

A

AJAY GOSWAMI
v
UNION OF INDIA AND ORS.

DECEMBER 12, 2006

B

[DR. AR. LAKSHMANAN AND TARUN CHATTERJEE, JJ.]

Constitution of India, 1950: Articles 19(1)(a) and 21.

C

Newspapers—Freedom of speech and expression—Scope, ambit and limitation of—Sexually explicit material—Exposure of minors to—A writ petition was filed seeking protection to ensure that minors were not exposed to sexually exploitative materials; whether or not the same is obscene or is within the law—Prayer made for issue of guidelines to all the newspapers regarding the matter which may not be suitable for the reading of minors or which may require parents' or teachers' discretion—Direction to appoint a committee to suggest ways and means for regulating the access of minors to adult oriented sexual, titillating or prurient material was also sought—Maintainability—Held: Sufficient safeguards in terms of various legislations, norms and rules and regulations to protect the society in general and children in particular from obscene and prurient contents are already existing—

D

E

Leading newspapers have an internal regulatory system to ensure that no objectionable photographs or matters get published—Moreover, it would be inappropriate to deprive the adult population of the entertainment which is well within the acceptable levels of decency on the ground that it may not be appropriate for the children—Writ petition dismissed—Press Council Act, 1978, Ss. 13 & 14—Penal Code, 1860, S. 292—Indecent Representation of Women Act, 1986, Ss. 4 & 6.

F

Words & Phrases:

"Obscenity"—Meaning of—Explained.

G

The petitioner filed a writ petition seeking protection from this Court to ensure that minors were not exposed to sexually exploitative materials, whether or not the same is obscene or is within the law. The petitioner made the following prayers:-

H

(a) Guidelines in detail may be issued to all the newspapers regarding the matter which may not be suitable for the reading of minors or which may require parents' or teachers' discretion. A

(b) Newspapers should have self regulatory system to access the publication in view of those guidelines. B

(c) The nature and extent of the material having sexual contents should not be exposed to the minors indiscriminately and without regard to the age of minors. The discretion in this regard should vest with parents, guardians, teachers or experts on sex education. B

(d) A committee be appointed to suggest ways and means for regulating the access of minors to adult oriented sexual, titillating or prurient material. C

Dismissing the petition, the Court

HELD: 1.1. The prayer No. 1 cannot at all be countenanced inasmuch as sufficient protection in the form of legislations, rules, regulations and norms have already been laid down under the Press Council Act, 1978, Penal Code, 1860 etc. [793-E] D

1.2. Prayer No. 2 equally is vague and no case has been made out for constituting an Expert Committee. [793-F] E

Director General, Directorate General of Doordarshan v. Anand Patwardhan, JT (2006) 8 SC 255, relied on.

Lakshmikant Pandey v. Union of India, [1984] 2 SCC 244, *Unnikrishnan, J.P. v. State of Andhra Pradesh*, [1993] 1 SCC 645, *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala*, [1973] 4 SCC 225, *Brown v. Board of Education*, 347 US 483 (1954), *M.C. Mehta v. State of T.N.*, [1996] 6 SCC 756, *Comptroller & Auditor General of India v. K.S. Jaganathan*, [1986] 2 SCC 679, *Vineet Narain v. U.O.I.*, [1998] 1 SCC 226, *Vishaka v. State of Rajasthan*, [1997] 6 SCC 241, *Union of India v. Association for Democratic Reforms*, [2002] 5 SCC 294, *Shri Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, [1962] 2 SCC 687, *Samaresh Bose v. Amal Mitra*, [1985] 4 SCC 289, *Alfred E. Butler v. State of Michigan*, 1 Led 2d 412, *Networking of Rivers: In Re*: [2004] 11 SCC 360 and *Common Cause v. Union of India*, [2003] 8 SCC 250, referred to. F

2. In view of the availability of sufficient safeguards in terms of various G

H

A legislations, norms and rules and regulations to protect the society in general and children in particular from obscene and prurient contents, the writ at the instance of the petitioner is not maintainable. [796-B, C]

Virendra v. State of Punjab, AIR (1967) SC 896, referred to.

B 3.1. In judging whether a particular work is obscene, regard must be had to contemporary mores and national standards. While this Court held *Lady Chatterley's Lover* to be obscene, in England the jury acquitted the publishers finding that the publication did not fall foul of the obscenity test. This was heralded as a turning point in the fight for literary freedom in U.K. Perhaps "community mores and standards" played a part in this Court's taking a different view from the English jury. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with the click of a mouse. [801-G; 802-A]

D *Director General, Directorate General of Doordarshan v. Anand Patwardhan*, JT (2006) 8 SC 255 and *Shri Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, [1962] 2 SCC 687, relied on.

E *Samaresh Bose v. Amal Mitra*, [1985] 4 SCC 289, *Alfred E. Butler v. State of Michigan* 1 Led 2d 412, *Janet Reno v. American Civil Liberties Union*, 138 Led 2d 874 and *United States v. Playboy Entertainment Group, Inc.*, 146 Led 2d 865, referred to.

F 3.2. It is necessary that the publication must be judged as a whole and the impugned passages should also be separately examined so as to judge whether the impugned passages are so grossly obscene and are likely to deprave and corrupt. [802-B]

Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC and *Samaresh Bose v. Amal Mitra*, [1985] 4 SCC 289, referred to.

