal be destroyed.

The appellants then filed appeals in the Calcutta High Court. The appeals were dismissed and the High Court held that the Chief Presidency Magistrate should also take appropriate steps to destroy the offending portions of the journal in respect of the novel if published in book form.

The author and publisher then filed an appeal in the Supreme Court. The question for consideration in this appeal was whether the two appellants could be said to have committed an offence under Section 292. In order to decide this, the court looked at whether or not the novel *Prajapati* was obscene.

Issues: Whether references to kissing, descriptions of the body and the figures of female characters in the book and suggestions of sex acts by themselves have the effect of depraving and debasing, and encouraging lasciviousness among,

readers of any age, and must therefore be considered obscene.

Arguments:

The appellants argued that the novel depicts the feelings, thoughts, actions and life of Sukhen, the hero of the novel and its main character; and that through the speeches, thoughts and actions of Sukhen the novel seeks to condemn and criticise various prevalent aspects of life in various strata of society. They argued that if different kinds of words - cultured and sophisticated - were to be used for the thoughts, speeches and actions of Sukhen, the entire portrayal of Sukhen's character would become unreal and meaningless. They argued that in literature there was a distinction between obscenity and vulgarity, and it was only obscenity in literature that attracts the provisions of Section 292. They argued that the book had a social purpose to serve and had been written with the primary object of focusing the attention of persons interested in literature to the various ills and maladies ailing society and destroying the social fabric.

The state of West Bengal supported the judgment of the Chief Presidency Magistrate and the High Court. The state submitted that the novel has to be judged in the background of the conditions prevailing in society at the time when the novel was written.

The Supreme Court allowed the appeal and dismissed the charges of obscenity. It held that vulgar writing is not necessarily obscene. "Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences."

"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."

The court said that although, in some places in the book there may have been an exhibition of bad taste, it was up to readers of experience and maturity to draw the necessary inference. The court said that it was not sufficient to bring home to adolescents any suggestion that was depraving or lascivious. "We have to bear in mind that the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and have to read books which are purely religious".

3. K. A. Abbas v. Union Of India and Another

Citation: AIR 1971 SC 481

Judges: M. Hidayatullah, J.M. Shelat, G.K. Mitter, C.A. Vaidyalingam, A.N. Ray

Facts: The petitioner produced in 1968 a documentary film in 2 reels (with a running time of 16 minutes) called a Tale of Four Cities. In this film he purported to contrast the luxurious life of the rich in the four cities of Calcutta, Bombay, Madras and Delhi, with the squalor and poverty of the poor, particularly those whose hands and labour help to build beautiful cities, factories and other industrial complexes. The film, in motion sequences or still shots, showed contrasting scenes of palatial buildings, hotels and factories - evidence of the prosperity of a few, and shanties, huts and slums - evidence of poverty of the masses. Also included is a brief scanning shot, blurred by the movement of the camera, in which the red light district of Bombay is shown, with the inmates of the brothels waiting at the doors or windows.

The petitioner applied to the Central Board of Film Certification for a 'U' certificate for unrestricted exhibition of the film but the Committee was willing to grant only an 'A' certificate. On the petitioner's representation that the movie portrayed no obscenity, he was informed that he would get a 'U' certificate provided he deleted certain portions from the red light scene. Hence the writ petition to the Supreme Court. However, after a joint screening, the respondent acceded to the petitioner's demand and stated that he would be given a 'U' certificate. The petitioner then amended his submission so as to be able to challenge 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.

Issues:

Was Part 11 and Section 5B of the Cinematograph Act – which authorised the Central Government to issue directions to set out principles to guide the Censor Board in granting certification -- constitutionally valid?

Does pre-censorship of films violate the fundamental right to the freedom of speech and expression?

Even if pre-censorship were a legitimate restraint on freedom, does it have to be exercised on definitive principles leaving no room for arbitrary action?

Argument(s): The petitioner contended that there are other forms of speech and expression besides the films and none of them is subject to any prior restraint in the form of pre-censorship; that there should equality of treatment with such other forms and that there was no justification for differential treatment. Specifically, the petitioner argued:

(a) That pre-censorship itself cannot be tolerated under the freedom of speech and expression,

(b) That even if it were a legitimate restraint on such freedom, it must be exercised on very definite principles that leave no room for arbitrary action,

(c) That there must be a reasonable, fixed time-limit for the decision of the authorities censoring the film, and

(d) That the appeal should go to a court or to an independent tribunal and not the Central Government.

The respondent conceded (c) and (d) and stated that the Government would begin working on legislation to address these concerns at the earliest possible opportunity. The case then, boiled down to an academic debate of the validity of (a). The Court's opinion is set out in the following passage.

Decision:

The Court, relying on the Khosla Committee Report, 1968² and precedents from Indian, American and British case law, said that pre-censorship was valid (in the context) and an exception to the right to freedom of speech and expression had been provided under Article 19(2). The Court said that pre-censorship was necessary as the medium of film had to be treated differently from other forms of art and expression. "The art of the cameraman, with trick photography, vistavision and three dimensional representation thrown in, has made the cinema picture more true to life than even the theatre or, indeed, any other form of representative art."

