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OBSCENITY- THE CHANGING LEGAL PERSPECTIVE

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ABSTRACT

The term ‘Obscenity’ has since been conspicuously used to denote a broad spectrum of the distasteful depiction of certain visual /audio items. However, in the legal domain, the term is given a more precise meaning which completely differs from its other commonly misplaced (non) ‘synonyms’ such as ‘vulgarity’ ‘nudity’ ‘indecenty’ etc. Not only the meaning of the term ‘obsenity’ is singular, but also, it can be seen that this term has assumed a dynamic character for its dependence on the perspective of the Society at large towards the freedom of expression of personal preferences. Such peculiarity and the dynamism of the ‘Obsenity’ is the very subject matter of the present paper. Due to it being a perspective based term, ‘Obsenity’ does not have any lucid definition under the law. An attempt, however, has been made by legislative to define the said term under Ss. 292 - 294 of IPC.

The challenge to interpret the term has been time and again born by the Apex Court in few judgments including in the cases of **Ranjit D. Udeshi vs. State Of Maharashtra**¹ & **Ajay Goswami vs. Union of India**.² The present paper also seeks to elucidate the legal difference between the terms which are often confused with the term ‘obsenity’ such as nudity, vulgarity, pornography and indecenty. Paper also seeks to define the test of obscenity. Courts have been adopting various yardsticks to infer obscenity in different cases and have nomenclated the said tests also such as ‘E-readers’ test ‘National standard’ test etc. An objective analysis is also made of the term ‘Obsenity’ and how it has different interpretations from people to people, community to community, and country to country. Such analysis leads to a belief that the standard of social security also plays an important role in defining ‘Obsenity’ and the same is dealt with in detail in the present paper. The paper also seeks to suggest the best possible test which should be used for determining the term obscenity in its correct perspective which determination is a social must in the ever-changing global standpoints.

INTRODUCTION

Ours is a land with the Rule of law. This Rule of law finds its roots in our Constitution. Our constitution provides for the fundamental rights of the citizens of India. The Constitution of India, under article 19 (1)(a), guarantees the right to freedom of free speech and expression to

¹ AIR 1965 SC 881

² (2007) 1 SCC 143

all its citizens. However, one of the exceptions to the fundamental right guaranteed under Article 19(1)(a) of the constitution is in respect of laws which impose reasonable restrictions in the interest of “decency” and “morality”. These exceptions are provided under article 19(2) of the Constitution of India. Another exception to article 19(1)(a) is incitement to commit an offence. Obscenity, in terms of such speech or expression, is also an ingredient of such exceptions. The term ‘obscenity’ is often used in the context of decency and morality and is expressly prohibited by section 292 of Indian Penal Code, 1960.

Though widely used, the term ‘obscenity’ is a vague term and no lucid definition is provided under any law. However, an attempt has been made by the draftsmen of the Criminal law by way of the terminology of Section 292-294, IPC as “any book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object which is lascivious and is of such nature which appeals to the prurient interest or have a tendency to deprave and corrupt any person who will read, see or hear it, shall be considered to be obscene.”³ However, the judiciary in many cases has lamented over the vagueness of the definition of obscenity under this section and faced difficulty in applying it.

Obscenity is thus a subjective term and hard to define. Even the judiciary has been endeavouring hard to define it. In the case of “*Ranjit D. Udeshi v. State of Maharashtra*”⁴, Supreme Court had defined obscenity as “the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive.” In another case of “*Ajay Goswami v. Union of India*”⁵ the court held that “Obscenity” is used to describe expressions that offend prevalent sexual morality.⁶ The IPC under section 294 makes “the sale, letting to hire, distribution, public exhibition, circulation, import, export and advertisement of obscene material an offence punishable with imprisonment and fine.”⁷

The paper attempts to throw light on the test of obscenity as observed and accepted by the courts from time to time with the help of various judicial interpretations. Starting from the standard of “*most vulnerable person*” laid down in “*R v. Hicklin*”⁸ to the “*likely readers test*” which says that the test must be based on the target audience and not the person whose hands

³ Section 292, Indian Penal Code

⁴ AIR 1965 SC 881, 885 para7: (1965) 1 SCR 65

⁵ (2007) 1 SCC 143: AIR 2007 SC 493

⁶ Supra note 2

⁷ Section 294, Indian penal Code

⁸ (1868) LR 3 QB 360

the book might stray into as held in “*Chandrakant Kalyandas Kakodkar*”⁹ will be discussed in the paper. The author attempts to understand and suggest the true definition of obscenity and the accurate test for the same in the paper.