G 4. Section 14 of the Press Council Act, 1978 empowers the Press Council only to warn, admonish or ensure newspapers or news agencies and that it has no jurisdiction over the electronic media and that the Press Council enjoys only the authority of declaratory adjudication with its power limited to giving directions to the answering respondents arraigned before it to publish particulars relating to its enquiry and adjudication. It, however, has no further authority to ensure that its directions are complied with and its observations

H

implemented by the erring parties. Lack of punitive powers with the Press Council of India has tied its hands in exercising control over the erring publications. [803-C, D, E] A

5. The present scenario provides for a regulatory framework under which punishment is prescribed for flouting the standards set by the Press Council of India by newspapers/print media. Further, respondents Nos. 3 and 4 have a self-regulatory mechanism in place and they have to strictly adhere to the standards set by the Press Council Act, 1978. According to them, the advertisement, news articles and photographs are scrutinized by the advertising department and in the event the advertising department is in doubt, the assistance of the legal department is resorted to. It is also their case that the said departments are manned by qualified persons who are well acquainted with the Norms and Guidelines issued by the Press Council. It was also submitted that respondent No. 4, as among others, consistently rejected the publication of liquor and sexually exploitative advertisements, which may offend the sensibilities of families and in contravention it was further submitted that respondent No. 4, keeping in mind, the special educational needs of school going children publishes a supplement called "HT Next School Times" every Monday and respondent No. 4 does not send any supplement to schools other than "Ht Next School Times" along with the main paper. Further, respondent No. 4 publishes "HT Next" which is a newspaper positioned mainly for the youth. This paper too keeps in mind the special needs of the youth of today. The market segment of the respondent's paper wishes to cater and caters to sections of society interested in business and is keen on gathering information on all fronts of life. It was further submitted that the newspaper intends to give a holistic perspective of the world to an individual. It was submitted that the respondent's paper has consistently over the last few decades had a large circulation and consistent increase in its circulation each year has not been due to publishing of its supplement "HT City". [803-H; 804-A-E] B C D E F

6. In view of the foregoing legal propositions, the picture in dispute had been published by the respondents with the intent to inform readers of the current entertainment news from around the world and India. The respondents' newspaper seeks to provide a wholesome reading experience offering current affairs, sports, politics as well as entertainment news to keep its readers abreast of all the latest happenings in the world. The pictures that have been published should not be viewed in isolation rather they have to be read with the news reports next to them. In the event, that a particular news items or picture offends any person he may avail of the remedies H

A available to them under the present legal framework. Any steps to impose a blanket ban on publishing of such photographs would amount to prejudging the matter. [804-E, F, G]

Fraser v. Evans, (1969) 1 QB 549, referred to.

B 7.1. The definition of obscenity differs from culture to culture, between communities within a single culture and also between individuals within those communities. Many cultures have produced laws to define what is considered to be obscene and censorship is often used to try to suppress or control materials that are obscene under these definitions. [805-A]

C 7.2. The term obscenity is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality. On the other hand the Constitution of India guarantees the right of freedom to speech and expression to every citizen. This right will encompass an individual to take on any issue. However, this right is not absolute, if such speech and expression are immensely gross and badly violate the standards of morality of a society. Therefore, any expression is subject to a reasonable restriction. Freedom of expression has contributed much to the development and well being of our free society. [805-B, C]

D 8. The right conferred by the Constitution has triggered various issues. **E** One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material and the need to ensure respect for freedom of expression and to preserve a free flow of information and idea. [805-C, D]

F 9. Be that as it may, the respondents are leading newspapers in India and they have to respect the freedom of speech and expression as is guaranteed by our constitution and in fact reaches out to its readers in a responsible and decent manner. Any steps to ban publishing of certain news pieces or pictures would fetter the independence of free press which is one of the hallmarks of our democratic setup. It is clearly established that the present petition is liable to be dismissed as the petitioner has failed to establish the need and requirement to curtail the freedom of speech and expression. **G** The Times of India and Hindustan Times are leading newspapers in Delhi having substantial subscribers from all sections. It is not their intention to publish photographs which cater to the prurient interest. They have an internal regulatory system to ensure that no objectionable photographs or matters get published. **H** Respondents Nos. 3 & 4 are conscious of their responsibility towards children

but at the same time it would be inappropriate to deprive the adult population of the entertainment which is well within the acceptable levels of decency on the ground that it may not be appropriate for the children. An imposition of a blanket ban on the publication of certain photographs and news items etc. will lead to a situation where the newspaper will be publishing material which caters only to children and adolescents and the adults will be deprived of reading their share of their entertainment which can be permissible under the normal norms of decency in any society. [805-E-H; 806-A]

10.1. A culture of 'responsible reading' should be inculcated among the readers of news article. No news item should be viewed or read in isolation. It is necessary that the publication must be judged as a whole and news items, advertisements or passages should not be read without the accompanying message that is purported to be conveyed to the public. Also the members of the public and readers should not look for meanings in a picture or written article, which is not conceived to be conveyed through the picture or the news item. [806-B, C]

10.2. Therefore, in the present matter, the petitioner has failed to establish his case clearly. The petitioner only states that the pictures and the news items that are published by respondents Nos. 3 and 4 'leave much for the thoughts of minors'. [806-D, E]

United States v. Playboy Entertainment Group, Inc. 146 Led 2d 865, referred to.

11. Fertile imagination of anybody especially of minors should not be a matter that should be agitated in the Court of law. In addition, it is also held that news is not limited to Times of India and Hindustan Times. Any hypersensitive person can subscribe to many other newspapers of his choice, which might not be against the standards of morality of the concerned person.

12. The writ petition is, therefore, dismissed but, however, it is observed that the request made by the Press Council of India to amend the Section should be seriously looked into by the Government of India and appropriate amendments be made in public interest. [806-G]

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 384 of 2005.

(Under Article 32 of the Constitution of India.)

A Satyendra Kumar and Diwakar Singh for the Petitioner and Ajay Goswami-Petitioner-In-Person.

Harish Chandra, Kiran Bhardwaj, G. Prakash and V.K. Verma with him for U.O.I.

B P.H. Parekh, D.P. Mohanty, S. Goel and Rukmini Bobde (P.H. Parekh & Co.) for Press Council.

Sanjay Kumar for Respondent No.5.

A.K. Seth, Vineet Seth and Dr. K.C. Aggarwal for Respondent No.6.

C Gopal Jain, R.N. Karanjawala, Ruby Singh Ahuja, Simran Brar and Manik Karanjawala for Respondent No.4.

Vimal Chandra S. Dave, K.V. Mohan, Subramonium Prasad and Dr. Kailash Chand for the Respondents.

D The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J. The Petitioner is a lawyer by profession. Respondent No.1 is Union of India, respondent No.2 is a statutory body, respondent Nos. 3 & 4 are the leading national daily newspapers and respondent No.5 & 6 are news agencies.

