



Case Comment:
Devidas Ramachandra Tuljapurkar
V. State of Maharashtra

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I. Introduction

On May 8 2008, Maqbool Fida Hussein, was acquitted by the Delhi High Court, in what was considered to be a landmark judgment on obscenity.¹ The artist had painted '*Bharatmata*' in the nude and had at various instances in the past, painted Hindu goddesses in obscene postures. The Delhi High Court held that the aesthetics of the painting and the social message it carried, far outweighed the 'obscenity' in it. The Bench believed that art ought not to be chained by anti-obscenity laws, if it is intended for the welfare of society and aimed to convey a social message and not the sexual arousal of the audience.

The judgment states that:

The ingredients of section 298 Indian Penal Code, 1860 as alleged are not met since there seems to be no deliberate intention on the part of the petitioner to hurt feelings of Indians.

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¹MF Hussain v. Raj Kumar Pandey, 2008 CrLJ 4107 (Del).

Further, Justice Sanjay Kishan Kaul concluded that mere knowledge of the likelihood that the religious feelings of another person may be wounded would not be sufficient. One may conclude that this judgment of the Delhi High Court briefly captures the mood of the Indian judiciary as a whole, on matters pertaining to obscenity; in fact the Supreme Court has mirrored the Delhi High Court's views and passed renowned judgments espousing libertarian thoughts and ideals in the recent past.²

The boundaries of obscenity have been limited considerably and that of speech and literary expression expanded. Yet, a stain in this tradition of tolerance is the case of *Devidas Ramachandra Tuljapurkar v. State of Maharashtra* ('*Devidas*')³ wherein, the Apex Court retracted its progress and decided that, the work in question would fall under the category of 'obscene material'.

II Facts

The facts of the case are simple and succinct. The problem began when a Marathi poem 'Gandhi Mala Bhetala', written by Mr. Vasant Dattatreya Gujar was published in a magazine meant for private circulation amongst members of the All India Bank Association Union. Mr. V.V. Anaskar, a member of the 'Patit Pawan Sangathan' found that certain words as well as certain phrases used in the poem, were of an offensive nature, and therefore merited strict action. These offensive phrases include (Translation) "I saw Gandhi masturbating in the memory of Hema Malini on a public street; I saw Gandhi at Bhagwan Rajneesh's meditation session saying satisfaction through sex."

He subsequently filed a case under Sections 153-A and 153-B read with Section 34, and finally Section 292, Indian Penal Code, 1860 (IPC). On hearing the facts, the Chief Magistrate, Latur, quashed all

²Ajay Goswami v. Union of India, (2007) I SCC 143; Shreya Singhal v. Union of India, AIR2015SC1523; Directorate General of Doordarshan v. Anand Patwardhan, (2006) 8 SCC 433.

³*Devidas*, (2015) 6 SCC 1.

charges except the one under Section 292, Indian Penal Code, 1860.⁴ Following this, the High Court of Bombay dismissed the matter and later, a Special Leave Petition brought the matter to the Supreme Court of India.

The poet's defense was that of freedom of speech and expression guaranteed under Article 19 of the Indian Constitution, as well as the explanation that his poem in fact lamented the loss of Gandhian values and in no way meant to ridicule him.⁵ The case took two decades for the judgment to be pronounced, at the end of which, the Supreme Court rejected the defense of the poet and imposed the punishment under Section 292 of the Indian Penal Code, 1860, on him. To arrive at this decision, Justice Dipak Misra as well as Justice Prafulla C. Pant discussed obscenity cases in India, dating back to *Ranjit Udeshi v. State of Maharashtra*.⁶

III. Against Precedents

With each judgment on obscenity, the Supreme Court has become more tolerant, and has recognized the need for art and literature to have varied views in the society. The scope of the words 'obscenity' and 'immoral' have thus narrowed down to an almost ignorable category to be used infrequently. After *Ranjit Udeshi case*⁷, the Apex Court in *Chandrakant Kakodkar*⁸ observed that the disputed material

⁴Using Obscene Language Against Historically Respectable Personalities Cannot Be Allowed in the Name of Artistic Freedom, (Dec. 24, 2015) available at <http://www.livelaw.in/using-obscene-language-against-historically-respected-personalities-cannot-be-allowed-in-the-name-of-artistic-freedom-critical-thinking-or-creativity-sc/>

⁵ Mumbai Mirror, *My Poem talks about how we have destroyed Gandhi's values*, May 16, 2015, available at <http://www.mumbaimirror.com/mumbai/cover-story/My-poem-talks-about-how-we-have-destroyed-Gandhis-values/articleshow/47304204.cms> (Dec. 26, 2015).

