

“HISTORICALLY RESPECTABLE PERSONALITIES”: A NEW HURDLE FOR FREEDOM OF SPEECH AND EXPRESSION? AN ANALYSIS IN LIGHT OF DEVIDAS RAMACHANDRA TULJAPURKAR V. STATE OF MAHARASHTRA

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ABSTRACT

In May 2015, the Indian Supreme Court delivered a judgment in which it declared an alleged vulgar poem on Mahatma Gandhi obscene, thereby creating a new threshold for obscenity when the said matter is related to historically respectable figures. In a judgment which runs over 100 pages, the court also discussed tests used for obscenity including the oldest Hicklin Test along with more than 50 odd judgments from various jurisdictions dealing with issues ranging from applicability of tests to the freedom of speech and expression. This article attempts to bring out flaws in the court's reasoning when it seeks to create an exception regarding historically respectable figures which in itself is a debatable issue. It also points out errors in court's understanding of the community standards test. It recommends a more forward looking and wide approach, in which the tests for obscenity are applied keeping the mind the context and the wider implication of the alleged obscene content.

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I. INTRODUCTION

Obscenity, in general, is an offence against public morals, committed either by making an indecent publication or by indecent conduct which tend to undermine public morals.¹ In India, ‘obscenity’ is an offence under § 292 of the IPC.² However what constitutes as obscene has been debated around the world for years.³ With the wider reach of print media, and the advent of internet the definition of obscenity is changing in its dimensions. The present case is about a more than 30 years old poem which has been declared obscene, stating that the freedom of speech and expression is not absolute. While it is clear that freedom of speech and expression has certain restrictions,⁴ the point of contention is whether it was justified in this case.

The case⁵ concerns the appeal by a publisher *Devidas Tuljapurkar*, editor and publisher of a bulletin magazine of All India Bank Association. He had challenged his prosecution for publishing in 1994 a poem by Marathi poet Vasant Dattatray Gujar. The poem “Gandhi mala Bhetla Hota (I met Gandhi)” had allegedly attributed obscene and loutish expletives to Mahatma Gandhi and the author had been held liable by the court. The article mainly addresses three points. First, it points out shortcomings in court’s analysis of obscenity. It then discusses the court’s explanation of historically respectable figures and raises some questions regarding it. The article concludes by suggesting a better approach by giving arguments in favour of analysing the matter by viewing its context and also its effect on the target audience.

II. TEST OF OBSCENITY: AN ERRONEOUS ANALYSIS?

The foremost case of obscenity was the Victorian-Era British case *R. v. Hicklin*⁶ in which the test for obscenity was laid down, popularly known as the *Hicklin Test*. According to it, “material was obscene if it tended to deprave or corrupt the people into whose hands it was likely to fall.”⁷ The *Hicklin Test* was later adopted in the much debated *Ranjit Odeshi*⁸ case, in which Justice Hidayatullah upheld the ban on the book ‘*Lady Chatterly’s Lover*’ in India. However

¹ DD BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 2462 (2007).

² The Indian Penal Code, 1860, § 292

³ MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW 75(2013).

⁴ Constitution of India, Art. 19(1) (a).

⁵ *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*, (2015) 6 SCC 1.

⁶ (1868) 3 QB 360.

⁷ *Id.*

⁸ AIR 1965 SC 881.

the major problem with the Hicklin Test was that the words “deprave” and “corrupt” were very vague and broad.⁹ It focused on isolated aspects of the work in question which made it more vulnerable to be deemed obscene.¹⁰ Moreover, it judged the work by its apparent influence on susceptible readers, such as children or weak minded adults instead of viewing it through the eyes of a normal individual.¹¹

During the course of fifty years in cases such as *GD Doordarshan*¹² and *Anand Goswami*¹³ the court liberalised its approach to tackling obscenity issues but it was last year when the court in the *Aveek Sarkar Case*¹⁴ finally tossed out the *Hicklin test* stating the aforementioned reasons. The court followed *Roth v. US*¹⁵ which laid down the “contemporary community test” a more rational and practical test according to which “to the average person the material taken as a whole applies to prurient interest.” The *Roth* test is certainly more streamlined as it guarantees more freedom of speech as it takes the matter as a whole and sees whether the dominant theme of the work applies to the prurient interest.

In the present case, the court used the “community standards test” to hold the appellant liable but it seems that it failed to provide any concrete reasoning as to how the said poem in question applies to “prurient interest”. It looks like the court totally ignored the latter part of the test and reached a conclusion. Even if the former part of the test is used in isolation, it is very

⁹ Indian Constitutional Law and Philosophy, *Historically respectable personalities: The Supreme Court invents new exception to freedom of speech*, May 15, 2015, available at <https://indconlawphil.wordpress.com/2015/05/14/historically-respectable-personalities-the-supreme-court-invents-a-new-exception-to-free-speech> (Last visited July 27, 2015).

¹⁰ Indian Constitutional Law and Philosophy, *Obscenity: The Supreme Court discards the Hicklin Test*, February 7, 2014, available at <https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test> (Last visited on July 26, 2015).

¹¹ *Aveek Sarkar v. State of West Bengal* (2014) 4 SCC 257.

¹² (1996) 8 SCC 433. (An award winning documentary was denied telecast by Doordarshan alleging patriarchy, violence and obscenity. In the appeal the Supreme Court upheld the High Court’s decision and held that there are scenes of violence and social injustices but the film, by no stretch of the imagination, can be said to subscribe to any of that, and ordered the channel to telecast it).