E The present petition involves a substantial question of law and public importance on the fundamental right of the citizens, regarding the freedom of speech and expression as enshrined under Article 19(1)(a) of the Constitution of India. The petitioner's grievance is that the freedom of speech and expression enjoyed by the newspaper industry is not keeping balance with the protection of children from harmful and disturbing materials. Article 19(1)(a) guarantees freedom of speech and expression of individual as well as press. It acknowledges that the press is free to express its ideas but on the same hand, individual also has right to their own space and right not to be exposed against their will to other's expressions of ideas and actions.

F By way of this petition, the petitioner requested the Court to direct the authorities to strike a reasonable balance between the fundamental right of freedom of speech and expression enjoyed by the press and the duty of the Government, being signatory of United Nations Convention on the Rights of the Child, 1989 and Universal Declaration of Human Rights, to protect the

G

H

vulnerable minors from abuse, exploitation and harmful effects of such expression. The petitioner requested the Court to direct the concerned authorities to provide for classification or introduction of a regulatory system for facilitating climate of reciprocal tolerance which may include:- A

- (a) an acceptance of other people's rights to express and receive certain ideas and actions; and B
- (b) accepting that other people have the right not to be exposed against their will to one's expression of ideas and actions.

The reciprocal tolerance is further necessary considering the growing tendency among youngsters and minors in indulging in X-rated jokes, SMS and MMS. C

We heard Mr. Ajay Goswami, petitioner-in-person and Mr. Harish Chandra, learned senior counsel, Mr. P.H. Parekh, Mr. Sanjay Kumar, Mr. A.K. Seth, Mr. Gopal Jain, Mr. Vimal Chandra, Mr. S. Dave, learned counsel appearing for the respondents and the entire documents placed before us. D

The Lawyer Petitioner who appeared in person submitted that he filed this petition to seek protection from this Court to ensure that minors are not exposed to sexually exploitative materials, whether or not the same is obscene or is within the law. The real objective is that the nature and extent of the material having sexual contents should not be exposed to the minors indiscriminately and without regard to the age of minor. The discretion in this regard should vest with parents, guardians, teachers or experts on sex education. E

The petitioner is not in any way seeking restrain on the freedom of press or any censorship prior to the publication of article or other material. The petitioner is only seeking for the regulation at the receiving end and not at the source. Whatever is obscene is not protected by any law and there are numerous avenues for the redressal of grievance for the publication of any obscene material. However, all sex oriented material are not always obscene or even indecent or immoral. The effect of words or written material should always judged from the standards of reasonable strong minded, firm and courageous man i.e. an average adult human being. No attempt has been made till date to define any yardstick for the minors whose tender minds are open for being polluted and are like plain state on which any painting can be drawn. F
G
H

A 1. *Is the material in newspaper really harmful for the minors?*

B These articles etc. may not be obscene within the four corners of law but certainly have tendencies to deprave and corrupt the minds of young and adolescent who by reasons of their physical and mental immaturity needs special safeguards and care. He invited our attention to some of the clippings annexed along with the petition. These clipping are only examples and such examples not only confine to newspapers mentioned herein but is of general nature. The double meaning jokes cannot in any way leave healthy impact on the tender minds of the teenagers. The photographs certainly are part of news from around the world and India. However, the tone and tenor of the article as a whole and the way some of the photographs are published and described may not be in the interest of the minors. The photographs annexed at page 24 of the paper book and the caption below them such as “the center of attention”, “double jeopardy” “butt of course” leave much for the thoughts of minors. If the minor is of an age where he/she cannot understand the meaning, he/she would like to know from others and if the minor has come to an age where he/she is able to understand this would certainly energize his grey cells in the brain and would titillate him/her. What kind of culture and message the article titled “moan for more” or “get that zing bag into your sex life” convey. Is it really necessary for a child to read at a very early stage the concept of masturbation, ejaculation, penetration etc. as is normally discussed by so called sex experts in columns of newspapers. At what age should we start telling our children where to have sex and how to break their monotony. News item on MMS clipping is certainly not obscene but do we really need to show the nude photographs with only small black stripes on the private parts to our children without even bothering of its effect. In Times of India dated 1.8.2005 an article titled “Porn In potter VI” was published, copy of which is annexed with the petition. The author has tried to read and suggest sexual messages in these lines. Children who were reading the book might not have any such inclination. However, after reading newspaper their mind would certainly wander to an area which the author might not have even conceived.

G No doubt, we are not living an era of Gandhari but certainly we have culture and respect for elders and some decorum and decency towards children. Undoubtedly, such kind of stuff is available freely on internet, movies; televisions etc. but are the families and the community environment really ready to accept it in toto or are they passive receiver of the same without any control or check. Are these articles really making our children morally healthy?

H

Moral values should not be allowed to be sacrificed in the guise of social change or cultural assimilation. **A**

2. *Whether the minors have got any independent right enforceable under Article 32 of the Constitution?*

The right of the minor flows from Article 19(1)(a), Article 21 read with Article 39(f) of the Constitution of India and United Nation Convention on the Rights of the Child. In a recent judgment delivered by this court in the matter of *Director General, Directorate General of Doordarshan & Ors. v. Anand Patwardhan & Anr.*, (C.A.No. 613 of 2005), to which one of us was a member, Dr. Justice AR. Lakshmanan, observed as under: **B**

“..one of the most controversial issue is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and idea.” **C**

It was further observed by this Court : **D**

“.....The Indian Penal Code on obscenity grew out of the English Law, which made court the guardian of public morals. It is important that where bodies exercise discretion, which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate law.” **E**

“.....The judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers.” **F**

It was observed by this Court in the matter of *Lakshmikant Pandey v. Union of India*, [1984] 2 SCC 244 as follows: **F**

“It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a “supremely important national asset” and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: “Child shows the man as morning shows the day” and the Study Team on Social Welfare said much to the same effect when **G**

