LAW OF OBSCENITY: AN INDIAN PERSPECTIVE

By Twinkle Kataria[171]

What is obscenity?

When confronted with the concept of obscenity, individuals may be inclined to consider obscenity as synonymous with pornography. The words "pornography" and "obscenity" are frequently interchanged in lay communication; however, they are in fact two discrete definitions of materials which some individuals may consider indecent. The word "pornography" derives from the Greek "porne" (harlot) and "graphos" (writing), and is identified in Webster's Third International Dictionary as "a description of prostitutes or prostitution, a depiction of licentiousness or lewdness, or a portrayal of erotic behavior designed to cause sexual excitement." Pornography describes sexually explicit material, but it is not a legally defined term. Obscenity, on the other hand, is legally defined; however the legal definition is purposefully vague. Its current definition is based on what is commonly referred to as the Miller Test, which stems from the 1973 Supreme Court case Miller v. California (discussed later in this paper). In order for material to be considered obscene, it must fail all three aspects of this test. When material is defined as obscene, it is not constitutionally protected under the First Amendment.

There has been a resurgence of interest in the definition of and laws regarding obscenity since the advent of the Internet. Due to our new information technology, words and images are spread faster and more widely than ever before, and although much of the information found on the information superhighway is of legitimate social value, there is a large amount of content that even the most liberal-minded would consider to be of questionable value. As is clear to most Internet users, pornographic websites are abundant – and available for anyone to view. J. Robert Flores of the National Law Center for Children, states, "the pornography industry has… become among the most aggressive marketers on the Internet…. Today only a lucky few are able to avoid [pornographic material]" (Clancy, 2002, p. 50). In addition, Forrester, an American research company, had estimated that in 1998, the commercial Internet market for pornography was nearly $1 billion, about ten percent the amount spent on e-commerce (Clancy, 2002, p. 50). Clearly, the online pornography industry is flourishing. Although some find its growth alarming, it is important to remember that pornographic material is not illegal unless it fails the Miller Test for obscenity.

The U.S. Supreme Court set up a test for obscenity in its 1973 decision Miller v. California[172]. The Court provided

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[172]Miller vs State of California 413 U.S 15

three "basic guidelines":

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

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

•"Whether the work, taken as whole, lacks serious literary, artistic, political, or scientific value."

These different guidelines are sometimes called the prurient-interest, patently offensive and serious-value prongs of the Miller test.

UK:

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

Indian scenario:

The Information Technology Act 2000

Section 67: Publishing of Information which is obscene electronic form:

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

Section 68: **Power of Controller to Give Directions**

(1) The controller may, by order, direct a Certifying Authority or any employee of such authority to take such measures or cease carrying on such activities as specified in the order if those are necessary to ensure compliance with the provisions of this Act rules or any regulations made there under.

(2) Any person who fails to comply with any order under sub-section (i) shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding two lakh rupees or to both.

The ingredients of an offence under this section are:

a) Publication or transmission in the electronic form.

b) Lascivious material appealing to prurient interests.

c) Tendency to deprave and corrupt persons.

d) Likely-audience

e) To read, see or hear the matter contained or embodied electronic form.

The word "publish" has not been defined under the Act. However, the Supreme Court held in the case of Bennett Coleman & Co. v. Union of India[173] that publish means "dissemination and circulation". In an electronic form, publication or transmission of information includes dissemination, storage and circulation. Information is defined under section 2 (1) (v) as "information" includes data, text, images, sound, voice, codes, computer programmes, software and data bases or microfilm or computer generated micro fiche. So, the obscene material could be in any of these forms to attract the offence of section 67. This section advocates that the 'obscene material in electronic form' must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the 'obscene material in the electronic form' is likely to fall.

It is necessary to note that any offence related to obscenity in electronic form cannot be tried under section 292 of the IPC, as section 81 of the ITA states that the Act will have an overriding effect:

"The provisions of this Act shall have effect not withstanding anything inconsistent therewith contained in any other law for the time being in force."

Therefore, as a thumb rule, offences related to 'obscenity in electronic form' should be tried under the provisions of section 67 only and any attempt to import provisions of section 292 of IPC would tantamount to disregard of legislative intent behind the Act and cause miscarriage of justice[174]. But, in the recent judgment of Avnish Bajaj v. State (NCT of Delhi)[175]both the provisions were considered together in arriving at the judgment. Also, the punishment under section 67 of the ITA is more stringent that section 292 of the IPC. Section 67 is also criticized it is very easy for a person to escape criminal charges just by proving his lack of knowledge of publication or transmission of obscene information in the electronic form. Moreover, though publication or transmission of

[173] (1972) 2 SCC 788.

