

1
**IN THE HIGH COURT OF MADHYA PRADESH
AT J A B A L P U R**

**BEFORE
JUSTICE ACHAL KUMAR PALIWAL**

M.Cr.C. No. 4891 of 2014

NAGENDRA SINGH GAHARWAR

Versus

**MANMOHAN AGRAWAL CHIEF EDITOR PUBLISHER AND PRINTER
DAINIK BHASKER NEWS PAPER**

Appearance

Shri Nagendra Singh Gharwar –Advocate for the petitioner through
video conferencing.

Shri Sanjiv Kumar Mishra – Advocate for the respondent.

Reserved on : 06.10.2025
Pronounced on : 29 .10.2025

***This M.Cr.C. having been heard and reserved for judgment, coming on
for pronouncement this day, Justice Achal Kumar Paliwal pronounced the
following:***

ORDER

This M.Cr.C. has been filed under Section 482 of Cr.P.C. against order dated
21.02.2014 passed in Cr.R.No.317/2012 (Nagendra Singh Gharwar Vs. Manmohan
Agrawal) whereby petitioner's Criminal Revision filed against order dated

06.11.2012 passed in unregistered complaint case (Nagendra Singh Gharwar Vs. Manmohan Agrawal) dismissing petitioner's complaint has been affirmed.

2. Learned counsel for the petitioner submits that he filed a private complaint for offence under Sections 292 and 293 of IPC and Sections 3, 4 & 6 of the Indecent Representation of Women (Prohibition) Act, 1986 (hereinafter referred as "Act 1986). on the ground that in Rewa addition of Dainik Bhaskar news paper, published and printed by respondent, almost nude photo of woman was published. Aforesaid Act of respondent comes within the purview of offence as define under Sections 292 and 293 of IPC and Sections 3, 4 & 6 of the Indecent Representation of Women (Prohibition) Act. Aforesaid act of respondent is not covered under any exception and it has been published solely for commercial purpose. The photograph allegedly published in Dainik Bhaskar comes within the purview of Sections 292 and 293 of the IPC. Therefore, learned trial Court as well as revisional Court has materially erred in dismissing petitioner's complaint with respect to offence under Sections 292 and 293 and Sections 3, 4, and 6 of Act, 1986.

3. Learned counsel for the respondent submits that petitioner has no *locus standi* to file instant complaint. It is urged that the alleged obscene item is a bona fide advertisement. Further, image shown in the advertisement has been blurred. Therefore, learned courts below have rightly dismissed the petitioner's complaint.

4. Heard. Perused the record of the case.

5. Sole issue involved in the case is whether the advertisement of nude lady published in Dainik Bhaskar news paper dated 04.01.2012 comes within the purview of the Sections 292 and 293 of IPC as well as Sections 3, 4 and 6 of the Act, 1986.

Test of obscenity :-

6. Before proceeding further, it would be appropriate to refer and reproduce relevant pronouncements having bearing on the issue involved in the case.

7. In **Shri Chandsrakant Kalyandas Kakodkar Vs. State of Maharashtra and others, (1969) 2 SCC 687**, the Hon'ble Apex has held as under:-

“5. What is obscenity has not been defined either in Section 292 IPC or in any of the statutes prohibiting and penalising mailing, importing, exporting, publishing and selling of obscene matters. The test that has been generally applied in this country was that laid down by Cockburn, C.J., in **Queen v. Benjamin Hicklin [(1868) LR 3 QB 360]** and even after the inauguration of the Constitution and considered in relation to the fundamental rights of freedom of speech and expression this test, it has been held, should not be discarded. In **Hicklin case while construing** Statutes 20 and 21, Victoria, a measure enacted against obscene books, Cockburn, C.J., formulated the test 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 publication of this sort may fall It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thought of most impure and libidinous character.”

This Court has in **Udeshi v. State of Maharashtra [1964 SCC OnLine SC 52 : (1965) 1 SCR 65]** considered the above test and also the test laid down in certain other American cases. Hidayatullah, J., as he then was, at the outset pointed out that it is not easy to lay down a true test because “art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees

beauty and art but nothing gross”. It was also pointed out in that decision at p. 74:

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

It is, therefore, the duty of the court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on the social morality of our contemporary society. We can do no better than to refer to this aspect in the language of Hidayatullah, J., at p. 76:

“An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall.”

Referring to the attempt which our national and regional languages are making to strengthen themselves by new literary standards after a deadening period under the impact of English, it was further observed at p. 77—

“that where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to

bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.”