H

A it observed that “the physical and mental health of the nation is
determined largely by the manner in which it is shaped in the early
stages”. The child is a soul with a being, a nature and capacities of
its own, who must be helped to find them, to grow into their maturity,
B into fullness of physical and vital energy and the utmost breadth,
depth and height of its emotional, intellectual and spiritual being;
otherwise there cannot be a healthy growth of the nation. Now
obviously children need special protection because of their tender age
and physique mental immaturity and incapacity to look-after
themselves. That is why there is a growing realisation in every part
C of the globe that children must be brought up in an atmosphere of
love and affection and under the tender care and attention of parents
so that they may be able to attain full emotional, intellectual and
spiritual stability and maturity and acquire self-confidence and self-
respect and a balanced view of life with full appreciation and realisation
D of the role which they have to play in the nation building process
without which the nation cannot develop and attain real prosperity
because a large segment of the society would then be left out of the
developmental process. In India this consciousness is reflected in the
provisions enacted in the Constitution. Clause (3) of Article 15 enables
the State to make special provisions *inter alia* for children and Article
E 24 provides that no child below the age of fourteen years shall be
employed to work in any factory or mine or engaged in any other
hazardous employment. Clauses (e) and (f) of Article 39 provide that
the State shall direct its policy towards securing *inter alia* that the
tender age of children is not abused, that citizens are not forced by
economic necessity to enter avocations unsuited to their age and
strength and that children are given facility to develop in a healthy
F manner and in conditions of freedom and dignity and that childhood
and youth are protected against exploitation and against moral and
material abandonment. These constitutional provisions reflect the great
anxiety of the constitution makers to protect and safeguard the interest
and welfare of children in the country. The Government of India has
G also in pursuance of these constitutional provisions evolved a National
Policy for the Welfare of Children. This Policy starts with a goal-
oriented perambulatory introduction:

H The nation’s children are a supremely important asset. Their nurture
and solicitude are our responsibility. Children’s programme should
find a prominent part in our national plans for the development of

human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice. A

The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the perambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen family ties “so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment.....” B C

Further this Court in *Unnikrishnan, J.P & Ors. v. State of Andhra Pradesh & Ors.*, [1993] 1 SCC 645 upheld the right to education for children of age of 14 as fundamental right. In para 165, this Court observed as follows: D

“It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that Fundamental Rights are but a means to achieve the goal indicated in Part-IV. It is also held that the fundamental Rights must be construed in the light of the Directive Principles. It is from the above stand-point that Question No. 1 has to be approached”. E

This judgment to that extent was not overruled even by larger Bench. This Court in the case of *Unnikrishnan* (supra) relied upon numerous judgments.

In *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.*, [1973] 4 SCC 225, this court observed as follows: F

“.....The fundamental rights and the directive principles constitute the ‘conscience’ of our Constitution....To ignore Part IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built....there is no anti-thesis between the fundamental rights and the directive principles. One supplements the other. G

“.....Both Parts III and IV.....have to be balanced and harmonized, then alone the dignity of the individual can be achieved....“They H

A (fundamental rights and directive principles) were meant to supplement each other.

Mathew, J. while adopting the same approach remarked: (SCC pp. 875-76, para 1700)

B The object of the people in establishing the Constitution was to promote justice, social and economic, liberty and equality. The *modus operandi* to achieve these objectives is set out in Part III and IV of the Constitution. Both parts III and IV enumerate certain moral rights. Each of these parts represent in the main the statements in one sense of certain aspirations whose fulfillment was regarded as essential to the kind of society which the Constitution- makers wanted to build.

C Many of the articles, whether in Part III or IV, represents moral rights which they have recognized as inherent in every human being in this country. The tasks of protecting and realizing these rights is imposed upon all organs of the state, namely, legislative, executive and judicial.

D What then is the importance to be attached to the fact that the provisions of Part III are enforceable in a court and the provisions in Part IV are not? Is it that the rights reflected in the provisions of Part III are somehow superior to the moral claims and aspirations reflected in the provisions of Part IV or not? I think not. Free and compulsory education under Article 25, Freedom from starvation is as important as right to life. Nor are the provisions in Part III absolute in the sense that the rights represented by them can always be given full implementation....”

E

This Court also cited observation in *Brown v. Board of Education*, 347 US 483 (1954) wherein it was emphasized in the following words:

F “....Today, education is perhaps the most important function of State and a local government... It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of education.”

G

H This Court in the case of *M.C. Mehta v. State of T.N. and Ors.*, [1996]

6 SCC 756 observed that:

“Of the aforesaid provisions, the one finding place in Article 24 has been a fundamental right ever since 28th January, 1950. Article 45 too has been raised to high pedestal by Unni Krishnan, which was decided on 4th February, 1993. Though other articles are part of directive principles, they are fundamental in the governance of our country and it is the duty of all the organs of the State (a la Article 37) to apply these principles. Judiciary, being also one of the three principal organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern and significance.

It would be apposite to apprise ourselves also about our commitment to world community. For the case at hand it would be enough to note that India has accepted the convention on the Rights of the Child, which was concluded by the UN General Assembly on 20th November, 1989. This Convention affirms that children’s right require special protection and it aims, not only to provide such protection, but also to ensure the continuous improvement in the situation of children all over the world, as well as their development and education in conditions of peace and security. Thus, the Convention not only protects the child’s civil and political right, but also extends protection to child’s economic, social, cultural and humanitarian rights.”

3. *Maintainability of Petition*

In view of the above facts and circumstances and legal proposition, Mr. Ajay Goswami, the petitioner-in-person submitted that:

- (i) Newspapers are publishing sex oriented material which may not be obscene otherwise but still caters to prurient interest of the minor.
- (ii) Minors have got fundamental right under Article 19(1)(a), Article 21 read with Article 39(f) of the Constitution and United Nation Convention on the Rights of the Child. As freedom of speech and expression also includes the expressions of the minors which need care as the minor due to their tender age and mental immaturity are not capable of deciding themselves as to what is

A in the interest of their growth morally & culturally, so that they can assume their responsibility within the community.

(iii) The right also flows from Article 21 as the right to live shall also includes right to education as pronounced in the judgments of this Court. By necessary corollary, it shall also mean right to proper education which may be decided by the parents, teachers and other experts and newspapers cannot be allowed to disturb that by their indeterminately access of the offending article to the minors regardless of their age.

