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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL. REVISION PETITION NO.114/2007

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Reserved on : 04-04-2008
Date of decision : 08-05-2008

MAQBOOL FIDA HUSAIN

.....PETITIONER

Through: Mr. Akhil Sibal, Ms. Bina
Madhavan & Mr. Pradeep
Chhindra, Advs.

-VERSUS-

RAJ KUMAR PANDEY

.....RESPONDENT

Through: None.

CRL. REVISION PETITION NO.280/2007

MAQBOOL FIDA HUSAIN

.....PETITIONER

Through: Mr. Akhil Sibal, Ms. Bina
Madhavan & Mr. Pradeep
Chhindra, Advs.

-VERSUS-

DWAIPAYAN V. VARKHEDKAR

.....RESPONDENT

Through: Mr. B.B. Varakhedkar, GPA
holder for the respondent.

CRL. REVISION PETITION NO. 282/2007

MAQBOOL FIDA HUSAIN

.....PETITIONER

Through: Mr. Akhil Sibal, Ms. Bina
Madhavan & Mr. Pradeep
Chhindra, Advs.

-VERSUS-

AJAY SINGH NARUKA

.....RESPONDENT

Through: Ms. Poornima Sethi, Adv.
for the Respondent.
Mr. Gopal Subramaniam,
ASG, Amicus Curie with
Mr.Devansh A. Mohta,
Law Officer.
Mr. Jaideep Malik, APP for
the State.

CORAM: HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1.Whether the Reporters of local papers

- may be allowed to see the judgment? Yes
- 2.To be referred to Reporter or not? Yes
- 3.Whether the Judgment should be reported in the Digest? Yes

SANJAY KISHAN KAUL, J.

1. Pablo Picasso, a renowned artist said, "Art is never chaste. It ought to be forbidden to ignorant innocents, never allowed into contact with those not sufficiently prepared. Yes, art is dangerous. Where it is chaste, it is not art."
2. Art, to every artist, is a vehicle for personal expression. An aesthetic work of art has the vigour to connect to an individual sensory, emotionally, mentally and spiritually. With a 5000-year-old culture, Indian Art has been rich in its tapestry of ancient heritage right from the medieval times to the contemporary art adorned today with each painting having a story to narrate.
3. Ancient Indian art has been never devoid of eroticism where sex worship and graphical representation of the union between man and woman has been a recurring feature.¹ The sculpture on the earliest temples of 'Mithuna' image or the erotic couple in Bhubeneshwar, Konarak and Puri in Orissa (150-1250 AD); Khajuraho in Madhya Pradesh (900-1050 AD); Limbojimata temple at Delmel, Mehsana (10th Century AD); Kupgallu Hill, Bellary, Madras; and Nilkantha temple at Sunak near Baroda to name a few. These and many other figures are taken as

¹ Freedom of Art under seige In India; Pallabi Ghosal; At: http://www.legalserviceindia.com/articles/re_ind.htm.

cult figures in which rituals related to Kanya and Kumari worship for progeny gained deep roots in early century A.D. Even the very concept of 'Lingam' of the God Shiva resting in the centre of the Yoni, is in a way representation of the act of creation, the union of Prakriti and Purusua.² The ultimate essence of a work of ancient Indian erotic art has been religious in character and can be enunciated as a state of heightened delight or ananda, the kind of bliss that can be experienced only by the spirit.

4. Today Indian art is confidently coming of age. Every form of stylistic expression in the visual arts, from naturalism to abstract expressionism derives its power from the artist's emotional connection to his perceptual reality. The Nude in contemporary art, a perennial art subject, considered to be the greatest challenges in art has still not lost its charm and focuses on how the human form has been re-interpreted by the emerging and influential artists today. The paintbrush has become a powerful tool of expression as the pen is for some, and has thus occasionally come under the line of fire for having crossed the 'Lakshman Rekha' and for plunging into the forbidden, which is called 'obscene', 'vulgar', 'depraving', 'prurient' and 'immoral'.³ No doubt this form of art is a reflection of a very alluring concept of beauty and there is certainly something more

² Ibid.

³ Id.

to it than pearly 'flesh'⁴ but what needs to be determined is which art falls under the latter category.

5. The present petitions seeking to challenge the summoning orders against the petitioner arise from such a contemporary painting celebrating nudity made by an accomplished painter/petitioner. The said painting depicts India in an abstract and graphical representation of a woman in nude with her hair flowing in the form of Himalayas displaying her agony. It is stated that the said painting was sold to a private collector in the year 2004 and that the petitioner did not deal with the same in any manner whatsoever after sale. Subsequently in the year 2006, the said painting entitled "Bharat Mata" was advertised as part of an on-line auction for charity for Kashmir earthquake victims organised by a non-governmental organisation with which the petitioner claims to have no involvement. It is stated that the petitioner at no point in time had given a title to the said painting. The advertisement of the said painting led to large scale protests for which the petitioner also had to tender an apology.
6. It is in this background that there were private complaints filed at various parts of the country being Pandharpur, Maharashtra; Rajkot, Gujarat; Indore and Bhopal, Madhya Pradesh alleging various offences against the petitioner on account of the aforesaid painting consequent whereto

4 Id. n. 1.

summons and warrants of arrest were issued against the petitioner. The petitioner approached the Supreme Court seeking consolidation of the matter. The Supreme Court acceded to the request and in pursuance to the directions passed vide order dated 04-12-2006, the said complaint cases pending consideration were consolidated and transferred to the court of the Ld. ACMM, Delhi by way of transfer petitions filed by the petitioner being T.P. (Cri.) No. 129/2006, T.P. (Cri.) No. 182/2006 and T.P. (Cri.) No. 224/2006. The Ld. ACMM, Delhi issued summons to the petitioner for various offences u/s 292/294/298 of the Indian Penal Code ('IPC' for short) against which the present revision petitions have been filed.

7. Notices were issued by this court and exemption was granted to the petitioner from personal appearance. In view of certain propositions having arisen, this court deemed it appropriate to issue court notice to the Ld. Attorney General in order to depute a law officer for assistance to this court. A perusal of the order sheets shows that none had sought to appear and argue the matter for the respondents in Crl. Rev. P. 114/2007 and Crl. Rev. P. 280/2007, thus this court vide order dated 20-03-2008 closed the right of the said respondents to advance any further submissions. However, the GPA holder of the respondent in Crl. Rev. P. 280/2007 entered appearance on 31-03-2008 and requested to make further submissions in that behalf which was permitted.

8. India has embraced different eras and civilizations which have given her a colour of mystery and transformed into her glorious past adapting various cultures and art forms. In the Mughal period too one may see murals and miniatures depicting mating couples. That has been the beauty of our land. Art and authority have never had a difficult relationship until recently. In fact, art and artists used to be patronized by various kings and the elite class. It is very unfortunate that the works of many artists today who have tried to play around with nudity have come under scrutiny and have had to face the music which has definitely made the artists to think twice before exhibiting their work of art. Therefore, looking at a piece of art from the painters' perspective becomes very important especially in the context of nudes. What needs to be seen is that the work is not sensational for the sake of being so and hence needs to be understood before any objections are raised. The courts have been grappling with the problem of balancing the individuals' right to speech and expression and the frontiers of exercising that right. The aim has been to arrive at a decision that would protect the "quality of life" without making "closed mind" a principal feature of an open society or an unwilling recipient of information the arbiter to veto or restrict freedom of speech and expression.
9. In order to examine the matter closely it would be pertinent to discuss the broad realms of the law relating

to obscenity and the artistic freedom given within the parameters of Article 19 of the Constitution of India (hereinafter referred to as the Constitution). The learned counsel for the petitioner and the Ld. ASG have assisted this court to bring to light this aspect by way of a plethora of precedents (Indian as well as international) where the courts faced with similar situations have discussed and enunciated the law in relation to obscenity. The position in this respect is summarized below:

United States of America

10. The courts in United States of America have given primary importance to protect the freedom guaranteed by the *First Amendment* to the American Constitution wherein an absolute prohibition is imposed on the abridgment of freedom of speech thus casting a heavy burden on anyone transgressing the right to justify the transgression. Since the constitutional provision contained no exceptions, these had to be evolved by judicial decisions.
11. It was in the case of *Chaplinsky v. New Hampshire* 315 U.S. 568, wherein the Courts recognized "obscenity" as an exception to an absolute freedom guaranteed by the American Constitution. In *Roth v. United States* 354 U.S. 476 the Supreme Court directly dealt with the issue of "obscenity" as an exception to freedom of speech and expression. It delved into the constitutionality of 18 U.S.C 1461 that made punishable the mailing of any material

which was "obscene, lascivious, lewd or filthy and other publication of an indecent character". While upholding the constitutional validity of the above Code the Court observed that "obscenity is not within the area of constitutionally protected freedom of speech or press - either (1) under the First Amendment, as to the Federal Government, or (2) under the *Due Process Clause* of the Fourteenth Amendment, as to the States". The Court further held that the rejection of "obscenity" was implicit in the First Amendment. Sex and Obscenity were held not to be synonymous with each other. Only those sex-related materials which had the tendency of "exciting lustful thoughts" were held to be obscene. The aspect of obscenity had to be judged from the point of view of an average person by applying contemporary community standards.

12. In this case the Supreme Court also rejected the common law test evolved in England in the case of *Regina v. Hicklin* 1868. L. R. 3 Q. B. 360 of the material having the tendency to deprave and corrupt the minds of only those persons who are open to such immoral influence, and into whose hands the publication of this sort may fall. The Supreme Court observed as follows:

"The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted

standard provides safeguards adequate to withstand the charge of constitutional infirmity.”