It said that the general principles that applied to exceptions to Article 19 (1) (a) applied to the censorship of film, and that there was nothing vague about the wording of the Censorship Act. "We are quite clear that expressions like 'seduction,' 'immoral traffic in women,' 'soliciting, prostitution or procuration (sic),' 'indelicate sexual situation' and scenes suggestive of immorality,' 'traffic and use of drugs,' 'class hatred,' 'blackmail associated with immorality' are within the understanding of the average man and more so of persons who are likely to be the panel for purposes of censorship. Any more definiteness is not only not expected but is not possible."

However, the Court observed that the censors need to take into account the value of art while making their decision. "The artistic appeal or presentation of an episode robs it of its vulgarity and harm and also what may be socially good and useful and what may not."

4. Raj Kapoor and Others v State and Others

² Report of the Enquiry Committee on Film Censorship 1968-1969 instituted by the Ministry of Information and Broadcasting to enquire into the working of the existing procedures for certification of cinematograph films for public exhibition in India

Citation: AIR 1980 SC 258

Judges: V.R. Krishna Iyer, R. S. Pathak

Facts: A complaint was filed by the respondent, a private complainant claiming to be the president of a youth organisation devoted to defending Indian cultural standards, alleging that the movie, “Satyam Shivam Sundaram,” was obscene and indecent and rendered the producers liable for an act constituting an offence under Section 292, IPC.

Issues: Whether the issuance of a censor certificate by the specialised Board of Film Censors bars the criminal court’s jurisdiction to try offences under Sections 292 and 293³ of the Indian Penal Code relating to obscenity.

Arguments:

When a notice was issued to the producer, he moved the High Court contending that this was an abuse of the judicial process and engineered by ulterior considerations and that no prosecution could be legally sustained in the circumstances of the case, the film having been duly certified for public show by the Censor Board (the film had been given 'A' certificate by the Central Board of Film Certification). The High Court, however, dismissed the petition. The producer then appealed to the Supreme Court contending that he was protected under Section 79 of the IPC.⁴

Decision:

While a certificate issued by the Censor Board is of relevance, it does not preclude the court from deciding if a film is obscene or not.

Justice Krishna Iyer: “An act of recognition of moral worthiness by a statutory agency is not opinion evidence but an instance or transaction where the fact in issue has been asserted, recognized or affirmed. The Court will examine the film and judge whether its public policy, in the given time and clime, so breaches public morals or depraves basic decency as to offend the penal provisions. Yet, especially when a special statute (the Cinematograph Act) has set special standards for films for public consumption and created a special Board to screen and censor from the angle of public morals and the like, with its verdicts being subject to higher review, inexpert criminal courts must be cautious to “rush in” and must indeed “fear to tread” lest the judicial process become a public

³ 293. **Sale, etc., of obscene objects to young person.**-- Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished [on first conviction with imprisonment of either description for a term which may extend to three 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 seven years, and also with fine which may extend to five thousand rupees.

⁴ Section 79- Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of believes himself to be justified by law, in doing it

footpath for any highwayman wearing a moral mask holding up a film-maker who has traveled the expensive and perilous journey to the exhibition of his “certificated” picture.

Iyer went on to state, “Art, morals and laws, aesthetics are sensitive subjects where jurisprudence meets other social sciences and never goes alone to bark and bite because state-made strait-jacket is inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to aesthetics.” He observed, “The world’s greatest paintings, sculptures, songs, and dances, India’s lustrous heritage, the Konarks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if pruders and prigs and state moralists prescribe paradigms and prescribe heterodoxies.”

The Court allowed the appeal and sent back the case to the High Court for fresh disposal.

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

Citation: 1996 AIR (SC) 1846

Judges: S.P. Bharucha; B.N. Kirpal

Facts: A writ petition was filed by the first respondent to quash the certificate of exhibition awarded to the film, "Bandit Queen." The film was based on a book which had been in the market since 1991 without objection. The first respondent was the President of the Gujjar Gaurav Sansthan and was involved in the welfare of the Gujjar community. The certificate was quashed by a Single Judge in the Bombay HC and on appeal to a Division Bench, the verdict was upheld.

Issues: Whether the portrayal of frontal nudity, rape and violence in the movie, ‘Phoolan Devi,’ were obscene, indecent and denigrating to women.

Argument(s): At the High Court, the first respondent contended that he had seen the film and that his fundamental rights had been violated. He alleged that the depictions in the movie were "abhorrent and unconscionable and a slur on the womanhood of India." He also claimed that a rape scene in the film was suggestive of the moral depravity of the Gujjar community because the rapist was a Gujjar. Thus the film depicted the petitioner and his community as rapists and the use of the name Babu Gujjar for the principal villain lowered the reputation of the Gujjar community. Thus, he had been discriminated against and Articles 14, 19 and 21 of the Constitution had been violated.