DEFINITION UNDER SECTION 292-294 IPC

Section 292 of the Indian penal code reads as under:

*“(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 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.”*¹⁰

Therefore, even through this section the definition of “obscenity” is not clearly laid out and by the use of words such as “shall be deemed to be obscene”, the framers of the criminal law made an attempt to define obscenity as something which has the tendency to deprave or corrupt the mind of innocent. In the case of Directorate General of “*Doordarshan v. Anand Patwardhan*”¹¹ the Supreme Court has lamented over the vague meaning of the term “*Obscenity*” under section 292 of the Indian penal Code and pointed out the difficulty in its application.

Further, in the case of “*Ranjit D. Udeshi v. State of Maharashtra*”¹², a bookseller was selling a book named “*Lady Chatterley’s Lover*” and was convicted under section 292 of IPC since the book was considered to have obscene content. The court determined its obscenity by analysing what effect it has on society and by striking a balance between public decency and morality.

Section 293, Indian Penal Code, reads as

“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

⁹ (1969) 2 SCC 687: AIR 1970 SC 1390

¹⁰ Section 292, Indian Penal Code

¹¹ (2006) 8 SCC 433: AIR 2006 SC 3346

¹² AIR 1965 SC 881

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 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.”¹³

These sections prohibit the publication of such obscene matter which is inclusive of lotteries, misuse of national symbols and animosity amongst the different sections of society. The government in all such cases is empowered to forfeit the copies of such material containing obscene content.

However, the determination of whether a publication is obscene or not differs not only from case to case but also from nation to nation. The reason behind it is that the moral standard of each nation differs. In one of the leading cases, i.e. that of “*Chandrakant Kalyandas Kakaodar v. State of Maharashtra*”¹⁴ and Others, the Hon’ble court held that obscenity can’t have a rigid set definition and has a different meaning under different nation due to the varied culture and custom across the world. Therefore, according to the researcher, these sections fail in their attempt to define obscenity in a strict sense and are still vague.

DEFINITION BY SUPREME COURT IN VARIOUS CASES

Obscenity being a subjective term was always hard to define. With the passage of time, soon it was realized that given the dynamics of changing social morality and evolving standards of the people in the society, it is quite difficult to come up with a rigid and definite definition of obscenity. But, it would rather result in the creation of more problems. It should also be noted that the judiciary is still striving to give an absolute rigid definition to obscenity and the accurate test for determining it. The author, therefore, makes an attempt to analyse various case laws and will try to draw a difference between obscenity and indecency, obscenity and vulgarity, obscenity and nudity, obscenity and pornography through precedents.

¹³ Section 293, IPC

¹⁴ Supra note 4

A. OBSCENITY –DISTINCT TO INDECENCY

Commonly, the term obscenity is confused with immorality and indecency. But the judiciary has in many cases laid out the difference in both these terms. In the case of “*Ranjit D. Udeshi v. State of Maharashtra*”¹⁵ the Apex court observed that obscenity is different form indecency and held that “the quality of being obscene means offensive to modesty or decency; lewd, filthy and repulsive.”¹⁶

In another case of “*Ajay Goswami v. Union of India*”¹⁷ the Hon’ble Supreme Court held that “obscenity” is different from indecency. The court observed that indecency is a wider concept as compared to obscenity. Any material or art which is considered to be obscene is indecent, but every material which is indecent might not be obscene. The court also held that “indecent” implies non- conformance with the ideal standard of morality which is accepted and approved by society. On the other hand “obscenity” is one which amounts to prurient or lascivious appeal.

B. OBSCENITY- DISTINCT FROM VULGARITY

The Supreme Court has laid down that there is a difference between obscenity and vulgarity in the case of “*Samaresh Bose v. Amal Mitra*”.¹⁸ The court in this case held that anything which amounts to vulgarity is not necessarily obscene. Vulgarity on one hand relates to the feeling of disgust or revulsion, whereas on the other hand obscenity refers to one which has a tendency to deprave or corrupt the mind of people who are open for such influences.