13. The Supreme Court in the case of *Memoirs v. Massachusetts* 383 U.S. 413 further explained the meaning of the term “obscenity” in the following words:

“Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”

14. The California Penal Code was approximately based on the above test, under the terms of which an intentional distribution of obscene matter was an offence. In *Miller v. California* 413 U.S. 15, the test of “utterly without redeeming social value” was rejected. This was a case involving an aggressive sales campaign relating to a book containing sexually explicit material which came to be thrust upon people who had expressed no desire to receive them. It was observed that the court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.
15. In *Stanley v. Georgia* 394 U.S. 557, the Supreme Court of United States dealt with another issue related to

“obscenity” which concerned private possession of obscene material by the Appellant which was an offense under the law of Georgia. The Court in this case held that mere possession of the obscene material was not a crime. In doing so, the Court did not hold that obscene material had become a “protected speech”, rather, the Court recognized that the freedom of speech goes beyond self-expression and includes the fundamental right to “receive information and ideas regardless of their social worth.”

16. In Mishkin v. New York 383 U.S 502 the Court removed the test of the average person by saying that if the material is designed for a deviant sexual group, the material can be censored only if it appeals to the prurient interest in sex of the members of that group when taken as a whole.
17. The United States of America has recently enacted a statute regulating obscenity on the internet i.e. Communication Decency Act, 1996 (CDA) which prohibits, knowingly sending or displaying of “patently offensive” material depicting or describing sexual or excretory activities or organs, in any manner that is available to a person under 18 years of age using an “interactive computer service”. The constitutionality of this statute came to be challenged before the Supreme Court in the case of Reno v. ACLU, 117 S. Ct. 2329 (1997) wherein it was argued that the aim of the Government while enacted the said statute was protecting the children from harmful material. The Supreme Court observed that the words of

the statute were vague and uncertain. It further held that the provisions of CDA lacked the precision that the First Amendment requires when a statute regulates the content of speech. The governments' interest in protecting children from exposure to harmful material was held not to justify "an unnecessarily broad suppression of speech addressed to adults". The court observed that the undefined terms "patently offensive" and "indecent" were wide enough to cover large amounts of non-pornographic material with serious educational value. In relation to the internet the "community standards" criterion was held to mean that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message, though in the case of New York v. Ferber 458 U.S 747 child pornography was recognized as an exception to freedom of speech guaranteed under the American Constitution.

Canada

18. For quite some time, the Canadian courts followed the *Hicklin's Test* but with the introduction of the statutory provision of section 163(8) in the Criminal Code, the said test was replaced with a series of rules developed by the courts. The Canadian Criminal Code defines obscene material as any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime,

horror, cruelty and violence, shall be deemed to be obscene. The first case to consider the said provision was Brodie v. The Queen, [1962] S.C.R. 681. The majority found in that case that D.H.Lawrence's novel, *Lady Chatterley's Lover*, was not obscene within the meaning of the Code.

19. One of the most progressive and liberal judgments on obscenity was Regina v. Butler (1992) 1 SCR 452 by the Supreme Court of Canada. The Supreme Court of Canada extensively interpreted the meaning of "undue exploitation, holding that the dominant test is a community standard one. The portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex, which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production. In order for the work or material to qualify as 'obscene' the exploitation of sex must only be its dominant characteristic, but such exploitation must be 'undue'. In determining when exploitation of sex will be 'undue', the courts formulated a workable test. The test being the '*community standard of tolerance*' test. It was further observed that the State could not restrict expression simply because it was distasteful or did not

accord with dominant conceptions of what was appropriate. In Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494 the court elaborated the the community standards test and held that it is the standard of tolerance, not taste that is relevant. What matters is not what Canadians think is right for themselves to see (but) what the community would (not) tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. In R v. Dominion News & Gifts 1963. 2 C.C.C. 103., the court stated that the community standard test must necessarily respond to changing mores.

Australia

20. There is no express right to free speech in Australia as in the USA. At most, Australia has a limited implied constitutional guarantee of political discussion. The right of free artistic expression in Australia is constrained by defamation law; trade practices laws; the provisions as per the Online Services Act and various State and Territory obscenity laws in particular the state Summary Offences Acts which create offences related to the display of indecent, obscene or offensive material. Definitions of 'obscene' or 'indecent' are often not contained in the legislation and courts rely on traditional legal tests such as the capacity of the material to 'deprave and corrupt' and/or community standards. .
21. Justice Windeyer settled the test for obscenity in Australia

in *Crowe v. Graham* (1968) 121 CLR 375.

"Does the publication... transgress the generally accepted bounds of decency?

...where "[c]ontemporary standards are those currently accepted by the Australian community... And community standards are those which ordinary decent-minded people accept."

22. It is well established that this community standards test will be applied to sexual, violent, criminal and certain religious matters. These are the very concepts often explored in art. The courts while answering the question in particular cases relating to visual art and obscenity as to whether the artwork offends contemporary community standards have taken in consideration the following factors into account: the circumstances of the artwork's publication (including any evidence of its limited circulation); the target group of the publication (including whether the target audience was narrowed physically or by appropriate warning signs about the content of the artwork); and whether or not the artwork has artistic merit (taking into account any expert evidence on this point). There is not, however, any absolute or partial defence of artistic merit.

United Kingdom

23. Under the Common Law, obscenity being an indictable offense is punishable with fine and imprisonment at the discretion of the court. The offence of obscenity was established in England three hundred years ago, when Sir

Charles Sedley exposed his person to the public gaze on the balcony of a tavern. Obscenity in books, however, was punishable only before the spiritual courts as was held in 1708 in which year Queen v. Read 11 Mod 205 Q.B. came to be decided. In 1857, Lord Campbell enacted the first legislative measure against obscene books etc. and his successor in the office of Chief Justice interpreted his statute in Regina v. Hicklin (Supra) where it was held as follows:

"The test of obscenity is 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."

(Emphasis Supplied)

24. This came to be known as the *Hicklins test*. It set an early precedent for obscenity which was followed by the American courts until the decisions in Roth's Case (*supra*). The Hicklin's rule allowed a publication 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.
25. The general law of obscenity in England is contained in the Obscene Publications Act, 1959. In terms of the said Act publication of obscene article, whether for gain or not and its possession solely, either of the person himself or for gain of another person is an offence. Interestingly, the statute defines "obscenity" as follows:

“an article shall be deemed to be obscene if its effect or the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”

26. A 1994 amendment also brought within the purview of this statute data stored or transmitted electronically.

27. In DPP v Whyte [1972] AC 849 the respondent booksellers were charged with “having” obscene articles, namely books and magazines for publication for gain. They were acquitted on the basis that their clientèle was already depraved and corrupted, but the House of Lords held that even those already depraved and corrupted could be corrupted further. Lord Wilberforce observed as under:

“The Act is not merely concerned with the once for all corruption for the wholly innocent; it equally protects the less innocent from further corruption, the addict from feeding or increasing his addiction. To say this is not to negate the principle of relative obscenity certainly the tendency to deprave and corrupt is not to be estimated in relation to some assumed standard of purity of some reasonable average man. It is the likely reader. And to apply different tests to teenagers, members of men’s clubs or men in various occupations or localities would be a matter of common sense.”

28. Thus, it is clear that the *Hicklin’s Test* has been applied to determine obscenity in England since its evolution. The Courts in the United States of America have given up the *Hicklins Test*, but the Indian law on obscenity is more or less based on it. In addition to this, law on obscenity in India also panders to the test of 'lascivious and prurient

interests' as taken from the American law.

India

29. The general law of obscenity in India can be found in Section 292 of the Indian Penal Code, 1860 which reads as under:

"S. 292. Sale, etc., of obscene books, etc.-[(1)] For the purposes of sub-section (2) book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene, if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.]

[(2) Whoever- sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation or for purposes of sale, hire, distribution public exhibition of circulation, makes produces, or has in

(a) Possession any obscene book, pamphlet, paper, drawing painting, representation or figure or any other obscene objects whatsoever, or

(b) Imports, exports or conveys any obscene objects for any of the purposes, aforesaid, on knowing or having reason to believe that such objects will be sold let to hire, distributed or publicly exhibited or in any manner put into circulation or

(c) takes part in or receives profit from any business in the course of which he knows or has reasons to believe that such an object are for any of the purposes aforesaid, made produced, purchased, kept, imported, exported, convey, publicly excited, or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) Offers or attempts to do any act which is an offence under this section, shall be

punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.]

[Exception.- this section does not extend to-

(a) any book, pamphlet, paper, writing, drawing, painting, representation of figure-

(i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purpose;

(b) any representation sculptured, engraved, painted or otherwise represented on or in-

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958(24 of 58), or

(ii) any temple, or any car used for the conveyance of idols, or kept or used for any religious purpose.]]”

(Emphasis supplied)

30. Section 292 IPC was enacted by the Obscene Publications Act to give effect to Article I of the International Convention for suppression of or traffic in obscene publications to which India is a signatory. By Act 36 of 1969, section 292 was amended to give more precise meaning to the word ‘obscene’ as used in the section in addition to creating an exception for publication of matter which is proved to be justified as being for the public good, being in the interest of science, literature, art or learning or other objects of general concern. Prior to its

amendment, section 292 contained no definition of obscenity. The amendment also literally does not provide for a definition of 'obscenity' inasmuch as it introduces a deeming provision.

31. On a bare reading of sub-section (1) of Section 292 it is obvious that a book etc. 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. It is only once the impugned matter is found to be obscene that the question of whether the impugned matter falls within any of the exceptions contained in the section would arise.

32. Section 67 of the Information Technology Act, 2000 relevant for the subject under discussion reads as follows:

"67. Publishing of information which is obscene in electronic form.--Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees."

33. Thus Section 67 is the first statutory provisions dealing with obscenity on the Internet. It must be noted that the

both under the Indian Penal Code, 1860 and the Information Technology Act, 2000 the test to determine obscenity is similar. Therefore, it is necessary to understand the broad parameters of the law laid down by the courts in India, in order to determine "obscenity".