Bearing in mind these observations and the tests laid down in **Udeshi case [1964 SCC OnLine SC 52 : (1965) 1 SCR 65]**, we propose to examine, having regard to our national standards, the passages in Shama to ascertain in the light of the work as a whole whether they treat with sex in such a way as to be offensive to public decency and morality as can be considered likely to pander to lascivious, prurient or sexually precocious minds.-----

11. We agree with the learned Judge of the High Court that there is nothing in this or in the subsequent passages relating to Neela, Vanita and Shama which amounts to pornography nor has the author indulged in a description of the sex act or used any language which can be classed as vulgar. Whatever has been done is done in a restrained manner though in some places there may have been an exhibition of bad taste, leaving it to the more experienced to draw the inferences, but certainly not sufficient to suggest to the adolescent anything which is depraving or lascivious. To the literate public there are available both to the adults and the adolescents innumerable books which contain references to sex. Their purpose is not, and they have not the effects of stimulating sex impulses in the reader but may form part of a work of art or are intended to propagate ideas or to instil a moral.

12. The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expression to their ideas, and emotions and objective with full freedom except that it should not fall within the definition of “obscene” having regard to the standards of contemporary society in which it is read. The standards of contemporary

society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in **Udeshi case [1964 SCC OnLine SC 52 : (1965) 1 SCR 65]** if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect.

8. In **Ajay Goswami Vs. Union of India and others, (2007) 1 SCC 143**, the Hon'ble Apex has held as under:-

Test of obscenity :-

“57. This Court has time and again dealt with the issue of obscenity and laid down law after considering the right of freedom and expression enshrined in Article 19(1)(a) of the Constitution of India, its purport and intent, and laid down the broad principles to determine/judge obscenity.

58. In a recent judgment **Director General, Directorate General of Doordarshan & Ors. Vs. Anand Patwardhan & Anr. [(2006) 8 SCC 433 (Dr. AR. Lakshmanan and L.S. Panta, JJ)]** this Court has referred to the *Hicklin* test laid down in **R.V. Hicklin, (1868) LR 3 QB 360** and observed.

- “32. (a) whether the ‘average person, applying contemporary community standards’ would find that the work, taken as a whole, appeal to the prurient interest.....
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically, defined by the applicable state law; and
- (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.”

59. In **Chandrakant Kalyandas Kakodkar vs. The State of Maharashtra and Others, (1969) 2 SCC 687**, this Court has held:

"In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expression to their

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

60. In [**Samaresh Bose & Anr. Vs. Amal Mitra & Anr., \(1985\) 4 SCC 289**](#), this Court held as under:

"29. In England, as we have earlier noticed, the decision on the question of obscenity rests with the jury who on the basis of the summing up of the legal principles governing such action by the learned Judge decides whether any particular novel, story or writing is obscene or not. In India, however, the responsibility of the decision rests essentially on the Court. As [laid down in](#) both the decisions of this Court earlier referred to, "the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions of [Section 292 I.P.C.](#)" In deciding the question of obscenity of any book, story or article the Court whose responsibility it is to adjudge the question may, if the Court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The Court must

take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the Court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of [Section 292 I.P.C.](#) by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment".

Per se nudity is not obscenity

61. The American Courts, from time to time, have dealt with the issues of obscenity and laid down parameters to test obscenity. It was further submitted that while determining whether a picture is obscene or not it is essential to first determine as to quality and nature of material published and the category of readers. In 50 Am Jur 2 d, para 22 at page 23 reads as under:

" Articles and pictures in a newspaper must meet the Miller test's constitutional standard of obscenity in order for the publisher or distributor to be prosecuted for obscenity. Nudity alone is not enough to make material legally obscene.

The possession in the home of obscene newspaper is constitutionally protected, except where the such materials constitute child poronography."

Contemporary Society:

62. It was also submitted that in order to shield minors and children the State should not forget that the same content might not be offensive to the sensibilities of adult men and women. The incidence of shielding the minors should not be that the adult population is restricted to read and see what is fit for children.

63. In **Alfred E Butler vs. State of Michigan, 1 Led 2d 412 (1957)**, the U.S. Supreme Court held as under:

"The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig."