⁶A.I.R. 1965 S.C. 881.

⁷*Supra* note 10.

⁸*Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, (1969) 2 S.C.C. 687.

must be taken as a whole and isolated sentences do not merit the offence of obscenity being imposed on it.

This view emerged once again in the *Phoolan Devi* case,⁹ as well as in *Aveek Sarkar v. State of West Bengal*.¹⁰ In the poem, 'Gandhi Mala Bhetala', there are exactly three sentences which may be included in the broadest definition of obscenity. The rest of the poem focuses on other incidents encountered by the poet. Thus, on the first count, the poem fails the obscenity test as these isolated sentences have historically not been recognized as 'obscene' or immoral as defined in the Indian Penal Code, 1860.

Secondly, where at one point the 'Hicklin test' or 'the most vulnerable constituency' test was applied,¹¹ today the 'Contemporary Standards Test' is regarded as more suitable.¹² According to the Contemporary Standards Test, the average person applying contemporary community standards finds that the subject matter taken as a whole, appeals just to the prurient interest and lacks serious literary artistic, political, educational or scientific value.

Therefore, the general approach towards obscenity cases in India has gradually become more accepting and tolerant. Literary and artistic freedom of expression has time and again been regarded as necessary and therefore encouraged by the judiciary. In *Raj Kapoor and Others v. State and Others*,¹³ India's heritage was cited as proof of its historical tolerance. The bench stated:

The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may

⁹The State of Bihar v. Shailabala Devi, 1952 A.I.R. 329.

¹⁰Aveek Sarkar, 2005 (2) C.H.N. 694.

¹¹MADHAVIGORADIA DIVAN, FACETS OF MEDIA LAW, 80, (Eastern Book Company, 2nd ed. 2013); RanjitUdeshiv. State of Maharashtra, A.I.R. 1965 S.C. 881.

¹²Director General of Doordarshan v. Anand Patwardhan, (2006) 8 S.C.C. 433.

¹³ 1980 A.I.R. 258.

be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and proscribe heterodoxies. It is plain that the procedural issue is important and the substantive issue portentous.

In *K.A. Abbas v. Union of India*¹⁴, the bench decided that “The standards that we set for our censors must make a substantial allowance in favor of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good”

In *Gajanan Vishveshwar Birjur v. Union of India*¹⁵, the Court observed that the Constitution of India permits a free trade in ideas and ideologies and guarantees freedom of thought and expression. The Court further observed, that thought control is alien to our constitutional scheme. The freedom enshrined in Article 19 of the Indian Constitution is recognized to include the freedom to offend, disturb and shock the society, in order to question accepted morals.¹⁶ In *K.A. Abbas*,¹⁷ the constitutional bench famously observed that ‘Hicklin test’ should be discarded, as the quality of a material ought not to be judged by weak minded people.

The bench states:

If the depraved begin 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. Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral.

The Indian judiciary has therefore consistently used other yardsticks which prove to be better fits. In later cases, the Supreme Court recognized the need to expand the scope of the test for

¹⁴ (1970) 2 S.C.C. 780.

¹⁵1994 S.C.C. (5) 550.

¹⁶Khushboo v. Kaniammal,(2010) 5 SCC 3346.

¹⁷K.A.Abbas v. Union of India and Another, (1970) 2 SCC 780.

obscenity and exempted literary and artistic works carrying social or moral messages.