34. The Indian Penal Code on obscenity has grown out of the English Law and while interpreting the meaning of "obscenity" the Supreme Court in Ranjit D. Udeshi v. State of Maharashtra AIR 1965 SC 881 uniformly adopted the test laid down by the English Court in Hicklins Case Supra wherein it was held that the word "obscene" in the section is not limited to writings, pictures etc. intended to arouse sexual desire. At the same time, the mere treating with sex and nudity in art and literature is not per se evidence of obscenity. It was emphasized that the work as a whole must be considered, 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. Where art and obscenity are mixed, art must so preponderate as to throw the obscenity out into the shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked.

35. The Courts explained that the *Hicklin's test* does not emphasize merely on stray words, as the words are "matters charged" and to that extent it must be held to

secundum subjectum materiam, that is to say, applicable to the matter there considered. Thus, the court must apply itself to consider each work at a time.

36. It was further observed that there exists a distinction between "obscenity" and "pornography", while later consists of pictures, writings etc. which are intended to arouse sexual feelings whereas the former consists of writings etc. which though are not intended to arouse sexual feelings but definitely has that tendency.
37. In Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra 1969 (2) SCC 687, which case relates to articles and pictures in the magazine being alleged to be obscene and calculated to corrupt and deprave the minds of the reader, the courts reiterated the ratio as was laid down in Ranjit Udeshi's case (supra) and held that the concept of obscenity would differ from country to country depending on the contemporary standards of the 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 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. It was held that with the standards of contemporary society in India fast changing, the adults and adolescents have available to them a large number of pieces of literature which have a content of sex, love and

romance and if a reference to sex by itself is considered obscene, no books could be sold except those which are purely religious. Thus, what one has to see is 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.

38. The Supreme Court of India in the K.A. Abbas v. UOI (1970) 2 SCC 780 has called the test laid down in Mishkin's case (supra) as "selective-audience obscenity test" and observed as follows:

"49. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read.....
The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. 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. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth."

(Emphasis supplied)

39. In Samaresh Bose v. Amal Mitra (1985) 4 SCC 289 the courts while distinguishing between vulgarity and obscenity held that "vulgarity" may arouse a feeling of revulsion, disgust and even boredom but unlike "pornography" or "obscenity" do not have the tendency

to corrupt or deprave the minds of a person. In addition to the above, the court observed that for the purposes of judging obscenity, firstly the judge must place himself in the position of the author in order to appreciate what the author really wishes to convey, and thereafter he must place himself in the position of the reader of every age group in whose hands the book is likely to fall and then arrive at a dispassionate conclusion.

40. The court in Sada Nand & Ors. v. State (Delhi Administration) ILR (1986) II Delhi 81 laid down the test to the effect that the pictures of a nude/semi-nude woman cannot per se be called obscene unless the same are suggestive of deprave mind and are designed to excite sexual passion in the persons who are likely to look at them or see them. This will depend on the particular posture and the background in which a nude semi-nude woman is shown. While applying this test in the instant case, the court held that the nude pictures cannot be termed as obscene i.e. which will have a tendency to deprave and corrupt the minds of people in whose hands the magazine in question is likely to fall. However, a look at the impugned pictures was held to show beyond a shadow of doubt that they can hardly be said to have any aesthetic or artistic touch, rather they seem to have been taken with the sole purpose of attracting readers who may have a prurient mind. The women in nude had been just made to lie on a grassy plot or sit on some stool etc. and

pose for a photograph in the nude. So they may well be said to be vulgar and indecent but all the same it may be difficult to term them obscene within the meaning of Section 292 IPC.

41. The findings of the court in *Bobby Art International & Ors. v. Om Pal Singh Hoon & Ors.* (1996) 4 SCC 1, which may be relevant for the present matter, have been reproduced below:

"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 been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinema-goer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that 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: rage and vendetta against the society that had heaped indignities upon her.

(Emphasis supplied)

42. In the case of Ajay Goswami v. Union of India (2007)1 SCC 143 the Supreme Court, while recognizing the right of adult entertainment, reviewed the position of law on obscenity and summarized the various tests laid down of obscenity.
43. Recently, in Vinay Mohan v. Delhi Administration 2008 II AD (Delhi) 315, Pradeep Nandrajog J. while dismissing the petition against framing of charge held that it is a recognised principle of law that concept of obscenity is moulded to a great extent by the social outlook of people and hence in relation to nude/semi-nude pictures of a woman it would depend on a particular posture, pose, the surrounding circumstances and background in which woman is shown.

Artistic Freedom and Obscenity

44. There is a sharp distinction between Constitution of United States of America and India. In the former, freedom of speech guaranteed is absolute and in the later the Constitutional itself provides for certain exceptions. The duty cast upon the courts in India is to ensure that the State does not impose any unreasonable restriction.
45. The Constitution of India, by virtue of Article 19 (1) (a), guarantees to its citizen the freedom of speech and expression. India is also a party to the International Covenant on Civil and Political Rights and therefore bound to respect the right to freedom of expression guaranteed by Article 19 thereof, which states:

- a. Everyone shall have the right to hold opinions without interference.
 - b. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in form of art, or through any other media of his choice.
46. Nevertheless, there is an inseparable connection between freedom of speech and the stability of the society. This freedom is subject to sub- clause (2) of Article 19, which allows the State to impose restriction on the exercise of this freedom in the interest of public decency and morality. The relevant portion of the same has been reproduced below:

“Article 19(1) (a): All citizens shall have a right to freedom of speech and expression.
...(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of 4[the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.]”

47. A bare reading of the above shows that obscenity which is offensive to public decency and morality is outside the purview of the protection of free speech and expression, because the Article dealing with the right itself excludes

it. Thus, any interpretation of 'obscenity' in the context of criminal offences must be in consonance with the constitutional guarantee of freedom of expression which freedom is not confined to the expression of ideas that are conventional or shared by the majority. Rather, it is most often ideas which question or challenge prevailing standards observed by the majority that face the greatest threat and require the greatest protection as was so observed in Ranjit Udeshi's case (supra).

48. The Supreme Court in Gajanan Visheshwar Birjur v. Union of India (1994) 5 SCC 550, while dealing with an order of confiscation of books containing Marxist literature, referred to the supremacy of the fundamental right of freedom of speech and expression, and observed as under:

"Before parting with this case, we must express our unhappiness with attempts at thought control in a democratic society like ours. Human history is witness to the fact that all evolution and all progress is because of power of thought and that every attempt at thought control is doomed to failure. An idea can never be killed. Suppression can never be a successful permanent policy. Any surface serenity it creates is a false one. It will erupt one day. Our constitution permits a free trade, if we can use the expression, in ideas and ideologies. It guarantees freedom of thought and expression - the only limitation being a law in terms of Clause (2) of Article 19 of the Constitution. Thought control is alien to our constitutional scheme. To the same effect are the observations of Robert Jackson, J. in American Communications Association v. Douds 339 US 382, 442-43 (1950): 94 L Ed 925 with reference to the US Constitution: 'Thought control is a copyright of totalitarianism, and

we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored'."

(Emphasis supplied)

49. As was also pointed out by Mr. Justice Holmes in Abramson v. United States 250 U.S. 616:

"The ultimate good desired is better reached by free trade in ideas-the best test of truth is the power of the thought to get itself accepted in the competition of the market."

50. Krishna Iyer, J., speaking for the Court in Raj Kapoor v. State AIR 1980 SC 258, dealing with a pro bono publico prosecution against the producer, actors and others connected with a film called "Satyam, Shivam, Sundaram" on the ground of prurience, moral depravity and shocking erosion of public decency held that the censor certificate is a relevant material, important in its impact, though not infallible in its verdict and observed as under:

"...Art, morals and law's manacles on aesthetics are a sensitive subject where jurisprudence meets other social sciences and never goes alone to bark and bite because State-made strait-jacket is an inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to aesthetics.

...The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konarks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and prescribe heterodoxies."

51. In T. Kannan v. Liberty Creations Ltd. (2007) the Madras

High Court has said that there should be a substantial allowance for freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. Art and literature include within themselves, a comprehensive view of social life and not only in its ideal form.

52. In S. Rangarajan's case (supra), the Apex court dealt with the aspect of censorship and held that freedom of expression cannot be held to ransom, by an intolerant group of people. The fundamental freedom under Article 19(1) (a) can be reasonably restricted only for the purposes mentioned in Articles 19(2) and the restriction must be justified. It was observed as under:

"The standard to be applied by the Board or courts for judging the film should be that of an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man. We, however, wish to add a word more. The censors Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation. Our country has had the distinction of giving birth to a galaxy of great sages and thinkers. The great thinkers and sages through their life and conduct provided principles for people to follow the path of right conduct. There have been continuous efforts at rediscovery and reiteration of those principles. ...Besides, we have the concept of "Dharam" (righteousness in every respect) a unique contribution of Indian civilization to humanity of the world. These are the bedrock of our civilization and should not be allowed to be shaken by unethical standards. We do not, however, mean that the Censors should have an orthodox or conservative outlook.

Far from it, they must be responsive to social change and they must go with the current climate."

53. In Sakkal Papers (P) Ltd. v. Union of India AIR 1962 SC 305, Mudholkar, J. said:

"This Court must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution, The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved."

(Emphasis supplied)

54. The Apex court in Ranjit Udeshi's case (supra) while answering the question in affirmative as to whether the test as laid down of obscenity squares with the freedom of speech and expression guaranteed under our Constitution, or it needs to be modified and, if so, in what respects, pointed out as under:

"...The laying down of the true test is not rendered any easier 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.

...The test which we evolve 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."

"...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."

