

“Tackling the Issue of Obscenity: Inconsistency in the Approach of the Supreme Court”

Devidas Ramchandra Tuljapurkar v. State of Maharashtra, (2015) 6 SCC 1

Kartik Chauhan
NUJS, Kolkata

Utkarsh Chauhan
NUJS, Kolkata

Abstract

The recent judgment of the Supreme Court in the case of ‘Devidas Ramchandra Tuljapurkar v. State of Maharashtra’ is very contentious. The judgment makes the already irregular stand of Indian judiciary on the issue of obscenity more complex and abstruse. Moreover, it has left many pertinent questions unanswered by inventing a new exception to freedom of speech called ‘historically respected personalities’. This case comment aims at examining various vital issues left open by the honourable Supreme Court of India. It further argues in favour of adopting a more efficacious and logical approach to obscenity in the context of Indian jurisprudence.

Introduction

Presently, the Indian law related to obscene material is settled in the Indian Penal Code, 1860 but is also open to the interpretations laid down by courts of the nation. However, the recent Supreme Court ruling in the case of *Devidas Ramchandra Tuljapurkar v. State of Maharashtra*¹ by Justice Dipak Mishra and Justice Prafulla C. Pant has given birth to a new controversy. It has unfortunately misstated and misinterpreted Indian obscenity law jurisprudence. Furthermore, the Supreme Court has come up with a new exception of ‘historically respected personalities’ in relation to the right of free speech which comes as a setback to the advocates of the said fundamental right. This is one of those decisions by the Apex court that is pre-determined but is justified by illusive legal analysis. The judgment comes only a few months after the verdict in ‘*Shreya Singhal v. Union of India*’² that had struck down the speech-restricting clause 66A of the Information Technology Act, 2000; the verdict in that case was hailed as a milestone in the Indian free speech jurisprudence. The facts of the *Tuljapurkar* case are: The seminal issue that spiraled in the course of the decision making was whether the poem titled ‘Gandhi Mala Bhetala’ (‘I met Gandhi’) in the magazine named the ‘Bulletin’ which was published, in July-August, 1994 issue, meant for private circulation amongst the members of All India Bank Association Union, could in the ultimate eventuate give rise to framing of charge of obscenity under Section 292 IPC against the author, the publisher and the printer. The charges under Section 153-A and 153-B of the IPC were quashed by the lower court but charges under section 292 stayed and after an unsuccessful appeal to the High Court, the case came to the Supreme Court. The case comment thus discusses two issues. Firstly, it analyse the jurisprudence related to the issue of obscenity in India and examine as to how far it is

¹ (2015) 6 SCC 1

² AIR 2015 SC 1523

a restriction on one's freedom of speech and expression. Secondly, it highlights the repercussions of including the exception of 'historically respected personalities' to the right of free speech. In doing so, the arguments and reasons given by the court in coming up with the vexed *ratio decidendi* will be critically scrutinized.

THE JUDICIARY ON OBSCENITY: FROM UDESHI TO TULJAPURKAR

The issue as to what is obscene was first addressed in the case of *Ranjit Udeshi v. State of Maharashtra*³ in which the Supreme Court relied on the standard laid down by the Victorian era Hicklin test which stated that “ *all material tending to deprave and corrupt those whose minds are open to such immoral influences*”. There were certain drawbacks in this test i.e. firstly, the girth of the phrase ‘deprave and corrupt’ made it open to misinterpretations. Secondly, contextuality was not to be given any emphasis i.e. any word, phrase or depiction would be independently judged irrespective of the context in which it is used and thirdly, the test considered the perspective of those who were most likely to be corrupt or deprave.⁴ Even though the courts in India have primarily followed the Hicklin test to judge obscenity but there arise a serious ambiguity when one looks at cases like *Directorate General of Doordarshan v. Anand Patwardhan*⁵ and *Chandrakant v. State*⁶ where the courts have followed the example of Roth⁷ test and the courts have used the yardstick of the community standard test and held that the judiciary was allowed to look into the overall impact of the material for determining the obscene content. This, the court has done without overruling or dispensing with the *Hicklin* test *per se*. This confusion was to a large extent put to rest when the Supreme Court in *Aveek Sarkar v. State of West Bengal*⁸ expressly abandoned the *Hicklin* Test and replaced it with the *Roth* test. *Roth* is a sharper and narrower test,⁹ though it has a limitation that it gives an impression that a material is either fit for the entire community or otherwise not.¹⁰ However, Roth test is far better than Hicklin as a test for obscenity. The Supreme Court in *Tuljapurkar* fails to apply the Roth test properly. In paragraph 73, the court says that the test to be used in the present context is the *contemporary community standard test*, however this essay argues that the court failed to lay down the complete test which states “ *...applying contemporary community standard test, the dominant theme of the material, taken as a whole appeals to the prurient interest*”. The court in