¹³ AIR 2007 SC 493. (The petitioner’s grievance was that the freedom of speech and expression enjoyed by the newspaper industry is not balanced with the protection of children from harmful and disturbing materials. The Court held that in view of the availability of sufficient protection by the way of various laws, rules, regulations and norms to protect society in general and children in particular from obscene and prurient contents, the petitioner’s writ was not maintainable. The court also held that a culture of ‘responsible reading’ should be inculcated so that everyone in the society get their share of entertainment).

¹⁴ *AVEEK SARKAR*, *supra* note 6.

¹⁵ (1957) 354 US 436.

obscure from the judgment as to how a satirical poem on Gandhi can corrupt an individual's mind.¹⁶

Moreover, the court has neither tried to synthesize the precedents with the alleged obscene poem nor has made an attempt to elaborate as to how the poem was obscene in context of Marathi literature.¹⁷ The court states that it has used the “*contemporary community standards test*” but it seems that it has followed the old approach and declared the poem obscene not from an average person's viewpoint but from a perspective of an individual who is vulnerable.

III. “HISTORICALLY RESPECTABLE PERSONALITIES”: A NEW EXCEPTION

The court ruled that the test for obscenity would apply to a greater degree and an accentuated manner as the poem was about a “historically respectable personality”. The very first question which pops up after reading this is the definition of “respectability” which in itself is very subjective.¹⁸ The court has made no effort to describe it and has created an artificial hierarchy between the so called respectable figures and others. This might be a huge blow for political and historical satire in future and would open floodgates of frivolous complaints and cases. Also, it is unreasonable to apply the test in its heightened form, when it has certain steps which have to be followed taking into consideration *what* the work is, instead of *who* the work is about. There is nothing in the jurisprudence, which keeps an elevated standard for any personality for that matter.

IV. TAKING CONTEXT INTO CONSIDERATION: A BETTER APPROACH

The court clearly did not explain the contextual basis of the poem being obscene. It just stated that there cannot be any immunity in the garb of poetic licence and freedom. The poem was published several times before and after it was published by the appellant. Also, it is to be

¹⁶ INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, *supra* note 9.

¹⁷ The Huffington Post, *The Supreme Court, Mahatma Gandhi and the Silly New standards for Obscenity*, May 22, 2015, available at http://www.huffingtonpost.in/aditya-bapat/the-supreme-court-mahatma_b_7296372.html (Last visited on July 26, 2015).

¹⁸ The Wire, *If you mock Gandhi, Other 'Historically Respectable Personalities', Get Ready to Go to Jail*, May 15, 2015, available at <http://thewire.in/2015/05/15/no-more-free-speech-on-historically-respectable-personalities-1725> (Last visited on July 28, 2015).

included in an anthology to be published by the Sahitya Academy, put together by the 2014 Gyanpeeth award winner, Bhalchandra Nemade, as one of the best literary works on Gandhi.

In a lesser known case, *Srishti School of Art, Design and Technology v. The Chairperson, CBFC*¹⁹ the issue was about a film which was not given the desired certificate by the Film Certification Board without excisions. The film was about philosopher poet Kabir and his journey. The Delhi High Court ruled in favour of the appellant and held that the right to speak, to disseminate, to argue, to debate, to disagree and form separate opinions are different facets of freedom of speech and expression.²⁰ Moreover the court deemed it highly unlikely that a viewer would feel hateful or vengeful towards any religion or community after watching the entire film. The court rejected the Censor Board's argument that the film is biased and only portrayed a one-sided perspective on events. Here the court decided taking into consideration the context of the film, ignoring whom the film was about or whether the individual clippings were obscene. The court reiterated that the individual clippings cannot be viewed alone, without knowing the context in which it is used.

In another case²¹ which concerned the ban on Marathi novel "Gandhi-hatya Ani mee" Justice Chandrachud opined that "a passage here or a passage there, sentence here or a sentence there, a word similarly, may if strained and torn out of context supply inflammatory matter to a willing mind. But such a process is impermissible. We must read the book as a whole, we must not ignore the context of a passage and we must try and see what, reasonably, would be the reaction of the common reader."²² The court also gave one more point saying that the class of readers for which the book is meant is also relevant, thereby striking down the ban.

It is clear from the above mentioned decisions that context of the disputed matter, and the target audience is relevant. Even here it is not clear as to how the poem was judged, whether the whole poem was considered or just a few words/ passages. It could be a better approach if the court also keeps the target audience in mind while judging the work, instead of viewing it from a general perspective. This could be rebutted by arguing that there cannot be different standards, but having different standards would at least be a more practical approach. These two

¹⁹ 2011 (123) DRJ1.

²⁰ *Id.*, ¶ 25.

²¹ *Gopal Vinayak Godse v. Union of India*, AIR 1971 Bom 56.

²² *Id.*, ¶ 279.

cases also imply that reaction of the audience, after watching/reading the work is also relevant, and should be kept in mind while deciding the matter.

V. CONCLUSION

It is highly debatable whether the poem is obscene or not, but in order to rule it obscene the court should have the stated the old law, provided the reason for its departure from it and amalgamated it with the new law which it intends to lay down. When the *Shreya Singhal*²³ judgement came earlier this year, it was considered revolutionary because the Supreme Court, in keeping with changing times and technology safeguarded the freedom of speech and expression. Recognising the fact that the Shreya Singhal judgment pertains to a different aspect of freedom of speech than that covered in the case at hand, it however seems that the former worked to further the cause of speech in essence, but the latter is highly regressive. The court went a step ahead in protecting freedom of speech and expression by striking off redundant laws and doctrines in *Shreya Singhal* and *Aveek Sarkar*, but here it went more than a step back by trying to protect historical figures by relying on archaic theories, which certainly was not the need of the hour.

²³ (2015) 5 SCC 1.