55. In so far as the scope of section 292 is concerned, from the above discussion, it is clear that that for an offence to be made out under the said section, its ingredients need to be met. In the context of the present painting to be deemed to be obscene, it has to satisfy at least one of the three conditions: (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. In addition to this, the relevance of exceptions arises in excluding otherwise obscene matter from the ambit of the criminal offence of obscenity and such exceptions has no role to play in determination of the obscenity of the impugned matter.
56. The evolution of law in relation to the delicate balance between artistic freedom viz-a-viz the right of speech and expression while dealing with the question of obscenity requires certain important norms to be kept in mind.

Contemporary standards

57. 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 in the case of *R v. Penguin Books, Ltd.* (1961) Crim. L.R. 176 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.

“Community mores and standards” played a part in the Indian Supreme Court taking a different view from the English jury. *Judging the work as a whole*

58. A holistic view must thus be taken apart from a closer scrutiny of the impugned subject to come to a conclusion whether the same is grossly obscene and likely to deprave and corrupt.

Aesthetic or artistic touch

59. The work of art must have any aesthetic or artistic touch and should not seem to have been taken with the sole purpose of attracting viewers who may have a prurient mind. In other words, where obscenity and art are mixed, art must be so preponderating as to throw obscenity into shadow or render the obscenity so trivial and insignificant that it can have no effect and can be overlooked.
60. Sex and obscenity are not always synonymous and it would be wrong to classify sex as essentially obscene or even indecent or immoral. The basic concern should be to prevent the use of sex designed to play a commercial role by making its own appeal.
61. In relation to nude/semi-nude pictures of a woman it would depend on a particular posture, pose, the surrounding circumstances and background in which woman is shown.

Opinion of literary/artistic experts

62. In Ranjit Udeshi's case (supra) 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 Samaresh Bose's case (supra) 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 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."

(Emphasis supplied)

Freedom of speech and expression

63. In S. Rangarajan v. P. Jagjevan Ram and Ors. (1989) 2 SCC 574, while interpreting Article 19(2) this Court borrowed from the American test of *clear and present danger* and observed:

"Our commitment to freedom of expression 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 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'."

(Emphasis supplied)

64. Public decency and morality is outside the purview of the protection of free speech and expression, and thus a balance should be maintained between freedom of speech

and expression and public decency and morality but the former must never come in the way of the latter and should not substantially transgress the latter.

Test of ordinary man

65. 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".

Social purpose or profit

66. When there is propagation of ideas, opinions and information or public interests or profits, the interests of society may tilt the scales in favour of free speech and expression. Thus books on medical science with intimate illustrations and photographs though in a sense immodest, are not to be considered obscene, but the same illustrations and photographs collected in a book from without the medical text would certainly be considered to be obscene.

67. Obscenity without a preponderating social purpose or profit cannot have the Constitutional protection of free speech or expression. Obscenity is treating with sex in a manner appealing to the carnal side of human nature or having that tendency. Such a treating with sex is offensive to modesty and decency.

Test of strict liability

68. Knowledge is not a part of the guilty act. The offender's knowledge of the obscenity of the impugned matter is not required under the law and it is a case of strict liability.

69. It is also clear and apparent that the criminal offence of obscenity is predicated upon the legal term of art and that the legal test of obscenity cannot be equated with the dictionary definition of obscenity which takes within its fold anything which is offensive, indecent, foul, vulgar, repulsive etc. In legal terms of obscenity, the matter which offends, repels or disgusts does not thereby tend to deprave or corrupt a person exposed to such matter and cannot therefore, without more, be said to be obscene.
70. To fall within the scope of 'obscene' under section 292 & 294 IPC, the ingredients of the impugned matter/art must lie at the extreme end of the spectrum of the offensive matter. The legal test of obscenity is satisfied only when the impugned art/matter can be said to appeal to a unhealthy, inordinate person having perverted interest in sexual matters or having a tendency to morally corrupt and debase persons likely to come in contact with the impugned art.
71. It must also be remembered that a piece of art may be vulgar but not obscene. In order to arrive at a dispassionate conclusion where it is crucial to understand that art from the perspective of the painter, it is also important to picture the same from a spectator's point of view who is likely to see it.
72. The learned counsel for the petitioner pleaded that the impugned painting on the face of it contains no matter capable of being held to be obscene in terms of the legal

test of obscenity delineated. It was thus submitted that in the complaints filed against the petitioner, the allegation of obscenity in terms of section 292 is sought to be sustained on the basis of the nudity of the figure depicted in the painting and the identity of the figure alleged as 'Bharat Mata'. The alleged identity of the figure has no bearing on the alleged obscenity of the said painting. The alleged 'Bharat Mata' painting in issue was at no given point in time either given a title or publicly exhibited by the petitioner. The petitioner had no involvement in any manner with the said on-line auction for charity.

73. The learned counsel further went ahead and contended that even if it is assumed that the said figure is 'Bharat Mata', its identity as such does not contribute in any manner to the painting being lascivious, or appealing to the prurient interest, or tending to deprave and corrupt persons who are likely to view the painting and that its identity is irrelevant to the alleged obscenity of the painting. This aspect is of some significance as the stage for recording of defence evidence has not arrived and the challenge is to the summoning orders.

74. The submission made on behalf of the petitioner was that the instant complaints were filed in the background of the protests being led even when the petitioner had tendered an apology which was so reported and the said painting was withdrawn from the auction. It was also pointed out that the complainants have selectively targeted the

petitioner for a painting which depicts nudity only in a mild, stylized manner which according to him is hardly graphic or anatomically precise especially taking into consideration that the petitioner has repeatedly asserted that nudity in his art is intended as an expression of purity as also the fact that there have been even more graphic depictions of nudity and sexuality, including hindu deities and mythological figures in many contemporary and ancient Indian art by the various artists concerned, some of which have also been placed on record.

75. The complainants/respondents in CrI. Rev. P. Nos. 114/2207 and 282/2007 have also alleged of an offence u/s 294 and 298 IPC against the petitioner. Section 294 IPC reads as under:

“Section 294. Obscene acts and songs.
Whoever, to the annoyance of others-

- (a) Does any obscene act in any public place,
or
- (b) Sings, recites or utters any obscene song,
balled or words, in or near any public place,

Shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]”

76. Section 294 IPC deals with the prevention of an obscene act being performed in public to the annoyance of the public. In this respect, the submissions made by the petitioner was that to make out a case under the aforesaid section the main ingredients of the section need to be complied with which includes the impugned act to

be performed in a public place; the said act to be obscene and lastly, to cause annoyance to others. The learned counsel placing reliance on Narendra H. Khurana & Ors. v. The Commissioner of Police & Anr. 2004Cri. L.J. 3393 stated there is no prima facie case made out under the aforesaid section since there is no disclosure made in the complainants of any immediate, proximate nexus between the alleged annoyance of the complainants and act done in a public place by the petitioner. The alleged annoyance could have been by viewing the painting on the internet and the only alleged act of the petitioner having a nexus with the alleged annoyance is the uploading of the painting on the website. It was also pleaded that there could have been no 'annoyance' caused to the complainants by their viewing the said painting on the website for the reason that the complainants could have easily chosen not to view the website any further.

77. For the offence to be made out under section 298 IPC, the accused must have a deliberate intention of wounding the religious feelings of the complainant by uttering some word or making some sound or a gesture or placing an object in the sight of the complainant and it is the contention of the learned counsel for the petitioner that the petitioner has done no such act which can fall under the said purview. Section 298 IPC provides as under:

“Section 298. Uttering, words, etc., with

deliberate intent to wound the religious feelings of any person

Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

78. Akin to section 294 IPC, section 298 IPC also requires a nexus between the impugned act and the alleged deliberate intention of the petitioner to wound the religious feelings of the complainants, which according to the learned counsel is not so in the present case. It is the case of the learned counsel for the petitioner that the impugned painting cannot form the basis of any deliberate intention on the part of the petitioner to wound the religious feelings of the complainants since the figure, on the basis of the identity alleged, represents an anthropomorphic depiction of the nation. It is also not a religious depiction which is capable of offending the 'Hindu' religious feelings as alleged as also that the concept of Bharat Mata is not the sole premise or belief of Hindus alone. Learned counsel for the petitioner drew strength from the judgments of Narayan Das & Anr. v. State AIR 1952 Ori 149; Shalibhadra Shah & Ors. v. Swami Krishna Bharati & Anr. 1981 Cri. L.J. 113 and Acharya Rajneesh v. Naval Thakur & Ors. 1990 Cri.L.J. 2511 to advance the proposition that a mere knowledge of the

likelihood that the religious feelings of another person may be wounded would not be sufficient to hold a person liable u/s 298 IPC.

79. In addition to this, in Crl. Rev. P. No. 282/2007, the offence u/s 500 IPC is also alleged against the petitioner. It is submitted by the learned counsel for the petitioner that such offence cannot be made out against the petitioner for the reason that the basic ingredient of the offence of defamation being some imputation capable of harming the reputation of the complainant is absent from the complaint.
80. On the other hand, the submissions made by the learned counsel for the respondents was that the petitioner having painted many contemporary and modern form of art in the past owns and maintains a website <http://www.mfhussain.com> where in the present case, the said painting was uploaded for the purposes of sale with the cause title "*Mother India Nude Goddess*". It was averred that the petitioner has placed nothing substantial on record to show that the said website is not owned by him. It was thus submitted that the painter's earlier conduct has also been on the same lines while he painted many hindu Gods/Godesses which resulted communal disharmony but on his tendering an apology no further action was taken. The argument advanced by the learned counsel was that for the reason that no action was taken against this painter earlier, he has now taken a further

liberty and went ahead to paint Bharat Mata depicting the boundaries of our nation with names of the various states on it and the national emblem i.e. the Ashoka Chakra. The alleged Bharat Mata is depicted in nude in a manner thereby making it obscene showing the different parts of her body as different states of our country. It was also contended that the painting depicts the Ashoka Chakra in an objectionable manner showing disrespect to the same which is covered under the provisions as envisaged in the Prevention of Insults to National Honour Act, 1971 and the Emblems and Names (Prevention of Improper Use) Act, 1950.