64. There should be no suppression of speech and expression in protecting children from harmful materials : In **Reno vs. American Civil Liberties Union, 138 L ED 2d 874 (1997)**, it has been held that:

"The Federal Government's interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults, in violation of the Federal Constitution's First Amendment; the Government may not reduce the adult population to only what is fit for children, and thus the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into the statute's validity under the First Amendment, such inquiry embodies an overarching commitment to make sure that Congress has designed its

statute to accomplish its purpose without imposing an unnecessarily great restriction on speech."

65. In United States v Playboy Entertainment Group, Inc. 146 Led 2d 865 (2000), it has been held that:

"In order for the State to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. (393 US 503, 509 (1969)..... What the Constitution says is that these judgments are for the individual to make, not for the government of decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."

Literary merit and "prepondering social purpose"

66. Where art and obscenity are mixed, what must be seen is whether the artistic, literary or social merit of the work in question outweighs its "obscene" content. This view was accepted by this Court in **Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881,**

" Where there is propagation of ideas, opinions and information of public interest or profit the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene.....

* * * *

Where art and obscenity are mixed, the element of art must be so prepondering as to overshadow the obscenity or make it so trivial/inconsequential that it can be ignored; Obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech"

Contemporary Standards

67. In judging as to whether a particular work is obscene, regard must be had to contemporary mores and national standards. While the Supreme Court in India held *Lady Chatterley's Lover* to be obscene, in England the jury acquitted the publishers finding that the publication did not fall foul of the obscenity test. This was heralded as a turning

point in the fight for literary freedom in UK. Perhaps "community mores and standards" played a part in the Indian Supreme Court taking a different view from the English jury. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with the click of a mouse.

Judging the work as a whole

68. It is necessary that publication must be judged as a whole and the impugned should also separately be examined so as to judge whether the impugned passages are so grossly obscene and are likely to deprave and corrupt.

Opinion of literary/artistic experts

69. In [Ranjit Udeshi Vs. State of Maharashtra, AIR 1965 SC 881](#) this Court held that the delicate task of deciding what is artistic and what is obscene has to be performed by courts and as a last resort by the Supreme Court and therefore, the evidence of men of literature or others on the question of obscenity is not relevant. However, in [Samresh Bose v. Amal Mitra, \(1985\) 4 SCC 289](#) this Court observed:

"In appropriate cases, the court, for eliminating any subjective element or personal preference which may remain hidden in the subconscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognized authors of literature on such questions as if there by any of his own consideration and satisfaction to enable the court to discharge the duty of making a proper assessment."

Clear and Present Danger

70. In [S.Ragharajan v. P. Jagjivam Ram, \(1989\) 2 SCC 574](#), while interpreting [Article 19\(2\)](#), this Court borrowed from the American test of clear and present danger and observed:

"the commitment to freedom demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably like the equivalent of a 'spark in a power keg'."

Test of Ordinary Man

71. The test for judging a work should be that of an ordinary man of common sense and prudence and not an "out of the ordinary or hypersensitive man." As Hidayatullah, C.J. remarked in **K.A. Abbas Vs Union of India, (1970) 2 SCC 780:**

"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."

74. In view of the foregoing legal propositions the pictures in dispute had been published by the respondents with the intent to inform readers of the current entertainment news from around the world and India. The respondent's newspaper seeks to provide a wholesome reading experience offering current affairs, sports, politics as well as entertainment news to keep its readers abreast of all the latest happenings in the world. The pictures that have been published should not be viewed in isolation rather they have to be read with the news reports next to them. In the event, that a particular news items or picture offends any person they may avail of the remedies available to them under the present legal framework. Any steps to impose a blanket ban on publishing of such photographs, in our opinion, would amount to prejudging the matter as has been held in **Fraser vs. Evans, (1969) 1 QB 349.**

75. The definition of obscenity differs from culture to culture, between communities within a single culture, and also between individuals within those communities. Many cultures have produced laws to define what is considered to be obscene, and censorship is often used to try to suppress or control materials that are obscene under these definitions.

76. The term obscenity is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality. On the other hand the Constitution of India guarantees the right of freedom to speech and expression to every citizen. This right will encompass an individuals take on any issue. However, this right is not absolute, if such speech and expression is immensely gross and will badly violate the standards of morality of a society. Therefore, any expression is subject to reasonable restriction. Freedom of expression has contributed much to the development and well-being of our free society.

77. This right conferred by the Constitution has triggered various issues. One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and idea.