In *Samresh Bose & Anr. V. Amal Mitra & Anr.*,¹⁸ it was observed that the work in question had great social and moral value, and therefore, merited the acquittal of the author. In another prominent case, *Ajay Goswami v. Union of India*¹⁹, the bench once again laid stress on the need to be more tolerant and view the message that a material carried, before imposing Section 292 of the Indian Penal Code, 1860 on it. The court observed that:

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

The argument regarding the social message of a particular work, gained much recognition in the *Phoolan Devi* case²⁰ and in *Aveek Sarkar*,²¹ as well. It was further observed, "The photograph has no tendency to deprave or corrupt the minds of the people because the said picture has to be viewed in the background in which it was shown and the message it has to convey to the public and the world at large." At the same time, the readers and viewers were advised to not look for meanings in a picture or written article, which are not conceived to be conveyed through the picture or the news item.

In the present case, the Supreme Court conveniently ignored the social message the poem carries that is, by mocking Gandhi, the poet shows the dilution of Gandhian ideals in the society. This

¹⁸*Samresh Bose*, 1986 A.I.R. 967.

¹⁹(2007) 1 S.C.C. 143.

²⁰*Supra* note 11.

²¹*Supra* note 11.

message is not considered by the Court, while applying the ‘Contemporary Standards Test’. Apart from these errors, in *Devidas*²², the Supreme Court makes one more observation. The judgment applies the law incorrectly and has no constitutional basis. There is no mention of ‘historically respectable personality’ as a category, in the Indian constitution. On the other hand, Article 14 expressly states that all citizens are equal in the eyes of the law. The ‘Contemporary Standards Test’ is wrongly applied in the case when Justice Mishra states in ¶105 of *Devidas*²³:

...the concept of ‘degree’ comes in. To elaborate, the ‘contemporary community standards test’ becomes applicable with more vigor, in a greater degree and in an accentuated manner.

The Contemporary Community Standards test, however, does not mention ‘degree’. It is a uniform, objective test, which is applied, irrespective of who the material speaks against. In this case, one can thus, see a misapplication of a generally well accepted principle of law.

IV. Obscenity as defined by the majority

In *Aveek Sarkar*²⁴, it was decided that the Hicklin test was to be substituted by the Community Standards Test. Despite the laudable and progressive approach taken by the Apex Court in deciding this case, the bench applied the *Roth* judgment²⁵ in a limited fashion. In its purest form, the Roth test is a three pronged test to examine a material which is, that the material has to be obscene according to the community’s standard of accepted morals (the community standards test), thereafter it must be patently offensive, and finally, the material must fulfill no social purpose.²⁶

²² *Supra* note 5.

²³ *Supra* note 5.

²⁴ *Supra* note 27.

²⁵ *Roth v. United States*, 354 U.S. 476 (1957).

²⁶ Gautam Bhatia, *Obscenity: The Supreme Court discards the Hicklin test*, available at

In *Aveek Sarkar*²⁷ however, the second and final part of this test has been left out. In doing so, today, the Indian system of law is left with a vague majoritarian concept of what is acceptable in society—the community standards test eliminates all kind of minority opinion and literary expression, by keeping the community’s acceptance as the test for judging the quality of a material. However, the concept of social value and purpose (explained as the third prong of the Roth test) has come to light in several later cases. In *Samresh Bose & Anr. v. Amal Mitra & Anr.*²⁸, the said witness deposed that the novel has ‘great social and moral value’.

In *Khushboo v. Kaniammal*²⁹, the court unambiguously stated the importance of free speech to churn society. This landmark judgment advised the respondent to challenge the views that she found unacceptable in the public forum or through the media. The court held that:

If the complainants vehemently disagreed with the appellant’s views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the freedom of speech and expression. An expression of opinion in favor of non-dogmatic and non-conventional morality has to be tolerated as the same cannot be a ground to penalize the author.

Moreover, it was opined that the very utility of free speech arose from its power ‘to offend, shock or disturb’ the society

we must lay stress on the need to tolerate unpopular views in the socio-cultural space.

<https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/> (Dec. 25, 2015).

²⁷Supra note 27.

²⁸ 1986 A.I.R. 967.

²⁹ (2010) 5 S.C.C. 3346.

In *Ajay Goswami*³⁰, it was held that the material in question must not be held in isolation, ergo the message it carried ought to be given value while judging it. Yet, in *Devidas*, using the contemporary community standards test, the Court essentially propagates the view that if the majority of the society does not accept the literary work in question, then it is deemed to be obscene.