81. This act of the petitioner is alleged to have not only hurt the feelings of Hindus who are in majority in India but also every patriotic Indian who loves his mother land. Bharat Mata is a symbol of pride, prestige, dignity and the soul of this country and it was the case of the respondents that the petitioner cannot be given the right to hurt the sentiments and feelings of the society under the garb of freedom of expression and that no one can be permitted to have onslaught on such sensibilities. It was contended that the standard set by the courts over the time have given substantial freedom for the creative persons thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. The line has to be drawn where the average man or a man with morals begins to feel embarrassed or disgusted at a

naked portrayal of life without redeeming touch of art or genuine or social value. It is a settled law that when the question pertains to an individual's rights versus public welfare, the rights of public at large prevails as so held in Baragur Ramachandrappa & Ors. v. State of Karnataka (2007) 3 SCC 11. It was submitted that since public decency and moral values of the society are to be given due consideration, making of nude picture of mother India cannot be termed in any manner as in the interest of the society or as an art having an aesthetic or artistic value.

82. It was argued that place of the motherland is above heaven which has been explicated by way of a *sanskrit shloka* i.e. "*Janani Janam Bhumisch Swargadapi Gariasi*". The values and the ethics are so imbibed in an Indian that the mother land is placed much above his own mother and that is the reason why mothers in India never hesitate in sacrificing their sons for the nation and the painter by depicting mother India in nude has offended such soldiers/sons sitting at the borders and their mothers. Although, it might not have provoked feelings of lust but has definitely provoked the feeling of hatred and hurt nationalistic feelings of millions of Indians which can be detrimental to our integrity and sovereignty.
83. The learned counsel for the respondents laid emphasis on the alleged previous/past misconduct of the petitioner where the petitioner's paintings with the depiction of Hindu Gods/goddesses in nude and erotic postures led to

widespread protests and agitations in masses. It was pleaded that the past conduct can be used as an evidence to prove that the petitioner had the mens rea to draw such a painting in order to hurt the sentiments and feelings of Indians as also that in such cases mens rea can be gathered only by circumstantial evidence. In this regard, the learned counsel drew the attention of this court to the decision of the Apex court in State of Karnataka v. Praveen Bhai Thogadia (Dr), (2004) 4 SCC 684, which has been reproduced as under:

"...Past conduct and antecedents of a person or group or an organisation may certainly provide sufficient material or basis for the action contemplated on a reasonable expectation of possible turn of events, which may need to be avoided in public interest and maintenance of law and order. No person, however big he may assume or claim to be, should be allowed, irrespective of the position he may assume or claim to hold in public life, to either act in a manner or make speeches which would destroy secularism recognised by the Constitution of India. Secularism is not to be confused with communal or religious concepts of an individual or a group of persons. It means that the State should have no religion of its own and no one could proclaim to make the State have one such or endeavour to create a theocratic State. Persons belonging to different religions live throughout the length and breadth of the country. Each person, whatever be his religion, must get an assurance from the State that he has the protection of law freely to profess, practise and propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of one's own presumptions of good social order.

...Communal harmony should not be made to suffer and be made dependent upon the will of an individual or a group of individuals,

whatever be their religion, be it of a minority or that of the majority. Persons belonging to different religions must feel assured that they can live in peace with persons belonging to other religions.

...The valuable and cherished right of freedom of expression and speech may at times have to be subjected to reasonable subordination to social interests, needs and necessities to preserve the very core of democratic life — preservation of public order and rule of law. At some such grave situation at least the decision as to the need and necessity to take prohibitory actions must be left to the discretion of those entrusted with the duty of maintaining law and order, and interposition of courts — unless a concrete case of abuse or exercise of such sweeping powers for extraneous considerations by the authority concerned or that such authority was shown to act at the behest of those in power, and interference as a matter of course and as though adjudicating an appeal, will defeat the very purpose of legislation and legislative intent.”

(Emphasis supplied)

84. The learned counsel for the respondents relied upon the judgment of Aveek Sarkar v. State of Jharkhand 2006 Cri. L.J. 4211 where the manufacturer and the TV channels were not held directly or indirectly responsible for the pictures of God/goddesses being used for products on television as distinguished from the present case where the petitioner is directly responsible for making such painting and uploading it on his own website thereby infringing the rights of the complainants and many other Indians.
85. The petitioner himself opted for getting the complaints cases filed against him to be transferred at one place and therefore had approached the Supreme Court to pass

appropriate directions. But, even after that, it is alleged that he has been flouting the law and refraining himself from the process of court on some or the other pretext and has filed the present revision petitions also with the same objective. In such a case, thus, the petitioner should not be entitled to any discretionary relief u/s 482 of the said Code which as per the settled law has to be exercised only in rarest of rare cases to prevent abuse of court or miscarriage of justice.

86. It was submitted that the matters at hand are being tried under certain provisions of the Indian Penal Code but that cannot be a reason to scuttle the proceedings on such technical grounds, specially when sections can be added or subtracted at any later stage of the proceedings as was held in *Dinesh Bharat Chand Sankla v. Kurlon Limited & Ors.* 2006 Cri.L.J. 261.
87. The learned counsel argued that it is not the case that the impugned painting was put up for display in some art gallery or private exhibition, instead it was uploaded on his own website which could be accessed by any person and any common man who is a patriot would get affected by the said picture. Hence, the yardstick to determine whether the painting is obscene or not should be seen from the mindset of the society as a whole and not of a particular 'class'.
88. The plea raised on behalf of the respondents was that the present petitions filed by the petitioner is at a premature

stage since evidence has to be led and parties have to be heard for determination of the case and that quashing the said proceedings at the threshold at such nascent stage would not be appropriate.

89. It was also averred that when the petitioner can make the deliberate act of outraging the sentiments of his fellow nationals by drawing such painting at the fag end of his life then he might as well be punished for such act if so held guilty. Thus, the petitioner cannot take the advantage, excuse and defense of his old age.
90. It was brought to the notice of this court that the State also in this regard has preferred to maintain its silence thereby not performing its duty and if this situation prevails, then anarchy would follow as a consequence. It is the bounden duty of the state to generate faith in the minds and hearts of its citizens so that they feel that their rights would be protected and that they would be given equitable justice.

Judicial scrutiny and abuse of process

91. It was contended that the complaints made in all the revision petitions bear a striking similarity to one another and hence have been used as a tool to harass the petitioner which amounts to gross abuse of the process of the court. It was submitted that where the avenue of filing a private complaint directly before the magistrate provides a salutary and invaluable remedy to a genuine complainant seeking redressal, easy recourse to such a

procedure as a convenient substitute to filing a complaint with the police also makes the remedy susceptible to misuse. In a police complaint case, prior to the summoning of an accused, the Magistrate has the benefit of a police report. Such a safeguard in favour of the accused ought not to be circumvented merely by taking recourse to the private complaint procedure and therefore the suggestion put forward by the learned counsel is that only in appropriate cases should a private complaint case proceed further without a prior investigation by the police consequent upon the direction of the Magistrate u/s 156(3) of the Code of Criminal Procedure (the said Code for short) in the matter.

92. It was further submitted that in case the magistrate feels appropriate to take cognizance of an offence, he still has the discretion u/s 202 of the Code to postpone the issue of process against the accused and either enquire himself into the case or direct investigation to be made by the police or by such other person he deems fit, for the purposes of deciding whether or not there is sufficient ground for proceeding u/s 204 of the Code. In this regard, reliance was placed on Pepsi Foods Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749 and Naganagouda Veeranagouda Patil & Anr. v. Special Judicial Magistrate & Ors. 1998 Cri.L.J. 1707 where it has been observed that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a

matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

93. In Punjab National Bank v. Surendra Prasad Sinha, 1993 Supp (1) SCC 499, the court held as under:

"...judicial process should not be an instrument of oppression or needless harassment.