³ AIR 1965 SC 881

⁴ Gautam Bhatia, *No dirty poems on Mahatma Gandhi: SC obscenity ruling is a big blow to free speech*, May 15, 2015, available at <http://www.firstpost.com/india/no-dirty-poems-mahatma-sc-obscenity-ruling-big-blow-free-speech-2245416.html> (last visited on 11th September, 2015)

⁵ AIR 2006 SC 3346

⁶ AIR 1970 SC 1390

⁷ As per the Roth test “The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest”

⁸ AIR 2014 SC 1495

⁹ Gautam Bhatia, *No dirty poems on Mahatma Gandhi: SC obscenity ruling is a big blow to free speech*, May 15, 2015, available at <http://www.firstpost.com/india/no-dirty-poems-mahatma-sc-obscenity-ruling-big-blow-free-speech-2245416.html> (last visited on 11th September, 2015)

¹⁰ A Cynthia MacDougall, ‘*Double Standards of Obscenity: The Ginsberg Decision*’ [1968] 3(1) Val U L 57, 66

the present scenario exhibits a careless attitude. It cannot be left to the whims of the judges to take up a part of a judicially evolved test and leave the rest of the part just to reach a desired conclusion. By simply ignoring the second part of the Roth test, the court is able to invent a new exception to the freedom of free speech i.e. obscenity standards are different when it comes to historically respected personalities, because of community standards. During the course of the whole judgment, the court fails to actually lay down what exactly is obscenity. Justice Mishra observes:

“The issue in the instant case, whether in the name of artistic freedom or critical thinking or generating the idea of creativity, a poet or a writer can put into the said voice or image such language which may be obscene”

This however isn't the bone of contention as it is indisputable that obscenity to a certain extent is a restriction to the freedom of speech but the important question is what constitutes obscenity! The court has failed to answer this and has further added to the confusion. Thus the ruling goes against the jurisprudential principle of *legal certainty*¹¹. The principle is considered to be a central requirement for the rule of law to exist. If the people to whom the law is applicable are not clear about the law, the law needs to be put to rest.

The judgment also illustrates the aftermath of attempting to dig into literary criticism. The recent *Charlie Hebdo*¹² incident was due to the inability to absorb or tolerate French satirical tradition. Similarly, the court hasn't tried to look into whether the poem was obscene in the context of Marathi literary tradition in which Marathi writers have for centuries used earthy, vulgar language for social denunciation¹³. Moreover, with the advent of modern times, judiciary should offer a relaxation to the way we look at obscenity. The concept of obscenity varies from society to society 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 reference to sex in what is written is equal to requiring the authors to write solely for adolescent and not the adults¹⁴. The realm of obscenity must be judged keeping one's right to expression in mind in the present modern scenario.

¹¹ Legal certainty is a principle in national and international law which holds that the law must provide those subject to it with the ability to regulate their conduct as per the law.

¹² On January 7, 2015, some terrorists stormed into the office of *Charlie Hebdo*, a French satirical magazine that has published a lampooning piece on Prophet Mohammad. More than 12 people were killed in the attack.