B

(iv) The State which has the duty to protect the minors by appropriate legislation or executive orders has failed in its duty. The Press Council of India which was constituted for preserving the freedom of press and maintaining and improving the standards of newspapers and news agency is a powerless body. No guidelines have been framed for the minors and adolescents in particular, which can be enforced in Court of law. The Council itself feel the necessity of some strong and effective measure to correct it.

C

D

(v) The citizens of this country can only pray to this Court to prevent injustice being done to them. This Court under Article 32 read with Article 142 can issue guidelines to ensure the growth of the children in a healthy and moral atmosphere which is exploited by the newspapers.

E

Mr. Ajay Goswami relied on two judgments of this Court. In *Comptroller & Auditor General of India & Anr. v. K.S. Jagnathan*, [1986] 2 SCC 679, this Court held as under:

F

“.....In order to prevent injustice resulting to the concerned parties, the Court may itself pass an order to give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion.”

G

Similarly in *Vineet Narain & Ors. v. U.O.I.*, (1998) 1 SCC 226, this Court held as under:

“.....There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders

H

of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognized and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.....” A

“Where there is inaction by the legislature it is the duty of executive to fill the vacuum and where there is inaction even by executive for whatever reasons judiciary must step in.” B

Concluding his arguments, Mr. Ajay Goswamy, petitioner-in-person made the following proposals:

(i) Guidelines in detail may be issued to all the newspapers regarding the matter which may not be suitable for the reading of minors or which may require parents or teachers discretion. C

(ii) Newspapers should have self regulatory system to access the publication in view of those guidelines. D

(iii) In case the newspapers publish any material which is categorized in the guidelines the newspaper be packed in some different form and should convey in bold in front of newspapers of the existence of such material.

(iv) This would give discretion to the parents to instruct the news vendor whether to deliver such newspaper or not. E

OR

In the alternative, he suggested a Committee be appointed to suggest ways and means for regulating the access of minors to adult oriented sexual, titillating or prurient material. F

Mr. Harish Chandra, learned senior counsel appearing for Union of India - respondent No.1 in reply to the arguments of the petitioner submitted that publishing as well as circulating of obscene and nude/semi-nude photographs of women already constitutes a penal offence under the provisions of the Indecent Representation of Women (Prohibition) Act, 1986, administered by the Department of Women & Child Development, Ministry of Human Resources Development. Relevant Sections 3 & 4 of the Indecent Representation of Women (Prohibition) Act, 1986 are reproduced hereunder for ready reference: G

H

A “3. Prohibition of advertisements containing indecent representation of woman:- No person shall publish, or cause to be published or arrange or take part in the publication or exhibition or, any advertisement which contains indecent representation of women in any form.

B 4. *Prohibition of publication or sending by post of books, pamphlets etc. containing indecent representation of women -* No person shall produce or cause to be produced, sell, let to hire, distribute or circulate or send by post any book, pamphlet, paper, slide, film, writing drawing, painting, photographs, representation or figure of women in any form, provided that nothing in this section shall apply to:

C (a) any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure:-

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

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

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

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

F (ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purposes;

(c) any film in respect of which the provisions of Part II of the Cinematograph Act, 1952 (37 of 1952), will be applicable.”

G Section 6 of the Indecent Representation of Women (Prohibition) Act, 1986 provides the penalty for committing such offences in contravention of Sections 3 & 4 of the said Act. Section 6 reads as follows:

H “6. Penalty- Any person who contravenes the provisions of Sections 3 & 4 shall be punishable 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 for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lac rupees.” A

It was further submitted that sale, letting, hiring, distributing, exhibiting, circulating of obscene books and objects of young persons under the age of twenty years also constitutes a penal offence under Sections 292 and 293 of the Indian Penal Code and is punishable on first conviction with imprisonment of either description for a term 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 seven years, and also with fine which may extend to five thousand rupees. B C

Concluding his submissions, he submitted that there are laws in existence which prohibit publishing, circulating and selling obscene books and objects to young persons and it is the responsibility of the “Press” to adhere to and comply with these laws and not to abuse the freedom of speech and expression (freedom of press) guaranteed under Article 19(1)(a) of the Constitution of India. D

Mr. P.H. Parekh, learned counsel appearing for respondent No.2-Press Council of India, submitted that the Press Council enjoys only limited authority, with its power limited to giving directions, censure etc. to the parties arraigned before it, to publish particulars relating to its enquiry and adjudication etc. The powers of the Council in so far its authority over the press is concerned are enumerated under Section 14 of the Press Council Act, 1978. However, it has no further authority to ensure that its directions are complied with and its observations implemented by the erring parties. Lack of punitive powers with Press Council has tied its hands in exercising control over the erring publications. E F

Learned counsel further submitted that despite various requests to the Central Government from the year 1999 to amend the Press Council Act, 1978, the same has not been amended. Recently, on 1.6.2006, under clause 18(d), an advertisement policy was issued by the Directorate of Audio Visual Publicity under the Central Government Advertisement Policy stating that the newspapers will be suspended from empanelment by DG, DAVP with immediate effect if it indulged in unethical practices or anti-national activities as found G H

A by the Press Council of India.

Learned counsel further submitted that as the issue which arise in the present petition requires urgent action, it will be appropriate that this Court may formulate certain guidelines as suggested by the Press Council vide its letter dated 6.1.2002 for amendment by way of incorporation of two provisions viz., Section 14(2)(a) and Section 14(2)(b) in the Press Council Act, 1978 till the law made by the legislature amending the Press Council Act, 1978 as per the various judgments passed by this Court which are as follows:

- B
1. *Vishaka & Ors. v. State of Rajasthan & Ors.*, [1997] 6 SCC 241
 - C 2. *Vineet Narain & Ors. v. U.O.I. & Ors.*, [1998] 1 SCC 226
 3. *Union of India v. Association for Democratic Reforms and Anr.*, [2002] 5 SCC 294.

Learned counsel submitted that this Court may consider to issue appropriate guidelines.