Decision: The Court reversed the decision of the Delhi High Court. It held that since the Tribunal (Censor Board) had viewed the film in “true perspective” and granted the film an ‘A’ certificate, and since Tribunal was an expert body capable of judging public reactions to the film, its decision should be followed. The Court dismissed the first

respondent's writ petition.

The Court observed that a film that illustrates the consequences of a social evil necessarily must show that social evil. "We find that the (High Court) judgement does not take due notice of the theme of the film and the fact that it condemns rape and degradation of violence upon women by showing their effect upon a village child, transforming her to a cruel dacoit obsessed with wreaking vengeance upon a society that has caused her so much psychological and physical hurt, and that the scenes of nudity and rape and use of expletives, so far as the Tribunal had permitted them, were in aid of the theme and intended not to arouse prurient or lascivious thoughts but revulsions against the perpetrators and pity for the victim."

6. Pratibha Naitthani v Union of India

Citation: AIR 2006 (Bom) 259

Judges: Lodha R.M. and Karnik D.G

Facts: Pratibha Naithani, a political science teacher in St Xavier's College, Mumbai, aggrieved by the telecast of "adult and obscene films shown by the electronic media" and "obscene photographs" in the print media, filed a writ petition before the Bombay High Court. The Court held that a number of television channels were violative of the programme code under the Cable TV Network Act and the Cable TV Network Rules. The Court issued a number of orders while hearing the case.

On 1 September 2004, the Court directed television channels to give details of "A" rated films telecast on TV channels over the previous three months. It directed the Police Commissioner to indicate what steps had been taken to deal with obscene publications, and the Union of India to disclose what steps it had taken for the regulation of broadcasting. Pending disposal of the petition, the Court restrained TV channels from telecasting any adult programme and/or film without appropriate certificates from the CBFC.

On 14 September 2004, the Joint Commissioner of Police (Law and Order), Greater Mumbai, filed an affidavit stating that the Cable Television Networks (Regulation) Act, 1995 is a regulatory Act under which the Central Government has the power to regulate programmes on broadcast and cable channels. He further stated that since most of the cable/TV channels were broadcast via satellite, it is not practically possible for the police to take any action against any particular TV/cable channels.

On 8 December 2004 the Court passed an order restraining newspapers and periodicals from publishing any advertisements that amounted to invitation to prostitution; which had a sexual overtone; or which violated Section 3 of the Indecent Representation of Women

(Prohibition) Act, 1986. On 1 December 2004 and 12 January 2005, the Division Bench said that it was absolutely imperative for the Central Government to issue appropriate guidelines regarding downlinking.

In March 2005, Naitthani complained that TV channels were flouting these orders by continuing to show movies rated 'A' and 'UA' by the CBFC. As a result, in August 2006, the police, acting on the instructions of the Court, cracked down on the control rooms of Hathway, InCable, Indus and Siti cable, leading to nine channels – Star Movies, HBO, AXN, SET Max, Zee Studio, Zee Café, Star World, Hallmark and Filmy -- going off the air.

Issue(s): The main question before the Court was whether cable operators/cable service providers are free to telecast CBFC certified adult films despite the restriction in Clause (o) of Rule 6(1) of the Cinematograph Act Rules that no programme shall be carried on the cable service which is “unsuitable for unrestricted public exhibition.”

Arguments: The respondents argued that every adult viewer has the fundamental right to view programmes with adult content on TV through cable services and that people who do not like this cannot impose policing through the State. They submitted that Sub-rule (5) of the Cinematograph Act Rules provides that a programme unsuitable for children shall not be carried at times when large number of children are viewing and that is how Clause (o) of Rule 6(1), which prohibits programmes meant for unrestricted viewing, should be read.

Decision: The Court held that the adult viewer's right to view films with adult content is not taken away by Clause (o) of Rule 6(1). “Such a viewer can always view Adult certified films in cinema halls. He can also view such films on his private TV set by means of DVD, VCD or such other mode for which no restriction exists in law.” The Court held that the restriction upon cable operators and cable service providers that no programme should be transmitted that is not suitable for unrestricted public exhibition did not violate their right to carry on trade and business. The Court further held that only films sanctioned by the CBFC, under the Cinematograph Act and Rules, as suitable for “unrestricted public exhibition” could be telecast or transmitted on Cable TV.

7. Suo Moto v State of Rajasthan

Citation: AIR 2005 Raj 300

Judges: Shiv Kumar Sharma and K.S. Rathore

Facts: The Court, taking up the matter (of “the depiction of women in an undignified manner by the media”) suo moto, directed the Ministry of Information and Broadcasting,

the Director General of Doordarshan and the Registrar of Newspapers, to submit affidavits of the concerned authorities indicating how the menace was being controlled and eradicated.

On 29 August 2004, the Court further directed the Government of India and the State of Rajasthan to offer concrete suggestions on how to curb the menace of depicting women in an indecent manner in newspapers, magazines, advertisements, television programmes, posters and music videos. The Monitoring Committee⁵ was also directed to submit a report on obscenity in hoardings and other advertisements and on television.