¹³ Arundhati Deosthale *“Voices of change: A survey of post independence Marathi literature”* India International Centre quarterly Vol. 17, No 1, 139-146

¹⁴ Chandrakant Kalyandas Kakodkar v State of Maharashtra AIR 1970 SC 1390

HISTORICALLY RESPECTED PERSONALITIES: A WRONG PRECEDENT

Another major flaw in the Tuljapurkar judgment is the invention of the phrase ‘historically respected personalities ‘with no basis in constitution, history or reason¹⁵. This has opened Pandora’s Box and comes with a lot of shortcomings. The court observes:

“When the name of Mahatma Gandhi is alluded or used a symbol, speaking or using obscene words, the concept of degree comes in. To elaborate, the ‘contemporary standard test’ is applicable with more vigour, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standard test for the same language, it would not be so, if the name of Mahatma is used as a symbol of allusion or surrealist voice to put words or to show him doing such acts that are obscene”

Firstly, an obvious inquiry would be as to how is this degree being raised. It is to large extent illogical to say that community standards test would apply with ‘greater degree’. Even if it is so, does it mean that social and artistic works are no longer a defence to obscenity in such cases? This paramount question remains unanswered in the ruling. This gives rise to the scope of ambiguity which further questions legal certainty. Secondly, by treating ‘historically respected personalities’ differently from an ordinary citizen, the court has exhibited different standards to judge different people, which goes against the basic tenets of the principle of equality as laid down in the Constitution of India. Thirdly, the court has allocated to itself the power to impose respectability, which is outside the realm of its jurisdiction.¹⁶ On what basis can one be forced to respect Gandhiji, now that we have a lot of literature against him and his personal life and his role in the freedom movement?

Moreover, by failing to define what exactly respectability is and what makes a historical personality respectable, the court has left a large loophole for future interpretations. In future, we may see a large number of organizations initiating criminal proceeding against people who have disrespected their ideals which will lead to further confusion as it is not the task of criminal law to punish individuals merely for expressing unpopular views.¹⁷ We must lay stress on the need to tolerate unpopular views in the socio cultural space; just because an individual is respected by some, does not grant him immunity from criticism. There is yet another way in which the exception of historically respected personality serves as a detriment. It eradicates any chance of discovery of truth in future related to the supposedly ‘respected historical personality’. Free

¹⁵ Gautam Bhatia, *No dirty poems on Mahatma Gandhi: SC obscenity ruling is a big blow to free speech*, May 15, 2015, available at <http://www.firstpost.com/india/no-dirty-poems-mahatma-sc-obscenity-ruling-big-blow-free-speech-2245416.html> (last visited on 11th September, 2015)

¹⁶ *ibid*

¹⁷ *S.Khushboo v. Kanniammal And Anr* AIR 2010 SC 310

speech jurisprudence disfavors restrictions on communication imposed for the sake of distorting rigidities of the generally accepted thoughts of the society.¹⁸

CONCLUSION

Obscenity law is a vital issue innately connected to the concept of morality which aims at safeguarding the general public from any sort of inconvenience facing sexual morality of our society. However, the question of ‘what is obscene’ ultimately boils down to ‘for whom it is obscene’. A clarification on this point is very necessary for the proper functioning of the relevant law. However, the court has only added to the existing confusion regarding the issue. The Supreme Court is trying to protect historically revered individuals like Gandhiji in the garb of respect for patriotism, social acceptance and established beliefs. It may be true that Gandhiji was instrumental in our fight for independence and that he should be respected, but to make it legally binding on a person is against the rule of law and inhibits free and rational thoughts. For reasons adduced above, the essayist is of an opinion that this settlement is wrong, open to mischief and misinterpretations and deserves to be overruled as soon as possible and a more efficacious approach needs to be adopted by the court.

¹⁸ David A. Richards, *Free Speech & Obscenity Law: Towards a moral theory and First Amendment*. University of Pennsylvania Law review, Vol. 123 No 1(1997) 45-91