The test used by the bench in *Devidas* is not accepted by many scholars even if it is applied correctly. Scholars, argue that this test ought to be done away with, as it essentially believes that a minority is wrong merely because it is not acceptable to the majority.³¹ It promotes uniformity of thought and does not allow scope for differences in the perception of what constitutes 'morally right' behavior and conversely, what is 'obscene'. Juxtaposing this principle with the judgment of *Khushboo v. Kanniammal*,³² one begins to understand the paradox posed by the apex court in *Devidas*³³.

It is perceptible that by making certain respectable persons 'off limits' for the public, the Court adds to the cult around national leaders. The hypersensitivity of the judiciary in this matter is therefore, a reflection of the paranoia of the executive. Keeping the public impervious to the flaws of their leaders and treating the leaders as divinity surely subdues dissent. In *Devidas*³⁴ it is evident that the judiciary is seeking to protect the Mahatma. In order to retain the purity of Gandhi's image, the bench creates a legal fiction which first arrives at a conclusion and then attempts to find reasons to justify it. Subsequently, the bench in no uncertain terms declares that the aura around Gandhi must not be meddled with.³⁵

³⁰Ajay Goswami v. Union of India & Others, A.I.R. 2007 S.C. 493.

³¹Directorate General of Doordarshan v. Anand Patwardhan, (2006) 8 S.C.C. 433.

³²Khushboo, (2010) 5 S.C.C. 3346.

³³Supra note 5.

³⁴Supra note 5.

³⁵ At ¶105, Misra J. in *Devidas*.

The cult following of the Mahatma was and continues to be popular in India and this seems to be the driving factor of the verdict.³⁶ As one probes deeper, one realizes that the bench does not stop at Mahatma Gandhi, but leaves scope for other people to be included in the 'historically respectable personalities' category. By using this qualification of historical respectability, the judiciary in essence is protecting most of the erstwhile parliamentarians and national leaders from scathing remarks of the public. Without any definition of the term or even providing a list of persons included in the list, the judiciary leaves a wide loophole for society's less tolerant to exploit.

It adds to the portrayal of our national leaders as towering personalities, inherently invulnerable and flawless. The protection afforded to Gandhi appears to be undue, as the poet himself states that his work does not ridicule Gandhi. In fact, the poet laments the erosion of Gandhian values in the post Emergency era, with allusions to anarchy and a society with feeble ideals.³⁷ Ideally, this should have acquitted him as it would fall squarely within the scope of the 'preponderating literary merit' test for adjudging obscenity.³⁸

V. Conclusion

Gandhi's wish to be born as an untouchable in his next life has indeed been fulfilled. The words - "But if I were to be reborn, I should be an untouchable..." in the context of the *Devidas*³⁹

³⁶First Post, *Fan Bhakti is killing Indian democracy*, April 1, 2013, available at <http://www.firstpost.com/politics/political-fan-bhakti-is-killing-indian-democracy-681794.html> (Dec. 25, 2015).

³⁷ Mumbai Mirror, *My Poem talks about how we have destroyed Gandhi's values*, May 16, 2015, available at <http://www.mumbaimirror.com/mumbai/cover-story/My-poem-talks-about-how-we-have-destroyed-Gandhis-values/articleshow/47304204.cms> (Dec. 25, 2015).

³⁸*Directorate General of Doordarshan v. Ananda Patwardhan*, (2006) 8 S.C.C. 433.

³⁹*Supra* note 5.

judgment, delivered by the Supreme Court, which argues for the creation of a separate category of 'historically respectable personalities,' has virtually made Gandhi and his like, untouchable by the common public. Essentially, such historical personalities cannot be used in any form of art that degrades them - even if they represent something beyond themselves in the literary work. Religion and national leaders, the two invincible components of a society, seethe with intolerance, at the mere hint of mockery. The Delhi High court's judgment on MF Hussain's artwork even brought religion to the public forum for discussion. It is despicable if the Supreme Court cannot keep up the tradition and leaves national leaders invulnerable.