78. Be that as it may, the respondents are leading newspapers in India they have to respect the freedom of speech and expression as is guaranteed by our constitution and in fact reaches out to its readers any responsible and decent manner. In our view, any steps to ban publishing of certain news pieces or pictures would fetter the independence of free press which is one of the hallmarks of our democratic setup. In our opinion, the submissions and the propositions of law made by the respective counsel for the respondents clearly established that the present petition is liable to be dismissed as the petitioner has failed to establish the need and requirement to curtail the freedom of speech and expression. The Times of India and Hindustan Times are leading newspapers in Delhi having substantial subscribers from all sections. It has been made clear by learned counsel appearing for the leading newspapers that it is not their intention to publish photographs which cater to the prurient interest. As already stated, they have an internal regulatory system to ensure no objectionable photographs or matters gets published. We are able to see that respondent Nos. 3 & 4 are conscious of their responsibility towards children but at the same time it would be inappropriate to deprive the adult population of the entertainment which is well within the acceptable levels of decency on the ground that it may not be appropriate for the children. An imposition of a blanket ban on the publication of certain photographs and news items etc. will lead to a situation where the newspaper will be publishing material which caters only to children and adolescents and the adults will be deprived of reading their share of their entertainment which can be permissible under the normal norms of decency in any society.

79. We are also of the view that a culture of 'responsible reading' should be inculcated among the readers of any news article. No news item should be viewed or read in isolation. It is necessary that publication must be judged as a whole and news items, advertisements or passages should not be read without the accompanying message that is purported to be conveyed to the public. Also the members of the public and readers should not look for meanings in a picture or written article, which is not conceived to be conveyed through the picture or the news item.

80. We observe that, as decided by the American Supreme Court in **United States v. Playboy Entertainment Group, Inc, 146 L ed 2d 865 (2000)**, that,

"in order for the State.....to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

Therefore, in our view, in the present matter, the petitioner has failed to establish his case clearly. The petitioner only states that the pictures and the news items that are published by the respondents 3 and 4 'leave much for the thoughts of minors.'

9. In **Aveek Sarkar and another Vs. State of West Bengal and others, (2014) 4 SCC 257**, the Hon'ble Apex has held as under:-

“1.A German magazine by name *Stern* having worldwide circulation published an article with a picture of Boris Becker, a world renowned tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, which was photographed by none other than her father. The article states that, in an interview, both Boris Becker and Barbara Feltus spoke freely about their engagement, their lives and future plans and the message they wanted to convey to the people at large, for posing to such a photograph. The article picturises Boris Becker as a strident protester of the pernicious practice of “Apartheid”. Further, it was stated that the purpose of the photograph was also to signify that love champions over hatred.

2.*Sports World*, a widely circulated magazine published in India reproduced the article and the photograph as cover story in its Issue 15 dated 5-5-1993 with the caption:

“Posing nude, dropping out of tournaments, battling racism in Germany. Boris Becker explains his recent approach to life”—*Boris Becker Unmasked*.

3.*Anandabazar Patrika*, a newspaper having wide circulation in Kolkata, also published in the second page of the newspaper the abovementioned photograph as well as the article on 6-5-1993, as appeared in *Sports World*.

Test of obscenity and community standards

13. The Constitution Bench of this Court in the year 1965 in **Ranjit D. Udeshi [Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881 : (1965) 2 Cri LJ 8]** indicated that the concept of obscenity would change with the passage of time and what might have been “obscene” at one point of time would not be considered as obscene at a later period. The judgment refers to several examples of changing notion of obscenity and ultimately the Court observed as follows: (AIR p. 888, para 18)

“18. ... The world, is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled. ...”

This is what this Court has said in the year 1965.

14. Again in the year 1969, in **Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) 2 SCC 687**, this Court reiterated the principle as follows: (SCC p. 694, para 12)

“12. ... The standards of contemporary society in India are also fast changing.”

The abovementioned principle has been reiterated in **Samaresh Bose v. Amal Mitra, (1985) 4 SCC 289** by laying emphasis on contemporary social values and general attitude of ordinary reader. Again in 2010, the principle of contemporary community standards and social values have been reiterated in **S. Khushboo v. Kanniammal [(2010) 5 SCC 600]**.

15. This Court in **Ranjit D. Udeshi, (AIR 1965 SC 881)** highlighted the delicate task to be discharged by the courts in judging whether the word, picture, painting, etc. would pass the test of obscenity under Section 292 of the Code and the Court held as follows: (AIR p. 887, para 16)

16. ... The Penal Code does not define the word ‘obscene’ and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by the Supreme Court. The test must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invites the court to reach a decision on a constitutional issue of a most far-reaching character and it must beware that it may not lean too far away from the guaranteed freedom.