[174]Vakul sharma, Informational Technology -Law and practice, universal publishing, 2007, pg 157.

[175]Avnish Bajaj V. State (NCT of Delhi) Delhi H.C judgment dated 29.05.2008

obscene information may be illegal but mere possession, browsing or surfing through obscene content is not an illegal activity.

The issues related to publication of obscene information in electronic form has to be looked at from the perspective of 'extra-territorial' jurisdiction and Internet technologies, keeping in view that 'obscenity' is no longer a local or static phenomenon. It is now global and dynamic in nature and thus needs strict interpretation of statute.

Section 75: **Act to apply for offence or contravention committed outside India**

(1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.

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

The Indian Penal Code 1860

Section 292: Sale, etc. of obscene books, etc.

The Indian Penal Code, 1860 section 293 also specifies, in clear terms, the law against Sale etc. of obscene objects to minors. As per the IPC Act,

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

As per IPC, 1860, Section 292 - 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.]

The Young Persons (Harmful Publication) Act, 1956

Section 2: Definitions

"harmful publication" means any book, magazine, pamphlet, leaflet, newspaper, or other like publication which consists of stories told with the aid of pictures or without the aid of pictures or wholly in pictures, being stories portraying wholly or mainly-

Incidents of repulsive or horrible nature; in such a way that the publication as a whole tend to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner whatsoever;

Section 3: Penalty for sale, etc. of harmful publications-

(1) If a person-

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, any harmful publication or

(b) for purposes of sale, hire, distribution, public exhibition or circulation, prints, makes or produces or has in his possession any harmful publication, or

(c) Advertises or makes known by any means whatsoever that any harmful publication can be procured from or through any person, he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

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

Section 2: Definitions

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

The Protection of Human Rights Act, 1993

Section2: Definitions

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

Chapters III –VI:

(Functions, Powers and Procedure of the National Human Rights Commission, State Human Rights Commissions and Human Rights Courts)

The Constitution of India

Article 19 (1)(a): Freedom of Speech and Expression read with Article 19(2).

CASE LAW

Ranjit D. Udeshi v. The State of Maharastra [176]

(Criminal Appeal)

"The word as the dictionaries tells us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form." [177]

"The cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality." [178]

"Cockburn C.J. laid down the test of obscenity in these words "-----I think the test of obscenity is this whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.---- it is quite certain that it would suggest to the minds of young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

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

[176] AIR 1965 (SC) 881
[177] Page 885 paragraph 7
[178] Para 8

expression, and obscenity is treatment of sex in a manner appealing to the carnal sides of human nature, or having that tendency." (3) "The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treatment of sex by an artist and hence there is some poetry even in the ugliness of sex. The book is probably an unfolding of the author's philosophy of life and of the urges of the unconscious but these are unfolded in his other books. Therefore, there is no loss to society if there was a message in the book. The divagations (sic) with sex are not legitimate embroidery but they are the only attractions to the common man." [179]

Bobby Art International & Others. v. Om Pal Singh Hoon & Others[180]

Hidayatullah, C.J. speaking for the Court, said needs to be reproduced: "We may now illustrate out meaning how even the items mentioned in the directions may figure in films subject either to their artistic merit or their social value over-weighing their offending character. The task of the censor is extremely delicate and his duties cannot be subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some with some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and forever from human thought and must give scope for talent to put them before society. The requirements of art and literature included requirements of art and literature include social life and not only in its ideal from and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average person would, in much the same way, as, it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things ideas having redeeming special or artistic ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral. It should be our concerned, however, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censor's scissors[181].

[179] Para 14
[180] AIR 1996 (SC) 1846
[181] Para 49

Therefore, it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the them is handled by the producer. It must, however, be remembered that the cinematograph is a powerful medium and its appeal is different. The horrors of war as depicted in the famous etching of Goya do not horrify one so much as the same scenes rendered in colour and with sound and movement would do. We may view a documentary on the erotic tableaux from our ancient temples with equanimity of read the Kamasutra but documentary from them as a practical sexual guide would be abhorrent[182].

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."