C. OBSCENITY- DISTINCT FROM NUDITY

It has been observed by the Supreme Court in a plethora of cases that there is a distinction between obscenity and nudity. In the case of “*Ranjit D. Udeshi v. State of Maharastra*”¹⁹the court held that there is a difference between sex and nudity as under:

“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.”

¹⁵ AIR 1965 SC 881

¹⁶ Ibid para 7

¹⁷ (2007) 1 SCC 143

¹⁸ AIR 1986 SC 967

¹⁹ AIR 1965 SC 881

Similarly, in the Case of “*K.A. Abbas v. Union of India*”²⁰, the Hon’ble Supreme Court has held that nudity and obscenity cannot be always synonymous and it is not correct to classify sex as obscenity or immoral. Further, in the case of “*Bobby Art International v. Om Pal Singh Hoon*”²¹ a distinction was laid by the court between obscenity and nudity. The Gujjar community filed a petition to prevent the exhibition of the film, Bandit Queen as according to them the depiction of the rape scene in the movie was “suggestive of moral depravity” of the community. However, the court held that the depiction of nudity in the movie doesn’t give rise to prurient feeling but develops a sense of revulsion for the perpetrators.

In another case of “*Maqbool Fida Hussain v. Raj Kumar Pandey*”²² M.F. Hussain in his painting had depicted Bharatmata in the nude form. The court held that it does not amount to obscenity as in the Indian artistic culture sexual images had been portrayed on the early Hindu temples and India is also regarded as the land of Kama Sutra where sex is an integral part of a full and complete life.

Therefore, the judiciary had defined and observed obscenity to be distinct from nudity. The researcher is of the opinion that just for the reason that the women are depicted in a nude form, it is not a sufficient ground to consider the painting or the art as obscene. The answer to the question as to whether art would constitute to be obscene is a matter of who is viewing it. As also said in the case of “*Maqbool Fida Hussain v. Raj Kumar Pandey*”²³ the beauty lies in the eyes of the beholder. It depends on the perception of the viewer as to how do they recognize and view the art.

D. OBSCENITY- DISTINCT FROM PORNOGRAPHY

The researcher would like to cite the example of “*Ranjit D. Udeshi v. State of Maharashtra*”²⁴ where the court gave the distinction between obscenity and pornography. The court held that pornography is the aggravated form of obscenity. Pornography is one which is explicitly meant and has the intention to arouse sexual desires while on the other hand, obscenity is one which does not intend but, has the tendency to corrupt the mind of the people. Further in the case of “*Shankarsan Krishna Mundra v. State of Maharashtra*”²⁵ the Bombay high

²⁰ AIR 1971 SC 481

²¹ (1996)4 SCC 1

²² 2008 Cri Lj 4107

²³ Ibid

²⁴

²⁵ WP (Cri) No. 1580 of 2010

court held that section 292 IPC will not be attracted if pornography or obscene film is watched within the closed boundary of a bungalow.

TEST FOR OBSCENITY

It has been well established by the judiciary in the precedents that there can be no particular test for determining obscenity. The courts have thus adopted and recognised various tests which can be used to judge obscenity differently in different cases based on the facts of each case. Some of them are explained as under:

A. HICKLIN TEST

The Hicklin’s test was laid down by the English court in the case of “R v. Hicklins”²⁶ and was adopted by the Indian court in the case of “*Ranjit D Udeshi v. State of Maharashtra*.”²⁷ The court in this case held that any material is said to be obscene if the publication of the material has the tendency to affect the most vulnerable member of the society irrespective of whether they are likely to read it or not.

D.H Lawrence’s book, “The Rainbow” was destroyed much before it was published as it supposed to consist of obscene content. Similarly, another book named “*The Well of Loneliness*” was also destroyed as one paragraph in the book was considered to be such which would give rise to the thought of the impure character.