Applying the above test, to the book *Lady Chatterley's Lover*, this Court in **Ranjit D. Udeshi, AIR 1965 SC 881** held that in treating with sex the impugned portions viewed separately and also in the setting of the whole book passed the permissible limits judged of from our community standards and there was no

social gain to the public which could be said to preponderate the book must be held to satisfy the test of obscenity.

16. The novel *Lady Chatterley's Lover* which came to be condemned as obscene by this Court was held to be not obscene in England by the Central Criminal Court. In England, the question of obscenity is left to the jury. Byrne, J., the learned Judge who presided over the Central Criminal Court in **R. v. Penguin Books Ltd. [1961 Cri Law Rev 176]** observed as follows:

“In summing up His Lordship instructed the jury that: they must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was: Was the book obscene? Was its effect taken as a whole tend to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to pervert, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interest of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison with other books. If it was obscene then if the

defendant has established the probability that the merits of the book as a novel were so high that they outbalanced the obscenity so that the publication was the public good, the jury should acquit.”

17. Later, this Court in **Samaresh Bose (1985) 4 SCC 289**, referring to the Bengali novel *Prajapati* written by Samaresh Bose, observed as follows: (SCC p. 317, para 35)

“35. ... We are not satisfied on reading the book that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity.”

We have already indicated, this was the contemporary standard in the year 1985.

18. We are, in this case, concerned with a situation of the year 1994, but we are in 2014 and while judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons.

Hicklin test

19. In the United Kingdom, way back in 1868, the Court laid down the **Hicklin test in R. v. Hicklin, (1868) LR 3 QB 360** and held as follows: (QB p. 371)

“... 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.”

20. The **Hicklin [R. v. Hicklin, (1868) LR 3 QB 360]** test postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. The United States, however, made a marked departure. Of late, it felt that the *Hicklin test* **[R. v. Hicklin, (1868) LR 3 QB 360]** is not correct test to apply to judge what is obscenity. In **Roth v. United States [1 L Ed 2d 1498 : 354 US 476 (1957)]**, the Supreme Court of United States directly dealt with the issue of obscenity as an exception to freedom of speech and expression. The Court held that the rejection of “obscenity” was implicit in the First Amendment. Noticing that sex and obscenity were held not to be synonymous with each other, the Court held that only those sex-related materials which had the tendency of “exciting lustful thoughts” were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards.

21. In Canada also, the majority held in **Brody v. R. [1962 SCR 681 (Can SC)]** that D.H. Lawrence's novel *Lady Chatterley's Lover* was not obscene within the meaning of the Canadian Criminal Code.

22. The Supreme Court of Canada in **R. v. Butler [(1992) 1 SCR 452 (Can SC)]** held that the dominant test is the “community standard problems test”. The Court held that explicit sex that is not violent and neither degrading nor dehumanising is generally tolerated in Canadian society and will not qualify as the undue exploitation of sex unless it employs children in its production. The Court held, in order for the work or material to qualify as “obscene”, the exploitation of sex must not only be a dominant characteristic, but such exploitation must be “undue”. Earlier in **Towne Cinema Theatres Ltd. v. R. [(1985) 1 SCR 494 (Can SC)]** the Canadian Court applied the community standard test and not the **Hicklin test [R. v. Hicklin, (1868) LR 3 QB 360]**.

Community standard test

23. We are also of the view that *Hicklin test* **[R. v. Hicklin, (1868) LR 3 QB 360]** is not the correct test to be applied to determine “what is obscenity”. Section 292 of the Penal Code, of course, uses the expression “lascivious and prurient interests” or its effect. Later, it has also been indicated in the said section of the applicability of the effect and the necessity of taking the

items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the “community standard test” rather than the “*Hicklin test*” **[R. v. Hicklin, (1868) LR 3 QB 360]** to determine what is “obscenity”. A bare reading of sub-section (1) of Section 292, makes clear that a picture or article shall be deemed to be obscene

(i) if it is lascivious;

(ii) it appeals to the prurient interest; and

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

Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in the section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse the feeling of or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of “exciting lustful thoughts” can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

Message and context

24. We have to examine the question of obscenity in the context in which the photograph appears and the message it wants to convey. In **Bobby Art International v. Om Pal Singh Hoon [(1996) 4 SCC 11]**, this Court while dealing with the question of obscenity in the context of film called *Bandit Queen* pointed out that the so-called objectionable scenes in the film have to be considered in the context of the message that the film was seeking to transmit in respect of social menace of torture and violence against a helpless female child which transformed her into a dreaded dacoit. The Court expressed the following view: (SCC p. 15, para 27)

“27. First, *the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those*

men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film 'Schindler's List' was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow-feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. 'Bandit Queen' tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her."