The Committee was asked to scrutinize television programmes telecast by various channels as well as newspapers in order to identify advertisements or photographs or material that were “compromising the dignity of women and at the same time corrupting and degrading those whose minds are open to immoral influence.”

In its report the Committee submitted that there was no effective scrutiny of newspapers. The Rajasthan High Court listed the findings of a meeting that the Committee had with various women’s organizations:

There must be a direct co-relation between the nature/usage of product and its advertisement and advertisements not following this must be discontinued. For example, using scantily clad female models for products like car batteries, tobacco, electric inverters, shaving appliances for men, etc., must be stopped.

Posters of 'A' certificate and adult films must be prepared and displayed in more healthy and less revealing manner at public places and near cinema halls.

There was no consensus on the issue of 'indecent' as different representatives had different views on the issue.

The participants (the women’s groups) expressed their strong commitment to the 'right to freedom of expression' as provided by the Indian Constitution. They apprehended curtailment of this right if provisions under various laws for the prohibition of ‘indecent’ representation of women were made stronger.

The participants were of the view that the Court should specify and give directions on some of the ambiguous terms in legislation related to this subject, and decide specific issues on a case-to-case basis.

The participants also felt that the issue of indecency and decency should be left for the future generation to deliberate and decide upon because every generation has its own way of looking at things.

⁵ State and District Monitoring Committees for private television channels are meant to enforce the Cable Television Networks (Regulation) Act, 1995. The Central Government had issued orders to set up district and state-level committees in September 2005. The committees have been envisaged to provide a forum for the public to lodge complaints regarding the content aired over cable television and take action

The Committee recommended that a special Judicial Magistrate -- appointed exclusively for the purpose of expediting action in the Indecent Representation of Women (Prohibition) Act, 1986 -- is required in all district headquarters of the State. They suggested that this Magistrate may hold mobile courts on the pattern of the Railway Magistrate.

It suggested that the District Level Committee constituted by the Home Department under the chairmanship of District Collector, be made more powerful by giving powers and authority to its non-official members for checking, inspection, etc. It recommended that the District Level Committee be given the task to scrutinize posters, hoardings, cinema halls, cable TV, newspapers, magazines, etc. It suggested that for posters and hoardings in the vicinity of cinema halls, the cinema hall owners and the Motion Pictures Association of the concerned district be made responsible. The Committee suggested that apart from advertising agencies, the manufacturer of the product being advertised and the person hiring the advertising agency may be made accountable for any use of unfair means tantamounting to indecent representation of women.

Issue(s): The main issue involved in this petition was the depiction of women in an “undignified manner” by the media, including television channels, and the nature of the government’s responsibility in regulating this.

Decision: The Court held that before telecasting/ broadcasting the programmes under the Cable Television Networks (Regulation) Act 1995, it is expected that the government verifies whether the programmes that are going to telecast conform to the regulations or not.

The Court said that in cases where a programme is telecast and broadcast in violation of Rule 6(1)(k) of the Cable Television Networks Rules, 1994, and where the programme is found indecent or derogatory to women, or is likely to deprive, corrupt or injure public morality or morals, strict action had to be initiated against those responsible for such telecasting. Similar action must also be taken against persons responsible for hoardings, advertisements and posters. The Court said that the District Magistrate or Sub Divisional Magistrate or a Commissioner of Police has to take steps under Section 19 of the Act to prohibit in the public interest transmission of certain programmes found violative of the prescribed Programme and Advertising Codes.

The Court observed that the Government had enacted the Indecent Representation of Women (Prohibition) Act, 1986, but that there was lack of implementation and enforcement of such laws and regulations.

The Court directed the government to ensure that advertisements not following rules and regulations be discontinued. “Using scantily clad female models for products like car batteries, tobacco, electric inverters, shaving appliances and other advertisements should be stopped forthwith.”

According to the Court, the Censor Board should ensure that 'A' certificates are given to

adult films and posters for such films are displayed in a “more healthy and less revealing manner” at public places and near cinema halls.

The State Government was directed to constitute a District Level Committee to implement the Indecent Representation of Women (Prohibition) Act, 1986, under the Chairmanship of the District Collector, with members drawn from among official and non-official organisations working for women's empowerment, jurists, cinema hall owners, etc.

The Court directed the Central Government to authorise a responsible person to oversee and ensure strict compliance with the Cable Television Networks (Regulation) Act, 1995 and Rules and the provisions of the Indecent Representation of Women (Prohibition) Act, 1986.

It asked the Central Government to help promote cooperation between state agencies in order to ensure strict compliance with the relevant acts and rules. According to the Court, compliance should be made in true in letter and spirit. It should not be a mere formality to give the statistics and details of action taken by the Union of India and the State Government. The concrete steps should be taken to prevent the depiction of women in an undignified manner through broadcasting, telecasting and advertisements, etc., and prompt steps need to be taken against the responsible persons.