D Learned counsel appearing for respondent no. 3 (Times of India) contented that legislations, rules and regulations already exists within the Indian legal framework to check publication of obscene materials and articles. Section 292 of the Indian Penal Code prohibits and punishes selling, hiring, exhibition, circulation, possession, importation, exportation of obscene material.

E Sections 3 and 4 of the Indecent Representation of Women Act also imposes a prohibition on the publication or sending by post of books, pamphlets etc., selling, hiring, distributing and circulating any material that contains indecent representation of women in any form. Section 6 of the said Act, also provides for punishment in the case of non-compliance to sections 3 and 4 of the Act.

F Further he submitted that the Press Council of India is constituted duly under the Constitution of India for regulating the functions and activities of the Press. Sections 13 (2) (c), 14 (1) and 14 (2) of the Press Council of India Act empowers the Press Council to impose serious checks on the Newspaper, News Agency, an editor or a journalist who flouts the norms as formulated by the Press Council and is against societal norms of decency.

G Learned Counsel also submitted that the Indian Constitution under Article 19 (1) (a) guarantees every citizen the right to freedom of speech and

H

expression and respondent being a leading Newspaper has the right to express its views and various news of National and International relevance in its edition and any kind of unreasonable restriction on this right will amount to the violation of the right guaranteed by the Indian Constitution. Learned Counsel referred to a recent judgment of this Court, *Director General of Doordarshan and Ors. v. Anand Patwardhan* (Supra), it was observed that the basic test for obscenity would be:

“(a) whether the average person applying contemporary community standards would find that the work, taken as a whole appeal to the prurient interest....

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically, defined by the applicable state law,

(c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.”

In *Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra and Ors.*, [1962] 2 SCC 687, this Court observed that:

“12. The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults.”

Learned counsel referred to the case of *Samaresh Bose and Anr. v. Amal Mitra and Anr.*, [1985] 4 SCC 289, this court observed that:

“The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The Court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find

A out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall.”

B Learned counsel also referred to American jurisprudence and stated that even nudity *per se* is not obscenity. In 50 Am Jur 2 d, para 22 at page 23, “Articles and pictures in a newspaper must meet the Miller’s test’s Constitutional standard of obscenity in order for the publisher or distributor to be prosecuted for obscenity. *Nudity alone is not enough to make a material legally obscene*”

C In *Alfred E Butler v. State of Michigan*, 1 Led 2d 412, the U.S. Supreme Court has held that: “*The state insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.*”

D Further the learned counsel submitted that, the Times of India, respondent no.3, is one of the leading newspapers and its popularity only stands to show that the pictures published in it are not objectionable and also that respondent while publishing any news article has any intention to cater to the prurient interest of anybody. Also the respondent no.3 has an internal regulatory system to ensure that no objectionable photograph or matter gets published.

E Mr. Gopal Jain, learned counsel appearing for Hindustan Times respondent no.4, practically adopted the arguments put forth by respondent no.3. In addition, respondent no.4 drew our attention to the Guidelines under the “Norms of Journalistic Conduct” which lays down guidelines for newspapers/journalists to maintain standards with regard to obscenity and vulgarity.

Norm 17 reads as follows:

G “*Obscenity and vulgarity to be eschewed*

- (i) Newspapers/journalists shall not publish anything which is obscene, vulgar or offensive to public good taste.
- (ii) Newspapers shall not display advertisements which are vulgar or which, through depiction of a woman in nude or lewd posture, provoke lecherous attention of males as if she herself was a

H

commercial commodity for sale. A

(iii) Whether a picture is obscene or not, is to be judged in relation to three tests: namely

(a) Is it vulgar and indecent?

(b) Is it a piece of mere pornography? B

(c) Is its publication meant merely to make money by titillating the sex feelings of adolescents and among whom it is intended to circulate? In other words, does it constitute an unwholesome exploitation for commercial gain. Other relevant considerations are whether the picture is relevant to the subject matter of the magazine. That is to say, whether its publication serves any preponderating social or public purpose, in relation to art, painting, medicine, research or reform of sex. C

(iv) The globalisation and liberalization does not give licence to the media to misuse freedom of the Press and to lower the values of the society. The media performs a distinct role and public purpose which require it to rise above commercial consideration guiding other industries and businesses. So far as that role is concerned, one of the duties of the media is to preserve and promote our cultural heritage and social values. D E

(v) Columns such as 'Very Personal' in a newspaper replying to personal queries of the readers must not become grossly offensive presentations, which either outrage public decency or corrupt public moral." F

Learned Counsel contented that, the test of judging should be that of an ordinary man of common sense and prudence and not an "out of the ordinary hypersensitive man". In the case of K.A. Abbas, Hidayatullah, C.J. opined: "*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.*" G

Learned counsel further explained the procedure followed by Hindustan Times before the publication of any advertisement, "*Advertisements are scrutinized by the advertising department and in the event the advertising department is in doubt, the assistance of the legal department is resorted*" H

A to. *The departments are manned by qualified persons who are well acquainted with the Norms and Guidelines issued by the Press Council.*"

B Further the learned counsel submitted that, keeping in mind special educational needs of the school-going students a supplement called "HT Next- School Times" is published by Hindustan Times. The respondent does not send any other supplement other than this to educational institutions along with the main paper. Thus, it was stated that respondent realizes its responsibility towards children and at the same time it would be inappropriate to deprive the adult population of the entertainment which is well within the acceptable levels on the ground that it may not be appropriate for the children.

C In conclusion, it was urged that any step to ban publishing of certain news-pieces or pictures would fetter the independence of free-press.

D Learned Counsel appearing for respondent no.5 and Learned Counsel Dr. Kailash Chand appearing for respondent no.6, submitted that the relief sought by the petitioner does not relate to them and accordingly they are not giving any reply.

We have given our careful consideration to the entire material placed before us and the rival submissions made by learned counsel appearing for the respective parties.

E *Maintainability of Writ Petition:*

Before proceeding further, we feel better to reproduce the prayers made in the writ petition which read as follows:

F "(1) Issue writ in the nature of writ of mandamus/order or direction to the respondent Nos. 1 & 2 for laying down rules/regulations to ensure that minor is not exposed to sexually explicit material whether or not the same is obscene or is within the law without express consent of the parents, guardians or the experts on sex education.