The researcher would like to draw the attention of the readers on the case of “*Ranjit D. Udeshi V. State of Maharashtra*”²⁸ where the Hon’ble court defined obscenity as one which is “offensive to modesty or decency; lewd, filthy and repulsive.”²⁹

B. LIKELY READERS TEST

The ground of “most vulnerable person” which was laid down in the case of Hicklin’s test was replaced with “Likely readers test” in the case of “*Chandrakant Kalyandas Kakodkar*”³⁰ In “*Samaresh Bose Case*”³¹ the Supreme Court laid down the principle of Likely readers test in

²⁶ (1868) LR 3 QB 360

²⁷ AIR1965 SC 881

²⁸ Ibid

²⁹ Ibid

³⁰ AIR 1970 SC 1390

³¹ AIR 1986 SC 967

which the judge had to put himself in the place of the people in whose hand the book is likely to fall and had to draw an inference as to what kind of influence the book is likely to have on the mind of the readers. However, in the Case of “*Anand Patwardhan*”³², the court again shifted to the Hicklin test and held that it is more suitable for determining obscenity in India. However, today the courts have gone beyond the Hicklin’s test and have come up with various tests for obscenity.

C. ART PREPONDERATING SOCIAL PURPOSE

Where the art and obscenity are inseparable, the court should see whether the art is of such nature which can make the presence of obscenity insignificant. Thereby, saying that for an obscene content to be protected under freedom of free speech and expression should have literary merit and “preponderating social purpose.”³³

The same test could not overshadow obscenity when applied to the case of “*Ranjit D. Udeshi v. State of Maharashtra*”³⁴ to determine the obscenity as the book did not hold any social gain for the public.

D. THE NATIONAL STANDARD TEST

According to this test, the court has to judge whether a particular work is obscene with regard to the national standard. In India where, *Lady Chatterley’s Lover* was considered to be obscene, in the UK, the court acquitted the publisher. Therefore in India, national and community standard plays an important role, unlike English court.

E. TO JUDGE THE WORK AS A WHOLE

A movie should be examined in accordance with the guidelines laid down in the Cinematography Act, 1952 under section 5-B reads as:

“The Board of Film Certification shall also ensure that the film-

(I) is judged in its entirety from the point of view of the overall impact;”

The court took a new approach to decipher whether the material is obscene or not, which is to judge the work in its entirety or as a whole. In this test, the passages which are alleged to have been obscene should also be examined separately. It is important to understand the message

³² (2006) 8 SCC 433

³³ KA Abbas V. UOI, AIR 1971 SC 481

³⁴ AIR 1965 SC 881

being propagated with the help of such an article or film and not discard the whole of the work due to the presence of obscene content at someplace.

F. TEST OF ORDINARY MAN

The court by using such a test judge any work based on common sense or on the views of an ordinary prudent man. In the case of “*Ramesh v. Union of India*”³⁵, the court held that

“The effect of the words must be judged from the standards of reasonable, strong minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view.”

The test, as to whether a particular act constitutes obscenity or not, is to be done with the well-known yardstick of common prudence that is to say, if the act can be perceived by an ordinary man or bystander having average prudence and orientation, as to be an act disturbing his conscience and an act to be an unbecoming one vis-a-vis the general standards of morality and behavior.

In other words, a particular act may seem to be appropriate to a particular person and inappropriate to the other. This difference in perception can be due to various factors including customs, lifestyle, personal background, level of education, social exposures, etc. However notwithstanding the opinion of the person aggrieved, what is to be seen is that as to whether a common and neutral person could have had the same perception.

ANALYSIS

From the above content, we can observe that obscenity doesn't have any rigid definition and it differs from people to people, community to community and country to country. One such example can be of pre-marital sex and live-in relationship which was not accepted by the Indian society, but with the change in psychological factors and the changing social- moral values, it is no more considered to be obscene.

We have seen that how obscenity and the standard for judging it have drastically changed from the case of “*Ranjit D. Udeshi*”³⁶, where obscenity referred to the depraving mind of ‘most vulnerable’ person in the society irrespective of, in whose hand the book might sway into, to

³⁵ AIR 1988 SC 775

³⁶ Supra note 6

the case of “*Chandrakant Kalyandas Kakodkar*”³⁷, where obscenity was judged on the basis of ‘effect of publication on the person who could reasonably be expected to have access to such publication’ was used. It is important here to understand that with each changing facts of the case, the definition of obscenity also seeks change and cannot be applied rigidly and consistently in all the cases. What might be obscene in one nation, might not be obscene in the other. What might be acceptable by one community might not be acceptable by the other. What might be immoral in the eyes of a society today, might become moral with tomorrow’s generations. Therefore, it is not possible to confine the term “obscene” in a rigid definition.