8. Ajay Goswami v. Union of India & Others

Citation: AIR2007SC493

Judges: AR Lakshmanan & Tarun Chatterjee

Facts: The petitioner's grievance was that the freedom of speech and expression enjoyed by the newspaper industry is not balanced with the protection of children from harmful and disturbing materials. The petitioner requested the Court to direct the authorities to strike a reasonable balance between the fundamental right of freedom of speech and expression enjoyed by the press and the duty of the Government to protect vulnerable minors from abuse, exploitation and the harmful effects of such expression. The petitioner requested the Court to direct the concerned authorities to provide for classification or introduction of a regulatory system for facilitating a climate of reciprocal tolerance, which could include:

- (a) an acceptance of other people's rights to express and receive certain ideas and actions; and
- (b) accepting that people have the right not to be exposed against their will to another person's expression of ideas and actions.

Issues:

The Court examined the following questions:

1. Is the material in newspapers really harmful for minors?
2. Do minors have any independent right enforceable under Article 32 of the Constitution?
3. Maintainability of Petition in view of the above facts and circumstances and the legal proposition.

Arguments:

The petitioner argued that the relevant material may not be obscene in law but it has tendencies to deprave and corrupt the minds of children and adolescents who, by reason of their physical and mental immaturity, need special safeguards and care. Mr. Ajay Goswami submitted that:

- i) Newspapers are publishing sex-oriented material, which may not be legally obscene but still caters to prurient interests of minors
- ii) Minors have fundamental rights under Article 19(1)(a) and Article 21 read with Article 39(f) of the Constitution and the United Nations Convention on the Rights of the Child. Freedom of speech and expression also includes the expressions of minors. Care is required as minors, due to their tender age and mental immaturity, are not capable of deciding for themselves what is in the interest of their moral and cultural growth as they learn to assume their responsibility within the community.
- iii) Minors have a right to life under Article 21 and this includes the right to proper education, the form and content of which may be decided upon by parents, teachers and other experts; newspapers cannot be allowed to disturb that by providing indiscriminate access to the offending article to minors regardless of their age.
- iv) The State, which has a duty to protect minors through appropriate legislation or executive orders, has failed in its duty. The Press Council of India, which was constituted for preserving the freedom of the press and maintaining and improving the standards of newspapers and news agencies, is a powerless body. No guidelines have been framed with special reference to minors and adolescents, which can be enforced in a court of law. The Council itself feels the need for some strong and effective measure to correct the situation.
- v) Under Article 32 read with Article 142 the Supreme Court can issue guidelines to ensure children's growth in a healthy and moral atmosphere and

to prevent exploitation by the press

The petitioner also made the following proposals:

- i) Detailed guidelines may be issued to all newspapers regarding matter which may not be suitable for minors or which may require parents' or teachers' discretion
- ii) Newspapers should have a self-regulatory system to assess publication in view of those guidelines
- iii) In case a newspaper publishes any material categorized as unsuitable for minors in the guidelines it must be packaged in a different form and should announce in bold in front of the paper the inclusion of such material.
- iv) This would give parents the discretion to instruct the news vendor to deliver such a publication or not.

Alternatively he suggested that a Committee be appointed to suggest ways and means for regulating the access of minors to adult-oriented sexual, titillating or prurient material.

The Central Government submitted that that publishing as well as circulating of obscene and nude/semi-nude photographs of women already constitutes a penal offence under the provisions of the Indecent Representation of Women (Prohibition) Act, 1986. It pointed out that that selling, letting, renting, hiring, distributing, exhibiting, circulating of obscene books and objects to young persons under the age of 20 also constitutes a penal offence under Sections 292 and 293 of the Indian Penal Code.

The Government said that since there are existing laws which prohibit the publication, circulation and sale of obscene books and objects to young persons, it is the responsibility of the "press" to adhere to and comply with these laws and not to abuse the freedom of speech and expression (freedom of the press) guaranteed under Article 19(1)(a) of the Constitution of India.

The Press Council of India said that it enjoys only limited authority, with its power limited to giving directions to, censuring, etc., the parties arraigned before it, and publishing particulars relating to its enquiry and adjudication. It has no further authority to ensure that its directions are complied with and its observations implemented by the erring parties. The Council's lack of punitive powers has tied its hands in exercising control over erring publications.

The counsel for The Times of India argued that legislation, rules and regulations already exist within the Indian legal framework to check the publication of obscene materials and articles. These included Section 292 of the Indian Penal Code and Sections 3, 4 and 6 of the Indecent Representation of Women Act.

The newspaper said that Sections 13 (2) (c), 14 (1) and 14 (2) of the Press Council of India Act empowers the Council to impose serious checks on the newspaper, news

agency, editor or journalist who flouts the norms it has formulated and is against societal norms of decency.

The Times of India argued that Article 19 (1) (a) guaranteed every citizen the right to freedom of speech and expression and, since the respondent was a leading newspaper, it has the right to express its views and to publish news of national and international relevance. Any kind of unreasonable restriction on this right would amount to a violation of the right guaranteed by the Indian Constitution, it said.