G (2) Respondent Nos. 1 & 2 be directed to constitute an expert committee to look into the problem of unwanted exposure to the minor through press and to lay down appropriate rules and regulations for the same."

H The maintainability of the writ petition was also raised as a preliminary issue by learned counsel appearing for some of the respondents and in particular, respondent Nos. 3 and 4. Learned counsel for respondent No.3

pointed out that there can be no mandamus for legislation and in support of the said submission, he relied on the judgment of this Court in *Networking of Rivers: In Re*: [2004] 11 SCC 360 wherein this Court held . A

“It is not open to this Court to issue any direction to Parliament to legislate but the Attorney General submits that the Government will consider this aspect and, if so advised, will bring an appropriate legislation.” B

He also cited *Common Cause v. Union of India & Ors.*, [2003] 8 SCC 250. This Court held:

“From the facts placed before us it cannot be said that the Government is not alive to the problem or is desirous of ignoring the will of Parliament. When the legislature itself had vested the power in the Central Government to notify the date from which the Act would come into force, then the Central Government is entitled to take into consideration various facts including the facts set out above while considering whether the Act should be brought into force or not. No mandamus can be issued to the Central Government to issue the notification contemplated under Section 1 (3) of the Act to bring the Act into force, keeping in view the facts brought on record and the consistent view of this Court. C D E

We have already noticed the prayer in the present writ petition. In our view, the prayer No.1 cannot at all be countenanced inasmuch as sufficient protection in the form of legislations, rules, regulations and norms have already been laid down under the Press Council Act, 1978, I.P.C. etc.

Prayer No.2 equally is vague and no case has been made out for constituting an Expert Committee. F

LEGISLATIONS AGAINST OBSCENITY:

Section 13 of the Press Council Act, 1978 specifies the objects and functions of the council. G

Section 13(2) (c) states:

“to ensure on the part of newspapers, news agencies and journalists, the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship....; H

A Section 14(1) states:

B “Where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that a newspaper or news agency has offended against the standards of journalistic ethics or public taste or that an editor or working journalist has committed any professional misconduct, the Council may, after giving the newspaper, or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry in such manner as may be provided by regulations made under this Act and, if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist, as the case may be :

C Provided that the Council may not take cognizance of a complaint if in the opinion of the Chairman, there is no sufficient ground for holding an inquiry.

D Section 14(2) states:-

E “If the Council is of the opinion that it is necessary or expedient in public interest so to do, it may require any newspaper to publish therein in such manner as the Council thinks fit, any particulars relating to any inquiry under this section against a newspaper or news agency, an editor or a journalist working therein, including the name of such newspaper, news agency, editor or journalist.

Section 292 of the Indian Penal Code reads:-

F “*Sale, etc., of obscene books, etc.*—(1) For the purposes of sub-section (2), a 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 effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it].

G [(2)] Whoever-

H (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire,

distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or **A**

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

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or **C**

(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 **D**

(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. **E**

[Exception- This section does not extend to- **F**

(a) any book, pamphlet, paper, writing, drawing, painting, representation or 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 of learning or other objects of general concern, or **G**

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

(b) any representation sculptured, engraved, painted or otherwise **H**

- A represented on or in-
- (i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or
- B (ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]”

Sections 4 and 6 of the Indecent Representation of Women Act, 1986 are also in existence.

- C In view of the availability of sufficient safeguards in terms of various legislations, norms and rules and regulations to protect the society in general and children, in particular, from obscene and prurient contents, we are of the opinion that the writ at the instance of the petitioner is not maintainable.

- D Article 19(1)(a) deals with freedom of speech and expression. In the matter of *Virendra v. State of Punjab & Anr.*, AIR (1957) SC 896 this Court held:

- E “...It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its correspondents relating to or concerning what may be the burning topic of the day.

- F Our social interest ordinarily demands the free propagation and interchange of views but circumstances may arise when the social interest in public order may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. Our Constitution recognises this necessity and has attempted to strike a balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of speech and expression in the interest of public order and on the freedom of carrying on trade or business in the interest of the general public.

- G Therefore, the crucial question must always be : Are the restrictions imposed on the exercise of the rights under Arts. 19(1)(a) and 19(1)(g) reasonable in view of all the surrounding circumstances ? In other words are the restrictions reasonably necessary in the interest of public order under Art. 19(2) or in the interest of the general public

H

under Art. 19(6) ?”

A

Test of obscenity:

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

B

In a recent judgment *Director General, Directorate General of Doordarshan & Ors. v. Anand Patwardhan & Anr.*, reported in JT (2006) 8 SC 255 (Dr. AR. Lakshmanan and L.S. Panta, JJ) This Court has referred to the Hicklin test laid down in 1868-3 QB 360 and observed:

C

“(a) whether the average person applying contemporary community standards would find that the work, taken as a whole appeal to the prurient interest...

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically, defined by the applicable state law,

D

(c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.”

In *Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra and Ors.*, [1969] 2 SCC 687. This Court has held:

E

“In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expression to their ideas, emotions and objectives with full freedom except that is should not fall within the definition of ‘obscene’ having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in *Udeshi’s* case (Supra) if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch

F

G

H

A the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect”

B In *Samaresh Bose & Anr. v. Amal Mitra & Anr.*, (Supra), this Court held as under:

C “In England, as we have earlier noticed, the decision on the question of obscenity rests with the jury who on the basis of the summing up of the legal principles governing such action by the learned Judge decides whether any particular novel, story or writing is obscene or not. In India, however, the responsibility of the decision rests essentially on the Court. As laid down in both the decisions of this Court earlier referred to, “the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions of Section 292 I.P.C.” In deciding the question of obscenity of any book, story or article the Court whose responsibility it is to adjudge the question may, if the Court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The Court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the Court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different

H

kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of Section 292 I.P.C. by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment”.

Per se nudity is not obscenity:

The American Courts, from time to time, have dealt with the issues of obscenity and laid down parameters to test obscenity. It was further submitted that while determining whether a picture is obscene or not it is essential to first determine as to quality and nature of material published and the category of readers.