...There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons

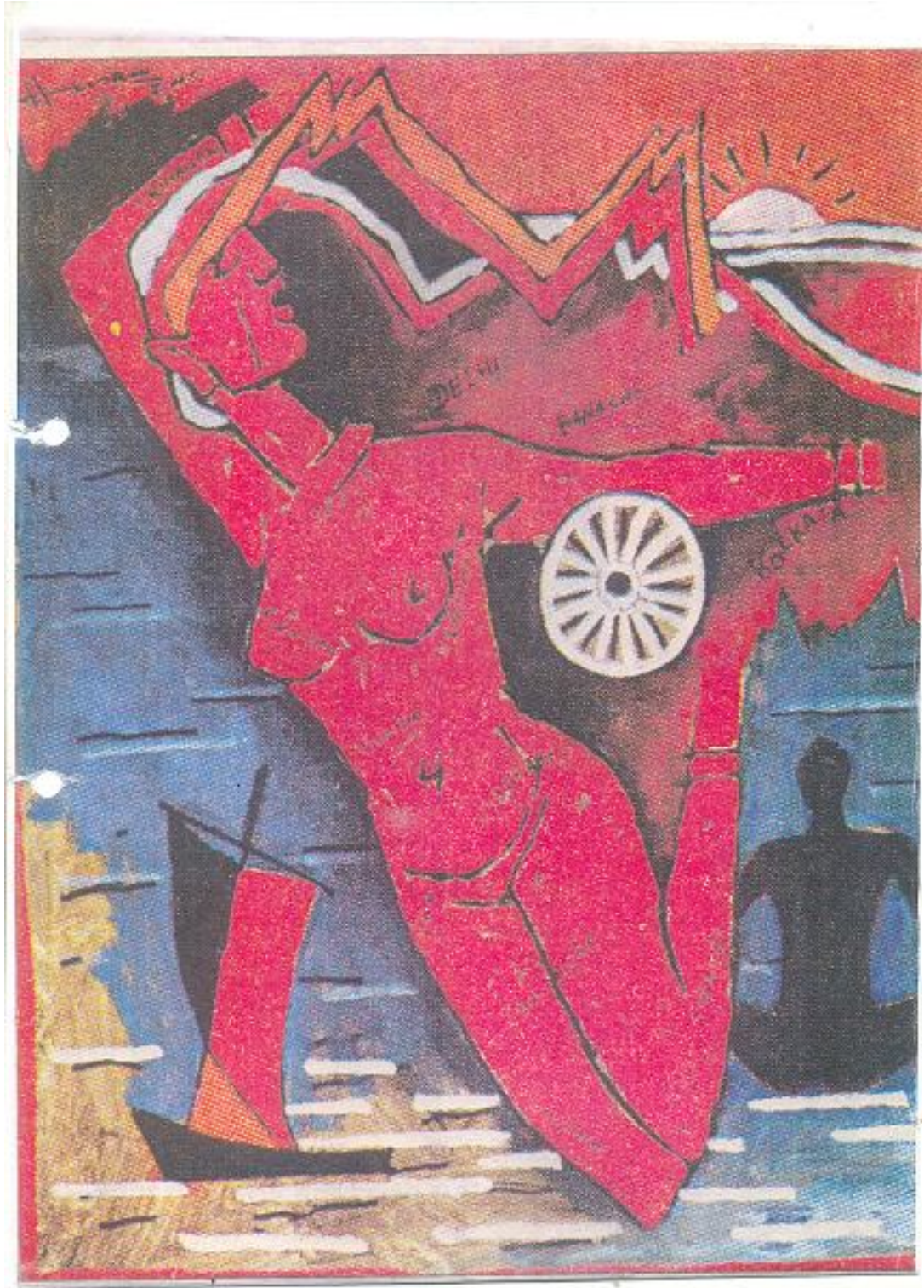
needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance."

(Emphasis supplied)

94. It was stated that under section 200 the magistrate is cast upon with a duty to take cognizance of an offence only upon oath of the complainant and the witnesses present therein to proceed u/s 204 Cr.P.C. The said requirement must not be treated as a mere formality, especially when the proceedings at that stage are ex-parte. It was thus contended that in the absence of a police report, ordinarily, unless a Magistrate is satisfied that the complaint provides the necessary facts and details and is adequately supported by pre-summoning documentary oral evidence, an enquiry u/s 202 may not be instituted. It was pointed out that a further safeguard has been provided through a recent amendment by the Act 25 of 2005 w.e.f. 23-06-2006 to section 202 of the said Code wherein it is now obligatory on the Magistrate to postpone issue of process against the accused where the accused is residing at a place beyond the area in which he exercises jurisdiction.
95. The submission made by the learned counsel on behalf of the respondents was that the legal position enunciated by the learned counsel for the petitioner cannot be disputed but the process against the

petitioner in the present cases was initiated only after recording the statement of the complainants and hearing the arguments on the same and thus it cannot be said that the Ld. Magistrate had not applied his judicial mind before issuing process.

96. I have heard the learned counsels for the parties and given deep thought to the matter keeping in mind the importance of the legal principles raised in this matter. A perusal of the complaints and the material placed on record show that the narrow questions which need consideration of this court are that whether an artist like in the present case be given the liberty to paint a nation in the context of motherland in nude and whether such a painting would be considered as obscene or not. In the trial proceedings, only summoning orders have been passed till now, thus the determination of the above said questions shall be based on certain assumptions that the painter had made the said painting portraying Mother India in nude titled 'Mother India Nude Goddess' and put up on the website owned by the artist himself.
97. In order to examine the matter closely, the impugned painting itself has been reproduced below:



98. In the conspectus of the legal principles enunciated and discussed aforesaid both of India and across the globe, the legal tests governing the law on obscenity are clear. On applying the said tests governing obscenity, in my considered view, the said painting cannot be said to fall within the purview of section 292 thereby making it obscene. The impugned painting on the face of it is neither lascivious nor appeals to the prurient interests. At the same time, the person who is likely to view the said painting would not tend to be depraved or corrupted. In other words, the said painting would not arouse sexual interest in a perverted inordinate person or would not morally corrupt and debase a person viewing the said painting. Though some might feel offended or disgusted at the very inception of seeing the alleged Mother India in nude but that by itself and nothing more in my opinion is not sufficient to qualify the test of obscenity. The said painting depicting India in a human form in no manner has that tendency to make an average person feel embarrassed by naked portrayal of a concept which has no particular face to it since the painting has not lost its artistic value/touch.
99. An attempt to understand the said painting from the artist's/petitioner's perspective would show how the painter by way of an abstract expression has tried to elucidate the concept of a nation in the form of a

distressed woman. No doubt, the concept of a nation has had a long association with the idea of motherhood but just because the artist has expressed it in nude does not make the painting obscene per se thereby satisfying the test that nudity or sex alone cannot be said to be obscene. If the painting is looked as a whole, it would reveal that that the revulsion referred to by learned counsel for the respondents of patriotic nationals would not arise for the reason that except the fact that it is in nude, there is nothing which can be considered as pinching to the eye. As a matter of fact, the aesthetic touch to the painting dwarfs the so called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked.

100. Once Hans Hofmann said and I quote, "A work of art is a world in itself reflecting senses and emotions of the artist's world." To put it differently in the words of Edward Hopper, "Great art is the outward expression of an inner life in the artist." If the above holds true, then it would not be wrong to suggest that the petitioner is pained by the growing untold misery of our nation and made an attempt to bring the same out on a canvass. The artist's creativity in this painting is evident from the manner in which the artist by way of a tear and ruffled, unkempt, open hair of the woman tried to portray the sad and the dispirited face of our nation who seems to have suffered a great deal of anguish and agony. A woman's sorrow has been described

by the way the woman is lying with her eyes closed, with one arm raised on her face and a tear dropping from the eye. The object of painting the woman in nude is also part of the same expression and is obviously not to stimulate the viewer's prurience but instead to shake up the very conscious of the viewer and to invoke in him empathy for India and abhorrence for the culprits. The person who may view the painting is likely to react in tears, silence or analogous to the same but no way near the feelings of lust. There can be many interpretations to the painting. One of the interpretations to it can be to show the disconsolate India which is entangled in various problems like corruption, criminalisation, crisis of leadership, unemployment, poverty, over population, low standard of living, fading values and ethics etc. The other can be that Bharat Mata is perhaps just used as a metaphor for being so bereft because of the earthquake which occurred around the time when this painting was made. Other than this, the bold use of colour and the depiction of the great range of Himalayas by way of the hair flowing of the women restores the artistic touch in the painting.

101. One of the tests in relation to judging nude/semi nude pictures of women as obscene is also a particular posture or pose or the surrounding circumstances which may render it to be obscene but in the present painting, apart from what is already stated above, the contours of the woman's body represent nothing more than the

boundaries/map of India. There can be a numbers of postures or poses that one can think of which can really stimulate a man's deepest hidden passions and desires. To my mind, art should not be seen in isolation without going into its onomatopoetic meaning and it is here I quote Mr. Justice Stewart of the US Supreme Court in Jacobellis v. Ohio 378 U.S. 184 (1964) who defined 'obscenity' as, "I will know it when I see it". The nude woman in the impugned painting is not shown in any peculiar kind of a pose or posture nor are her surroundings so painted which may arouse sexual feelings or that of lust in the minds of the deviants in order to call it obscene. The placement of the Ashoka Chakra or the States in the painting is also not on any particular body part of the woman which may be deemed to show disrespect to the Ashoka Chakra/States and the same was conceded by the learned counsel for the respondent during the course of the arguments advanced. Even if a different view had to be taken that if the painter wanted to depict India in human form, it may have been more appropriate to cloth the woman in some manner may be by draping a sari or by a flowing cloth etc., but that alone cannot be made a ground to prosecute the painter. It is possible that some persons may hold a more orthodox or conservative view on the depiction of Bharat Mata as nude in the painting but that itself would not suffice to give rise to a criminal prosecution of a person like the

petitioner who may have more liberal thoughts in respect of mode and manner of depiction of Bharat Mata. The very theme of our Constitution encompassing liberty, equality and fraternity would abhor the non tolerance of another view. The judge also must not apply his more liberal or conservative view in determining this aspect but should place himself in the shoes of the painter and endeavor to decipher the theme and thought process of the painter who created the painting. It would always be prudent for the judge to err on the side of a liberal interpretation giving the scheme of our Constitution.

102. The learned counsel had vehemently argued that the petitioner is a habitual offender who gets into controversies and uses it as a tool of publicity. He had offended the feelings of a particular sect of people by painting such pictures in the past also by depiction of Hindu Gods/Goddesses in nude. His conduct has been such that he cannot be pardoned. It was pleaded that the petitioner uses nudity just as a gimmick and to gain mileage over others.

103. In my considered view, the alleged past misconduct of the petitioner cannot have any bearing on the present case because there has been nothing which has come on record to prove the converse. It is made clear that the paintings depicting Hindu Gods/Goddesses in nude by the petitioner do not form a subject matter of the present case and as such the learned counsels have been unable

to bring to the notice of this court any cases/complaints pending or decided in this regard to go against the petitioner. The persons who may feel aggrieved by those set of paintings have an appropriate remedy in law to get their rights redressed. Hence, commenting on those paintings would be prejudging the said paintings and passing a verdict on the same thus prejudicing the rights of the accused/petitioner.