The Times of India also submitted that its status as a leading paper and its popularity show that the pictures published in it are not objectionable and also that it has no intention to cater to the prurient interest of anybody. It further claimed that it had an internal regulatory system to ensure that no objectionable photograph or matter gets published.

The Hindustan Times pointed out the "Norms of Journalistic Conduct" had laid down guidelines for newspapers and journalists to maintain standards with regard to obscenity and vulgarity. It argued that the test should be the judgment of an ordinary man of common sense and prudence and not an "out of the ordinary, hypersensitive man." It explained that advertisements were scrutinized by the advertising department and, if the advertising department was in doubt, it referred the matter to its legal department.

The newspaper also said that its supplement "'HT Next - School Times" catered to the special educational needs of school-going students. This, the newspaper argued, showed that it realized its responsibility towards children. It argued that it would be inappropriate to deprive the adult population of entertainment which is well within the acceptable levels on the ground that it may not be appropriate for children. It said that any step to ban publication of certain news items or pictures would fetter the independence of the free press.

The Court held that in view of the availability of sufficient safeguards in terms of various laws, rules, regulations and norms to protect society in general and children in particular from obscene and prurient contents, the petitioner's writ was not maintainable.

It stated that any steps to ban publication of certain news pieces or pictures would fetter the independence of the free press, which is one of the hallmarks of our democratic setup.

The Court examined the test of obscenity very carefully through existing Indian case law and case law from other jurisdictions. It held that an imposition of a blanket ban on the publication of certain photographs and news items, etc., would lead to a situation where the newspaper will be publishing material catering only to children and adolescents, thereby depriving adults of their share of entertainment of a kind permissible under accepted norms of decency in any society.

The court also held 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 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, 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.”

The Court dismissed the petition, but observed that the Central Government should seriously look into, and make appropriate amendments to, the provisions of Section 14(1) of the Press Council Act, 1978 in accordance with the request made by the Press Council of India to arm it with the authority to recommend official de-recognition of newspapers for government advertisements or for an appropriate period or withdrawal of the accreditation granted to a journalist to facilitate functioning and also to claim concessions in railways, etc.

9. Director General, Directorate General of Doordarshan & Others v Anand Patwardhan and Another

Citation: 1996(8)SCC433

Judges: AR. Lakshmanan & Lokeshwar Singh Pantia

Facts: The case was filed by independent filmmaker Anand Patwardhan challenging Doordarshan’s refusal to telecast his documentary titled, “Father, Son and Holy War.” The documentary portrayed issues such as patriarchy, violence, fundamentalism, suppression of women, etc. Part I of the film was given a 'U' Certificate and Part II was given an 'A' Certificate by the Censor Board.

In response to a writ petition filed by Doordarshan, the Bombay High Court asked the television network to take a decision within six months. Doordarshan then constituted a Select Committee, which said that the film should not be screened since it would have an adverse impact on the minds of viewers. Patwardhan then approached a Division Bench of the Bombay High Court, which ordered Doordarshan to telecast the film in an evening slot. This order was challenged in the Supreme Court. The Supreme Court ordered the reconstitution of the Select Committee according to the appropriate rules. The reconstituted committee held that the film was suitable for viewing. Doordarshan then constituted a larger committee, which gave the same findings.

Following this, Prasar Bharati previewed the film and said that it contained scenes that could promote violence, and that its telecast would violate Doordarshan’s policy of not screening ‘A’ certified movies. Patwardhan then filed a contempt petition before the Bombay High Court. The Court ordered Doordarshan to exhibit the film within twelve weeks. This decision was challenged in the Supreme Court.

Issues:

- a) Whether any film producer has a right to insist that his film must be shown on Doordarshan
- (b) Whether the High Court was justified in directing the screening of the film certified U/A
- (c) Whether the policy of Doordarshan of not telecasting adult movies can be said to be violative of Article 19(1)(a) of the Constitution of India as held by the High Court
- d) Whether or not it is open to the High Court to substitute its opinion for that of the competent authority about whether or not a film is fit to be aired on a public medium such as Doordarshan

Arguments: Doordarshan argued that as a matter of policy it did not telecast films that were certified as 'A' or 'UA,' and that Part II of the film was certified as 'A.' It said that the telecast of the film was likely to give rise to communal violence and riots, and that Doordarshan's audience mainly comprised illiterate and 'average' persons who would be affected by the screening.

Anand Patwardhan argued that Doordarshan's refusal to screen his film was in violation of his freedom of speech and expression under Article 19 (1) (a) and was unfair, unjust and arbitrary. He said that the Censor Board had already approved his film, and Doordarshan's guidelines could not be very different from that of the Censor Board.

Decision: There are scenes of violence and social injustices but the film, by no stretch of the imagination, can be said to subscribe to any of that. The depiction is meant to convey that such social evils are evil. There cannot be any apprehension that it is likely to affect public order or incite commission of an offence.