(emphasis supplied)

25. In Ajay Goswami v. Union of India [(2007) 1 SCC 143 : (2007) 1 SCC (Cri) 298], while examining the scope of Section 292 IPC and Sections 3, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, this Court held that: (SCC p. 170, para 70)

"70. ... '45. ... [The] commitment to freedom of expression demands that it cannot be suppressed unless the situations created by it allowing the freedom are pressing and the community interest is endangered."

26. We have to examine whether the photograph of Boris Becker with his fiancée Barbara Feltus, a dark-skinned lady standing close to each other bare-bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292 IPC. Applying the community tolerance test, we are not prepared to say such a photograph is suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Breast of Barbara Feltus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than

the father of Barbara. Further, the photograph, in our view, has no tendency to deprave or corrupt the minds of people in whose hands the magazine *Sports World* or *Anandabazar Patrika* would fall.”

Factual analysis of the case:-

10. Now the facts of the case would be examined in the light aforesaid legal principles/parameters as enunciated in the aforesaid pronouncements.

11. Contents of alleged advertisement are as under:-

“GET READY TO SIZZLE

VIACOM18 MOTION PICTURES IN ASSOCIATION WITH BURMAWALA BROS.
PRESENTS

PLAYERS

ABBAS MUSTAN THRILLER STYLE

GO FOR GOLD JANUARY 6, 2012

देखिए ‘प्लेयर्स का सिजल’ विडियो आज रात 9:00 से 10:00 के बीच”

12. Thus, aforesaid advertisement pertains to video titled as “players of sizzle”. Further, it is also evident from aforesaid advertisement that on the body of lady shown in the advertisement words “GET READY TO SIZZLE” has been written in bold capital letters. Further, body parts of the lady shown in the advertisement have been blurred and aforesaid words are also written thereon. Thus, though the body of lady shown in the advertisement does not have any cloths but breast and genitals part are sufficiently blurred. Some words are also written in bold letters on genitals part of the lady.

13. Thus, if photograph of lady published in Dainik Bhaskar news paper, Rewa edition is seen/viewed in/from any angle, then, it cannot be said that aforesaid photograph is suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them. In **Aveek Sarkarer (supra)**, breasts of the lady were fully covered with the arms of Boris Becker and in the instant case, breasts of the lady have been fully blurred and they are not visible. Thus, in the instant case also, the breasts as well as genitals part of the lady are not visible at all. In this Court's opinion, aforesaid photograph of lady published in Dainik Bhaskar News paper, Rewa, edition has no tendency to deprave or corrupt the minds of people in whose hands the news paper would fall.

14. Hence, if aforesaid factual matrix of the case is examined in the light of legal principles/parameters enunciated by the Hon'ble Apex Court in the forgoing paras, especially in **Ajay Goswami (supra)** and **Aveek Sarkar and another (supra)**, then in this Court's opinion, even prima facie, ingredients constituting offence under Section 292 and 293 of IPC and Sections 3, 4 and 6 of the Act, 1986 are not made out, and, there is no sufficient evidence and grounds for proceeding further and for taking cognizance of offence under Sections 292 and 293 of IPC and Section 3, 4 and 6 of the Act, 1986.

15. Further, perusal of order passed by the learned trial Court dated 06.11.2012 as well as order passed by the learned Revisional Court dated 21.02.2014 reveals that both the courts have discussed the matter in detail and have examined facts/evidence of the case in the light of the legal principles applicable to the facts

of the case. No illegality appears to have been committed by the courts in rejecting the complaint/dismissing the revision filed by the petitioner.

16. Resultantly, in view of the discussion in the forgoing paras, no grounds whatsoever are made out to interfere in the findings recorded by the trial Court in order dated 06.11.2012 as well as order passed by the Revisional Court dated 21.02.2014.

17. Hence, this petition filed by the petitioner is dismissed.

18. Petition filed by the petitioner is disposed off accordingly.

(ACHAL KUMAR PALIWAL)
JUDGE

L.R.