104. There are a few paintings brought on record which provide a glimpse of the ancient Indian art showcasing the absence of inhibition and guilt and the candour and boldness with which our society set out seeking its pleasures.⁵ Other than this, the literature of India both religious and secular is full of sexual allusions, sexual symbolisms and passages of such frank eroticism the likes of which are not to be found elsewhere in world literature.⁶ Hinduism being the world's oldest religious tradition, incorporates all forms of belief and worship without necessitating the selection or elimination of any. The Hindu is inclined to revere the divine in every manifestation, whatever it may be, and is doctrinally tolerant. A Hindu may embrace a non-Hindu religion without ceasing to be Hindu, and since the Hindu is disposed to think synthetically and to regard other forms of worship, strange gods, and divergent doctrines as

5 Love and Lust; An anthology of Erotic Literature from Ancient and Medieval India; Pavan K. Verma Sandhya Mulchandani; Harper Collins Publishers; 2004.

6 Ibid.

inadequate rather than wrong or objectionable, he tends to believe that the highest divine powers complement each other for the well-being of the world and mankind. The core of religion does not even depend on the existence or non-existence of God or on whether there is one god or many. Since religious truth is said to transcend all verbal definition, it is not conceived in dogmatic terms. Hinduism is then both a civilization and a conglomerate of religions with neither a beginning, a founder, nor a central authority, hierarchy, or organization.⁷

105. The conundrum which has blocked the minds of a few today was given a riposte by Swami Vivekananda in the following words⁸:

“...we tend to reduce everyone else to the limits of our own mental universe and begin privileging our own ethics, morality, sense of duty and even our sense of utility. All religious conflicts arose from this propensity to judge others. If we indeed must judge at all, then it must be ‘according to his own ideal, and not by that of anyone else’. It is important, therefore, to learn to look at the duty of others through their own eyes and never judge the customs and observances of others through the prism of our own standards.”

106. It would not be proper to hold that the painter/petitioner had a deliberate intention to manifestly insult Bharat Mata which is clear from his various interviews and reports placed on record where he has consistently maintained

⁷ *Dr Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte and Ors.* AIR1996SC1113.

⁸ Excerpted from *Hindutva: Exploring the Idea of Hindu Nationalism*, Jyotirmaya Sharma, Penguin Books India, Viking,. At: <http://www.hinduonnet.com/lr/2003/12/07/stories/2003120700100100.htm>.

that he actually celebrates nudity and considers it as the purest form of expression. It also cannot be lost sight of that he had immediately withdrawn the said painting from the auction and apologised to those offended, thus making it clear that his is only an artistic impulse. Under the criminal jurisprudence, for an offence to be made out against an accused, the ingredients of mens rea and actus reas need to be proved. In the present case, since the scope of the subject is so limited, it does not really require any evidence to be led and on the face of it, both the elements i.e. mens rea and actus reas appear to be absent.

107. I am unable to accept the plea raised by the learned counsel for the respondents that the said painting uploaded on a website could be accessed by any person sitting across the globe who in consequence whereto could get affected by viewing the same. There can be no exasperation caused by viewing such painting on the website for the reason that a person would firstly access such a website only if he has some interest in art and that too contemporary art and in case he does view such a website, he always would have the option to not to view or close the said web page. It seems that the complainants are not the types who would go to art galleries or have an interest in contemporary art, because if they did, they would know that there are many other artists who embrace nudity as part of their contemporary

art. Hence, the offence alleged u/s 294 IPC can not be made out. Similarly, the ingredients of section 298 IPC as alleged are not met since there seems to be no deliberate intention on the part of the petitioner to hurt feelings of Indians as already stated and as a matter of fact, the subject matter i.e Bharat Mata could be alleged to wound nationalist feelings of an individual and not any religious feelings. I am in agreement with the contention raised by the learned counsel for the petitioner that the impugned painting cannot form the basis of any deliberate intention to wound the religious feelings of the complainants since the figure, on the basis of the identity alleged, represents an anthropomorphic depiction of a nation as also that to hold a person liable under the above said section, mere knowledge of the likelihood that the religious feelings of another person may be wounded would not be sufficient.

108. Section 500 IPC requires the basic ingredient of defamation to be satisfied which seems to be completely absent in the present case.

109. From the dawn of civilization, India has been home to a variety of faiths and philosophies, all of which have co-existed harmoniously. The then Chief Justice S.R. Das in In Re: Kerala Education Bill 1957 AIR 1958 SC 956 speaking of the Indian tradition of tolerance observed as under:

“...Throughout the ages endless inundations of men of diverse creeds, cultures and races — Aryans and non-Aryans, Dravidians and Chinese, Scythians, Huns, Pathans and Mughals — have come to this ancient land from distant regions and climes. India has

welcomed them all. They have met and gathered, given and taken and got mingled, merged and lost in one body. India's tradition has thus been epitomised in the following noble lines:

"None shall be turned away
From the shore of this vast sea of humanity
That is India"

110. Consensus and accommodation have formed a significant and integral part of Indian culture and cornerstone of our constitutional democracy. In the context of obscenity, community mores and standards have played a very significant role in the past with the Indian courts. Indian art has always celebrated the female form. There is nothing salacious about it. Gloria Stienem, a feminist scholar and writer, once made a salient point about the problem behind obscenity:

"Sex is the tabasco sauce that an adolescent national pallet sprinkles on every dish on the menu."

We have been called as the land of the Kama Sutra then why is it that in the land of the Kama Sutra, we shy away from its very name? Beauty lies in the eyes of the beholder and so does obscenity. It is our perception to objects, thoughts and situations, which rule the mind to perceive them in the way we do. Way back then, perhaps it would not be wrong to assume that the people led exotic lives dedicated to sensuality in all its forms. It was healthy and artistic. They studied sex, practiced sex, shared techniques with friends, and passed on their secrets to the next generation. All in good spirit. Sexual pleasure was not behind closed doors or a taboo; it was in

the air in different forms. There was painting, sculpture, poetry, dance and many more. Sex was embraced as an integral part of a full and complete life.⁹ It is most unfortunate that India's new '*puritanism*' is being carried out in the name of cultural purity¹⁰ and a host of ignorant people are vandalizing art and pushing us towards a pre-renaissance era.

111. We are at such a juncture where for the purposes of introspection, for looking both inwards and outwards, there is a lot to be learnt from the past and the same to be implemented in the future. India is one such pluralist society which acts a model of unity in the mosaic of diversities and has taught the world the lesson of tolerance by giving shelter to the persecuted and refugees of all religions and all nations. The standards of the contemporary society in India are fast changing and therefore, now in this age of modernization, we should more so embrace different thinking and different thoughts and ideas with open arms. But while an artist should have his creative freedom, he is not free to do anything he wants. The line which needs to be drawn is between the art as an expression of beauty and art as an expression of an ill mind intoxicated with a vulgar manifestation of counter-culture where the latter needs to be kept way

9 Art of Kama Sutra, Poonam Deviah; At: <http://living.oneindia.in/kamasutra/kamasutra.html>.

10 Prudes take charge in India, [Independent, The \(London\), Jun 7, 1998](#); Peter Popham; At: http://findarticles.com/p/articles/mi_qn4158/is_19980607?pnun=2&opg=n14161393

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from a civilian society.

112. Plato once asked, "What do men organise themselves into the society for?" and answered, "To give the members of the society, all the members, the best chance of realizing their best selves". This is the very purpose of social organisation. All human beings incomplete in themselves seek their ordainment of fulfillment and destiny in the enriching human company and democracy provides the richest and the most profound opportunities of that mutual enrichment.¹¹

113. Democracy has wider moral implications than mere majoritarianism. A crude view of democracy gives a distorted picture. A real democracy is one in which the exercise of the power of the many is conditional on respect for the rights of the few. Pluralism is the soul of democracy. The right to dissent is the hallmark of a democracy. In real democracy the dissenter must feel at home and ought not to be nervously looking over his shoulder fearing captivity or bodily harm or economic and social sanctions for his unconventional or critical views. There should be freedom for the thought we hate. Freedom of speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends.¹²

114. Human personality can bloom fully and humanism can

¹¹ The 21st Dr. Kailashnath Katju Memorial Annual Lecture; "Constitutional Underpinnings of a Concordial Society"; M.N. Venkatachaliah.

¹² Indian Democracy: Reality or Myth? We have pledges to fulfil; V.M. Tarkunde Memorial Lecture by Soli J Sorabjee, Former Attorney General of India.

take deep roots and have its efflorescence only in a climate where all display an attitude of tolerance and a spirit of moderation.¹³

115. Our Greatest problem today is fundamentalism which is the triumph of the letter over the spirit.¹⁴ In a free democratic society tolerance is vital especially in large and complex societies comprising people with varied beliefs and interests. An intolerant society does not brook dissent. An authoritarian regime cannot tolerate expression of ideas which challenge doctrines and ideologies in the form of writings, plays, music or paintings. Intolerance is utterly incompatible with democratic values. This attitude is totally antithetical to our Indian Psyche and tradition. It must be realised that intolerance has a chilling, inhibiting effect on freedom of thought and discussion. The consequence is that dissent dries up. And when that happens democracy loses its essence.¹⁵

116. Our Constitution by way of Article 19 (1) which provides for freedom of thought and expression underpins a free and harmonious society. It helps to cultivate the virtue of tolerance. It is said that the freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom. It is the wellspring of civilization and

13 Supra N. 11.

14 Ibid.

15 Supra N. 12.

without it liberty of thought would shrivel.¹⁶

117. Every time an artist portrays something different, something which is an unpopular view point, it may accompany discomfort and unpleasantness but that in itself cannot be a ground to curb the artistic freedom and quickly go on to label it as obscene. There might be people who may actually get offended by those of Hussain's paintings or others but the right course of action for them, is to simply shrug it off or protest peacefully. In my considered view, criticism of art may be there. Rather, there are many other more appropriate avenues and fora for expression of differences of opinion within a civil society. But criminal Justice system ought not to be invoked as a convenient recourse to ventilate any and all objections to an artistic work. It should not be used as a mere tool in the hands of unscrupulous masters which in the process can cause serious violations of the rights of the people especially taking into consideration the people in the creative fields. Such a pernicious trend represents a growing intolerance and divisiveness within the society which pose a threat to the democratic fabric of our nation. It would be relevant to reproduce the observations made by Markandey Katju J. in Himsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat & Ors. JT 2008 (3) SC 421 where laying stress on the importance of tolerance, the court gave the historical illustration of Emperor Akbar's

¹⁶Supra N. 11.

tolerance during his reign. This case revolved around the resolutions taken by the State Government and the Ahmedabad Municipal Corporation for closure of the municipal slaughter houses during the period of Paryushan festival of the Jains that allegedly violated the fundamental right to trade of the respondents. :

"These days unfortunately some people seem to be perpetually on a short fuse, and are willing to protest often violently, about anything under the sun on the ground that a book or painting or film etc. has "hurt the sentiments" of their community. These dangerous tendencies must be curbed. We are one nation and must respect each other and should have tolerance."