The Court observed that the documentary was given two awards at the 42nd National Film Festival in 1995, conducted by the Ministry of Information and Broadcasting, Government of India, after being adjudged best investigative film and best film on social issues. It was, therefore, highly irrational and incorrect to say that such a film promotes violence, that its production quality was unsatisfactory and that it had no specific message to convey.

The Court also held that a documentary couldn't be denied exhibition on Doordarshan simply on account of its "A" or "UA" certification.

Responding to Doordarshan's objection to a scene in the documentary where a person is seen selling aphrodisiacs on the road and, while doing so, makes certain remarks about male sexuality, the Court held that a film must be judged from an average, healthy and

common sense point of view. “If this said yardstick is applied and the film is judged in its entirety and keeping in view the manner in which the filmmaker has handled the theme, it is impossible to agree that those scenes are offended by vulgarity and obscenity (sic).”

Saying that the High Court was right in pulling up Doordarshan for its failure to follow through with its own decision-making process, the Supreme Court said that, as a national channel, Doordarshan controls the airwaves, which are public property. “The right of the people to be informed calls for channelizing and streamlining Doordarshan's control over the national telecast media vehicle.”

Stating that Doordarshan’s actions were driven by mala fide and arbitrariness, the Court ordered it to broadcast Patwardhan’s documentary within eight weeks of the date of judgement.

10. R. Basu v. National Capital Territory of Delhi and Another

Citation: 2007CriLJ4245

Judges: A.K. Sikri J

Facts: Mr. Arun Aggarwal, a practising advocate, filed a complaint before the learned Chief Metropolitan Magistrate (CMM) against Star TV, Star Movies and Channel V, naming persons responsible for the day-to-day affairs of these channels or the various cable operators transmitting these channels. According to the complainant, the obscene and vulgar TV films shown and transmitted through various cable operators amounted to obscenity and, therefore, the accused persons had committed offences under Sections 292/293/294⁶ IPC and under Section 6 read with Section 7 of the Indecent Representation of Women (Prohibition) Act, 1986.

Acting on this complaint, the CMM viewed these films and, on 9 April 1997, ordered a police inquiry into who was responsible for the exhibition of the films. After the police report was received, the complainant was examined on 17 July. After hearing arguments, the CMM passed an order on 24 September 1997, prima facie finding that the four films shown on these TV channels were obscene. The accused persons were summoned under

⁶ See footnotes 2 and 3 for definitions of sections 292 and 293 Indian Penal Code

294. Obscene acts and songs.--Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place,

shall be punished with imprisonment of either description which may extend to three months, or with fine, or with both.

Section 292 IPC, Section 4 read with Sections 6 & 7 of the Indecent Representation of Women (Prohibition) Act, 1986 and Section 5A read with Section 7 of the Cinematograph Act, 1952. The accused filed this petition before the Delhi High Court challenging this summoning order.

The High Court judges quoted the CMM's order, in which he refers to each of the four movies in question, explaining their contents and why he finds them obscene. The CMM mentions the haphazard mushrooming of cable television networks all over the country, resulting in the availability of signals of foreign television networks via satellites. According to the CMM, "The programmes available on these satellite channels are predominantly western and totally alien to our culture and way of life. Such programmes play havoc with the moral fabric of society and need to be regulated." The CMM observed that viewing of these movies by the public at large would not have been possible without Cable Operators.

Issues: Did the accused persons violate Sections 292, 293, and 294 of the Indian Penal Code (relating to obscenity), and Section 6 read with Section 7 of the Indecent Representation of Women (Prohibition) Act?⁷

Arguments: The petitioners argued that two of the movies had been awarded "A" certificates by the CBFC and therefore were immune from being prosecuted for obscenity under Section 292 of the IPC and the Indecent Representation of Women Act. With regard to the other two movies it was admitted that they have no censor certificates. However, they stated that with respect to the movie, "Big Bad Mama," the application for certification had been made to the CBFC. They argued that these movies are telecast from other countries via satellite and broadcasters comply with various strict internal codes as well as the statutory codes prescribed by the Broadcasting Authority of the place of uplink. In respect of some of the individual accused persons, it was argued that they were not responsible for the telecast of these movies.

Decision: The High Court held that for the two films without censor certificates the petitioners could not claim immunity from Section 292 IPC. For the other two films, also, the Court said that, since the petitioners had not produced CBFC certificates, they could not claim immunity from prosecution.

The Court observed that the legislature had enacted the Cable Television Network (Regulation Act) to tackle the "problem" of obscenity, and a Programme Code had also been introduced. "Various statutory safeguards for regulating transmission on cable television networks in India have been provided therein. The petitioners have to abide by these guidelines and laws relating to the electronic media, keeping in mind the sentiments and social value of the Indian society, while relaying its programmes."

⁷ Both these sections deal with penalties and consequences of violating section 2 (c) of the Act, which deals with the "depiction in any manner of the figure of a woman, her form or body" or any portrayal that is indecent or derogatory or denigrating to women or is "likely to deprave, corrupt or injure the public morality or morals".