Since, as stated aforesaid, the meaning of obscenity changes with the user’s region, community, society and various other socioeconomic and academic factors. As such, a work has to be assessed for obscenity check in the background in which it was committed. Though the term “Obscenity” is a negative word, however, it is used to prevent down-gradation of the society by preventing such acts as a tough sublime counter of dynamic ethics. The word ‘society’ in this context is to be interpreted as a group of persons having a common belief, custom, tradition, etc. in which such an act may be perceived as obscene or otherwise. As such, there is no question of assessing the alleged work with the yardstick of common prudence and what is to be seen necessarily, is the background and circumstances, in which such work is written and/or published.

In order to define obscenity, there are two things which should be considered prior to it. Firstly, which is the relevant community in accordance with whose standard the obscenity has to be judged? Secondly, one needs to examine whether the work intends and has a tendency to raise prurient interest in the minds of the readers. The answer to this question would differ from country to country. Therefore, there is no need of giving obscenity a confined definition. Instead, these two questions should be examined in each case depending on the facts and circumstances of the case. It should also be noted that the different types of tests and the standard laid down by the judiciary in the past are not exhaustive.

The author also believes that the standard of social security also plays an important role in defining ‘obscenity’. For example, in a country where women are given little or negligible freedom of expression or exposure, even the slightest discourse qua personal preferences and humour may lead to serious charges of Obscenity. The analysis of the various judgments shows that there has been a constant evolution of the concept of obscenity. In the earlier era, where

³⁷ Supra note 7

the prime area of focus was to stabilize the society in view of various political threats including those of invasions etc, a tendency of defining any freedom of intimacy was termed as obscenity. Since India is one large country having the maximum number of different creeds and cultures, it is a live example as to how the theory of obscenity varies with every mile.

The Indian judiciary has played an important role in filtering the grain of art from the shaft of alleged obscenity by protecting various works of famous Indian artists, authors and/or filmmakers. The analysis certainly demonstrates that in the abstract areas like that of defining “obscenity”, the Legislature, despite being the code of law for the country, could play only a nominal role and it is only our judiciary which has performed of preserving and propounding the true meaning of the term in the given different times and backgrounds.

SUGGESTIONS

Hence, whenever a material or art is to be judged and decided as to whether it is obscene or not, the judge should not restrict oneself to any one interpretation of the concept, but also consider facts and circumstances while giving his judgement.

The best way would be to define it as any material which is violative of any national standard and can give rise to salacious or prurient thought in the mind of an ordinary prudent man. However, it is not exhaustive and depends on the facts of the case in which obscenity is to be judged.

The obscenity should not be tried to be confined but shown to be thrown wide open to the judiciary to define with the changing legal and social perspective. Thereby, a changed approach or a test can also be evolved with the passage of the time which would suit that particular circumstance and facts of the case. The judge can also try to apply a mixture of two to three of the test mentioned above in order to come up with the best possible grounds for determining obscenity.

In the context of India, to define Obscenity, one must bear in mind that this nation is a global model for a conglomerate of cultures and thus, a nation which can truly represent almost all the creeds of the world. This nation has been the pioneer of art in its true sense. Coupled with this, the soul of our constitution is democracy. As such, there should be no room for

interpretation of the given term but it should rather be invented (defined) dynamically with periodical reviews.

CONCLUSION

A conspectus of the judgements and the ratio laid down in the same shows that the inference as to whether a particular act or a statement is obscene or not, directly relates to the prevailing socio-psychological factors, changing dynamics of social morality, and the evolving standards. Since, obscenity is more of a perception rather than being a calculation based on any legal formula, (with thereof, of course, being no straitjacket definition of obscenity), it is more of an opinion reflected from the approach of the society at large where the acceptability of a particular form of expression in one society might be absent in another.

Also, with the passage of time, definitely there has been a drastic change in such perception as is also reflected from the changes in the successive judgements by the courts over the period. Article 19(1)(a) of our constitution, has been on the centre stage of such controversy. The freedom of speech provided to the Indians is restricted by article 19(2) of the constitution. However, our constitution provides only a basic guideline and it does not prohibit dynamism qua the adaptations required in the approach for such freedom or the necessary restrictions thereof to ensure no infringement.

The author is thus of the opinion that there cannot be any rigid or definite definition of the term “obscenity”, but it is always subject to the conditions and the facts of the case in which it is to be determined.

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