(Emphasis Supplied)

Thus, the practice of tolerance in our multi-religious, multi-cultural nation must be regarded as a fundamental duty of every citizen and must be actively encouraged and performed if we are to make our pluralist democracy a living robust.¹⁷

118. In this regard, the role of the magistrates and judicial scrutiny in protecting individual rights and freedoms and promoting constitutional values is not discretionary but obligatory. In a constitutional democracy wedded to and governed by the rule of law, responsibilities of the judiciary arouse great expectations.¹⁸ Justice Frankfurt once remarked:

"It is not a printed finality, but a dynamic process. Its applications to the actualities of

17 Supra N. 12.

18 Supra N. 11.

Government is not a mechanical exercise,
but a high function of statecraft."

Thus, a magistrate must scrutinise each case in order to prevent vexatious and frivolous cases from being filed and make sure that it is not used a tool to harass the accused which will amount to gross abuse of the process of the court. Only in appropriate cases should a private complaint case proceed further without a prior investigation by the police consequent upon the direction of the Magistrate u/s 156(3) of the said Code in the matter. Especially taking into account the recent amendment to section 202 of the said Code, a Magistrate should postpone the issue of process against the accused where the accused is residing at a place beyond the area in which he exercises jurisdiction. He may postpone the issue of process against the accused and either enquire himself into the case or direct investigation to be made by the police or by such other person as he deems fit, for the purposes of deciding whether or not there is sufficient ground for proceeding u/s 204 of the Code. He must examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused as enunciated in Pepsi Foods Ltd.'s

Case (Supra) and Naganagouda Veeranagouda Patil & Anr.'s Case (Supra).

119. The general principles laid down of the duties to be performed by the Magistrate before issuing summons are all the more applicable in matters pertaining to art, cinema, writings etc. to prevent any unnecessary harassment of persons from the creative fields where liberal thought processes permeate. We have had the scenario of painters, actors, writers, directors and theatre personalities being dragged to court on account of a mechanical exercise of issuance of summons ignoring the pressures created on such persons implicit in the process of issuance of summons. The result would be that that apart from the harassment element there would be growing fear and curtailment of the right of the free expression in such creative persons. This is hardly a desirable or an acceptable state of affairs.

120. In the end, it may be said that education broadens the horizons of the people and means to acquire knowledge to enhance one's ability to reason and make a sound judgment. However, when one is instructed to only view things in a certain manner, regardless of truth and facts, this is actually a form of programming - not education.¹⁹ There are very few people with a gift to think out of the box and seize opportunities²⁰ and therefore such peoples'

19 At: <http://in.answers.yahoo.com/question/index?qid=20061103131542AAHKrZ3>.

20 At: <http://www.thinkingms.com/pandurang/PermaLink,guid,f2898375-f5a8-461a-a4bb-3e496ba2b81e.aspx>.

thoughts should not be curtailed by the age old moral sanctions of a particular section in the society having oblique or collateral motives who express their dissent at the every drop of a hat. The society instead should be engaged in more meaningful activities which would go to show the importance of education over plain literacy.

121. In view of the aforesaid, the summoning orders and warrants of arrest issued against the petitioner in the complaint cases are quashed and the revision petitions filed against them are allowed leaving the parties to bear their own costs.

Jurisdiction

122. During the course of the hearing, the learned counsel for the parties were even confronted with a general question as to which court would be considered as a competent court having the jurisdiction to try the matter particularly when the nature of the case is like the present one where the impugned painting uploaded on the website, accessible to people across the globe, was being viewed by different people/complainants across the country who in turn got offended with such painting and filed their complaints at various places in India, especially keeping in mind the vexatious and the frivolous complaints which can be filed as an instrument to harass the accused. In the present case, the petitioner is a celebrated artist who can afford the costs borne out of such litigation but what about those who are not in a position to expend that

much of an amount and are unnecessarily foisted with such liability and harassment.

123. Learned ASG accepted and submitted that as such our Criminal Code does not deal with such jurisdictional aspect directly and submitted that the answer only rested in the power conferred to the Supreme Court of India under section 406 of the said Code which procedure has been adopted in the present case and reads as under:

"406. Power of Supreme Court to transfer cases and appeals. (1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2) The Supreme Court may act under this section only on the application of the Attorney General of India or of a partly interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

(3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case."

(Emphasis supplied)

124. The sum and substratum of the his submissions was that Chapter XIII of the Criminal Procedure Code, 1973 governs the law relating to the jurisdiction of courts with respect to

inquiries and trial and under section 177 of the said Code, every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. Section 178 provides that when it is uncertain in which of the several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or is a continuing one and continues to be committed in more local areas or one or consists of several acts done in different local areas, in such cases then it may be tried and inquired by a court having jurisdiction over any of such local areas.

125. Section 179 of the Code reads as follows:

“179. Offence triable where act is done or consequence ensues.—When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.”

126. As per section 179 of the Code, in case of an act which is an offence because of the ensuing consequences either the Court where the act was committed or where the consequences ensued will have jurisdiction. Under the above provision, it is not necessary to prove that things done must necessarily be an offence, as the conjunction “and” used in this section suggests that the act contemplated becomes an offence on account of the cumulative effect of the things done and the consequences ensued. In Ashok v. State of U.P 2005 Cri

L.J. 2324 where a leader of a political party made insulting remarks against a particular religious community in an interview to weekly magazine having all India circulation, the Court held that the Courts either in the place where interview was given or in the place where consequences of these interviews ensued, had jurisdiction to try the offence. In S. Bangarappa v. Ganesh Narayan 1984 Cri L.J. 1618 where defamatory statement made in press conference were published in the newspaper in the same place and on the next day, in a newspaper in a different place, it was held that the Court in second place had the jurisdiction to try the offense.

127. Section 186 of the said Code provides that in cases where two or more courts have taken cognizance of the same offence then the High Court will resolve the doubt relating the jurisdiction of the one of those courts to proceed with the matter in the following manner:

- a. where the courts are subordinate to the same High Court, that High Court;
- b. where the courts are not subordinate to the same High Court, then the High Court within whose appellate jurisdiction the proceedings were first commenced.

128. In Kuljit Singh v. CBI 2000 CriLJ 3681, a case was registered based on a report from the Indian Ambassador in Greece regarding the incident of a high sea tragedy on the night intervening 24/25 December 1996 in which 170

Indians were drowned. The Central Government entrusted the matter to CBI for investigation which charge-sheeted the accused persons on 8.9.1997 and the Chief Metropolitan Magistrate took cognizance of the offence and issued process against the accused persons. Thereafter, four separate criminal cases were also registered in District Hoshiarpur, Punjab. The Court in this case applied Section 186 CrPC and held that the CMM, Delhi would alone be competent to inquire into and try the offences in question.

129. In my considered view, this particular aspect of jurisdiction fettered within the parameters of scrutiny of section 202 of the said Code as discussed above derives its importance especially with the advent of the technological explosion where a person sitting anywhere across the globe can get access to what ever information he has been looking for just with a click of a mouse. Therefore, it has become imperative that in this information age, jurisdiction be more circumscribed so that an artist like in the present case is not made to run from pillar to post facing proceedings. It was found necessary to at least examine this aspect in view of the large number of incidents of such complaints which had been brought to light by press resulting in artists and other creative persons being made to run across the length and breath of the country to defend themselves against criminal proceedings initiated by oversensitive or

motivated persons including for publicity. This however is not an aspect where a direction can be issued since it is within the domain of appropriate legislation. The learned ASG while assisting this court fairly stated that he would advise the Government to take steps by way of appropriate legislative amendments as may be proper keeping in mind the balancing of interest between the person aggrieved and the accused so as to prevent harassment of artists, sculptors, authors, filmmakers etc. in different creative fields. I say nothing more but hope that this aspect would get the attention it deserves and the legislature in its wisdom would examine the feasibility of possible changes in law.

Epilogue

130. A liberal tolerance of a different point of view causes no damage. It means only a greater self restraint. Diversity in expression of views whether in writings, paintings or visual media encourages debate. A debate should never be shut out. *'I am right'* does not necessarily imply *'You are wrong'*. Our culture breeds tolerance- both in thought and in actions. I have penned down this judgment with this favourable hope that it is a prologue to a broader thinking and greater tolerance for the creative field. A painter at 90 deserves to be in his home – painting his canvass!

May 08, 2008
'RA'

SANJAY KISHAN KAUL, J.