The Court observed that, in view of this development, a joint application was moved by the petitioners and the complainant, in which the complainant agreed not to press his complaint in view of the aforesaid statutory provisions and other provisions now in place.

11. Maqbool Fida Husain v Raj Kumar Pandey

Citation: CrI. Revision Petition No. 114/2007

Facts

MF Husain painted an art work of a nude lady in grief without giving it any title. The untitled painting was sold to a private collector in 2004. In 2006 it was included as part of an online charity auction for victims of the Kashmir earthquake under the name 'Bharat Mata.' Husain had no role or involvement in this auction. There were large-scale protests against the painting, which appeared in an advertisement for the auction. Husain had to tender an apology to the public for the same.

This was the context in which several complaints were filed in different parts of the country alleging various offences against MF Husain on the account of the said painting. Arrest warrants and summons to appear in court were issued against him in these places. Husain approached the Supreme Court for the consolidation of all the complaints. The apex court consented and the matter was consolidated and transferred to the court of Ld. ACMM, Delhi, by way of transfer petitions. This court issued summons against the petitioner, MF Husain, for crimes under Sections 292, 294 and 298. A revision petition against this was filed in the High Court of Delhi.

Issues

Whether Husain's portrayal of 'Bharat Mata' should be considered obscene and whether he should be held criminally liable under Section 292 of the IPC.

Arguments

The petitioner, MF Husain, argued that, on the face of it, the painting contained no material that could be held to be obscene in terms of the legal definition of obscenity. He argued that there was nothing in the painting that could be interpreted to be lascivious, or appealing to the prurient interest, or tending to deprave or corrupt persons likely to view the painting, and that its identity was irrelevant to the alleged obscenity of the painting.

The petitioner pointed out that as soon as complaints were filed and protests held against the painting, he had tendered an unconditional apology and the painting was withdrawn from the auction.

The petitioner also argued that there was an abuse of process, and that all the petitions filed in the case were being used to harass him. He alleged that the procedure for private complaint was being misused and that the Magistrate had the power to postpone the issue of process until he was sure that there was sufficient ground to do so.

The counsel for the respondents contended that the petitioner's previous conduct had led to communal disharmony and the tendering of an apology by him, but no further action had been taken. They argued that the depiction of Bharat Mata as a nude, with different parts of the body representing different states, was obscene. They also said the painting depicts the national emblem in an objectionable manner.

The respondents alleged that the petitioner's acts had hurt the sentiments of Hindus and all patriotic Indians. A line had to be drawn where the average person with morals begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genuine or social value.

The respondents contended that the petitioner had the deliberate intention of wounding the religious feelings of the complainant/respondent (Section 298 IPC). The complainants also alleged violation of Section 294 (performing an obscene act in a public place).

Decision

The Court held that, on the face of it, the painting was neither lascivious nor likely to appeal to the prurient interest – i.e. the painting would not arouse sexual interest in a perverted person and would not morally corrupt or debase a person viewing it.

The Court ruled that nudity alone cannot be said to be obscene. According to the judgment, "...the aesthetic touch to the painting dwarfs the so-called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked." The nude woman was not shown in any peculiar kind of posture, nor were her surroundings painted so as to arouse sexual feelings or lust. The placement of the Ashoka Chakra was also not on any particular part of the body of the woman that could be deemed to show disrespect to the national emblem.

The Court pointed out that "...the literature of India, both religious and secular, is full of sexual allusions, sexual symbolisms and passages of such frank eroticism the likes of which are not to be found elsewhere in world literature." It went on to state that "While an artist should have creative freedom, he is not free to do anything he wants. The line which needs to be drawn is between art as an expression of beauty and art as an expression of an ill mind intoxicated with a vulgar manifestation of counter-culture where the latter needs to be kept away from a civilian society." The Court also said, "There

should be freedom for the thought we hate. Freedom of speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends.”

The court observed that magistrates should scrutinise each case in order to prevent vexatious and frivolous cases from being filed. Only in appropriate cases should a private complaint case proceed further without a prior investigation by the police – a magistrate should postpone the issue of process against the accused in cases where the accused resides at a place beyond the area in which he exercises jurisdiction. He must examine the nature of the allegations made in the complaint and the evidence – both oral and documentary – in support thereof and even question the complainant and witnesses himself to find out whether or not there is a prima facie cases.

According to the judges, “There are very few people with a gift to think out of the box and seize opportunities, and therefore such people’s thoughts should not be curtailed by the age-old moral sanctions of a particular section of society having oblique or collateral motives who express their dissent at every drop of a hat.”

The Court recommended that the government think of appropriate legislation to make sure that artists and other creative persons are not made to run from pillar to post to defend themselves against criminal proceedings initiated by oversensitive or motivated persons for publicity.

Compiled by Siddharth Narrain
(ALF, Bangalore)

NB Last updated in February 2009.