R. Basu v. National Capital Territory of Delhi and Another[183]

Mr. Arun Aggarwal, a practicing Advocate has filed a complaint before the learned Chief Metropolitan Magistrate, under Sections 292, 293 & 294 IPC, inter-alia, against Star TV, Star Movies and V Channels as many as 30 (thirty) persons have been arraigned as accused persons in the said complaint. Other persons, apart from aforesaid Star TV channels, are the persons who are in charge of and responsible for the day to day affairs of these channels or the various cable operators transmitting these channels. This is termed as probono public prosecution by the complainant in which he brought to the notice of the learned Chief Metropolitan Magistrate that on these channels obscene and vulgar TV films were shown and transmitted through various cable operators. According to the complainant, this amounted to obscenity and, therefore, accused persons committed offence under Sections 292/293/294 IPC and under Section 6 read with Section 7 of the Indecent Representation of Women (Prohibition)

[182] Para 50
[183] 2007CriLJ4245

Act, 1986. On this complaint, learned CMM viewed these films. And the issues were framed that; Did the accused persons violate Sections 292, 293, and 294 of the Indian Penal Code (relating to obscenity), and Section 6 read with Section 7 of the Indecent Representation of Women (Prohibition) Act?

With regard to other two movies it is admitted that they have no censor certificates. However, it is stated in respect of the movie "Big Bad Mama", the application for certification had been made to the CBFC. It is further stated that these movies are telecast from other countries via satellite and the broadcasters in their channels comply with various strict internal codes as also statutory codes prescribed by the Broadcasting Authority of the place of uplink. In respect of some of individual accused persons, it is also contended that they are not responsible for telecast of these movies[184]. The grounds which are common to all the petitions on the basis of which it is argued that the summoning orders as well as proceedings are without jurisdiction are the following:

I. The entire procedure followed before the issue of process was totally illegal in as much as:(a) Section 200 of Cr.P.C. mandatorily requires the examination of complainant before any further step is taken: AIR 1035 Allahabad 745; AIR 1942 Peshawar page 61; AIR 1949 Calcutta page 58; AIR 1950 Calcutta page 99; AIR 1956 Madras 129.

(b) He ordered a police enquiry in which the major issue to be investigated should have been whether the four films had been certified under Section 5-A of the Cinematograph Act, 1952. The police never investigated this. The learned Magistrate did not apply his mind to this. Two of the four films were proved to be certified and the remaining two were not proved to be uncertified.

II. The Indecent Representation of Women (Prohibition) Act, 1986 does not at all apply to films which are governed by Cinematograph Act as provided in Section 4 Proviso (c) of the Act.

III. He acted without jurisdiction in issuing the process under Section 292 of the Indian Penal Code because he did not notice Section 5-A of the 1952 Act.

IV. The police had asked the accused's explanation about the company's involvement. The accused had supplied the full explanation by their reply dated 19th December, 1998. The police report on which the learned Magistrate acted said that Rupert Murdock is the proprietor of Star T.V. Network and Basu is his official In-charge of entire transmission for India. There is no such entity much less a proprietory entity. Star T.V. is only a short form of Satellite Television Asian Region Limited - a company registered in Hong Kong.

V. Accused 7 to 30 are cable operators in India and the signals are supplied by the Hong Kong company with which accused No. 1 to 6 have nothing to do. In any event he has issued no process against accused No. 3 & 6[185].

[184] Para 5
[185] Para 6

Decision

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

Aveek Sarkar V. State of West Bengal [186]

The Supreme Court has held in this case that the photograph of couple, in the nude, is not "obscene" within the meaning of Section 292 of the Indian Penal Code. This judgment is particularly rejects the HICKLIN TEST, the archaic 1868 rule for determining obscenity, that the Court has regularly used in its history – most notably, to uphold the ban on Lady Chatterly's Lover in Ranjit Udeshi's Case[187]. The Court seems – at least implicitly – to be expressing its disapproval of Udeshi, almost fifty years after it was decided[188]. In contrast to the Hicklin Test, which was focused on individual or isolated aspects of an entire work that could be deemed obscene, as well as its impact on "vulnerable" sections of society, the Court adopts what it called the "community standards" test:

"*A picture of a nude/seminude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling orrevealing an overt sexual desire. The picture should be suggestive of deprave mind (sic) and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."*[189]

The Hicklin test become the basis for concluding the remarks for obscenity in any format. Hickling test came from the famous case of Regina v. Hicklin in this case court said *"tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall"*. Lord CJ

[186](2014) 4 SCC 257
[187] Supra
[188] Para 16, 17 and 22
[189] Para 24

Cockburn in his opinion in the Hicklin case explained that the danger of prurient literature was that it "would suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of a most impure and libidinous character".

CONCLUSION

Therefore, there is a continue question in the country's courts several times in the context of obscenity charges. The courts have always held that merely "one" ingredient does not necessarily allow the slap obscenity charges. Other ingredients that constitute the offence too need to be present.