In 50 Am Jur 2 d, para 22 at page 23 reads as under:

“Articles and pictures in a newspaper must meet the Miller test’s constitutional standard of obscenity in order for the publisher or

A distributor to be prosecuted for obscenity. Nudity alone is not enough to make material legally obscene.

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

B *Contemporary Society:*

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

In *Alfred E Butler v. State of Michigan*, 1 Led 2d 412, U.S. Supreme Court held as under:

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

E *There should be no suppression of speech and expression in protecting children from harmful materials* : In *Janet Reno v. American Civil Liberties Union*, 138 Led 2d 874, it has been held that:

F “The Federal Government’s interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults, in violation of the Federal Constitution’s First Amendment; the Government may not reduce the adult population to only what is fit for children, and thus the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into the statute’s validity under the First Amendment, such inquiry embodies an overarching commitment to make sure that Congress has designed its statute to accomplish its purpose without imposing an unnecessarily great restriction on speech.”

G In 146 Led 2d 865, *United States v. Playboy Entertainment Group, Inc.*, it has been held that:

H

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

Literary merit and “prepondering social purpose”

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

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

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

Contemporary Standards

In judging as to whether a particular work is obscene, regard must be had to contemporary mores and national standards. While the Supreme Court in India held *Lady Chatterley’s Lover* to be obscene, in England the jury acquitted the publishers finding that the publication did not fall foul of the obscenity test. This was heralded as a turning point in the fight for literary freedom in UK. Perhaps “community mores and standards” played a part in

A the Indian Supreme Court taking a different view from the English jury. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with the click of a mouse.

Judging the work as a whole

B

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

C

Opinion of literary/artistic experts.

In *Ranjit Udeshi* (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.

D

However, in *Samresh Bose v. Amal Mitra* (Supra) this Court observed:

E

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

F

Clear and Present Danger

In *S.Ragarajan v. P. Jagjivam Ram*, while interpreting Article 19(2), this Court borrowed from the American test of clear and present danger and observed:

G

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

H

other words, the expression should be inseparably like the equivalent of a 'spark in a power keg'." A

Test of Ordinary Man

The test for judging a work should be that of an ordinary man of common sense and prudence and not an "out of the ordinary or hypersensitive man." As Hidayatullah, C.J. remarked in K.A. Abbas: B

"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." C

An additional affidavit was filed on behalf of the Press Council of India on 7.8.2006. Inviting our attention to the said affidavit, Mr. P.H. Parekh submitted that Section 14 of the Press Council Act, 1978 empowers the Press Council only to warn, admonish or censure newspapers or news agencies and that it has no jurisdiction over the electronic media and that the Press Council enjoys only the authority of declaratory adjudication with its power limited to giving directions to the answering respondents arraigned before it to publish particulars relating to its enquiry and adjudication. It, however, has no further authority to ensure that its directions are complied with and its observations implemented by the erring parties. Lack of punitive powers with the Press Council of India has tied its hands in exercising control over the erring publications. D E

Mr. P.H. Parekh further submitted that prompted by the continued flouting of its observation/directions by some of the Press of the country, the Press Council has recommended to the Government between 1999-2003 to amend the provisions of Section 14(1) of the Press Council Act, 1978 to arm the Council with the authority to recommend to the Government de-recognition of newspapers for Government advertisement or withdrawal of the accreditation granted to a journalist which facilitates performance of his function and also entitles him to claim concession in railways etc. or to recommend de-recognition of a newspaper for the period deemed appropriate for the proposals made. F G

The Press Council of India is yet to receive any response from the Government. The counsel has also filed the copies of the letters written by Justice K. Jayachandra Reddy dated 17.12.2002 and 06.12.2003 issued by the Press Council to the Government of India for extending punitive powers and the amendments proposed by the Council have been annexed to the main writ petition. In our opinion, the present scenario provides for a regulatory H

- A framework under which punishment is prescribed for flouting the standards set by the Press Council of India by newspapers/print media. Further, respondent Nos. 3 & 4 have a self-regulatory mechanism in place and they have to strictly adhere to the standards set by the Press Council Act, 1978. According to them, the advertisement, news articles and photographs are scrutinized by the advertising department and in the event the advertising department is in doubt, the assistance of the legal department is resorted to. It is also their case that the said departments are manned by qualified persons who are well acquainted with the Norms and Guidelines issued by the press Council. It was also submitted that respondent No.4, as among others, consistently rejected the publication of liquor and sexually exploitative advertisements, which may offend the sensibilities of families and in contravention it was further submitted that respondent No.4, keeping in mind, special educational needs of school going children publishes a supplement called "HT Next School Times" every Monday and the respondent does not send any supplement to schools other than "HT Next School Times" along with the main paper. Further, the respondent publishes "HT Next" which is a newspaper positioned mainly for the youth. This paper too keeps in mind the special needs of the youth of today. The market segment that the respondent's paper wishes to cater and caters to sections of society interested in business and is keen on gathering information on all fronts of life. It was further submitted that the newspaper intends to give a holistic perspective of the world to an individual. It was submitted that the respondent's paper has consistently over the last few decades had a large circulation and consistent increase in its circulation each year has not been due to publishing of its supplement "HT City".

- In view of the foregoing legal propositions the pictures in dispute had been published by the respondents with the intent to inform readers of the current entertainment news from around the world and India. The respondent's newspaper seeks to provide a wholesome reading experience offering current affairs, sports, politics as well as entertainment news to keep its readers abreast of all the latest happenings in the world. The pictures that have been published should not be viewed in isolation rather they have to be read with the news reports next to them. In the event, that a particular news items or picture offends any person they may avail of the remedies available to them under the present legal framework. Any steps to impose a blanket ban on publishing of such photographs, in our opinion, would amount to prejudging the matter as has been held in the matter of *Fraser v. Evans*, (1969) 1 QB 549.

H

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

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

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

Be that as it may, the respondents are leading newspapers in India they have to respect the freedom of speech and expression as is guaranteed by our constitution and in fact reaches out to its readers any responsible and decent manner. In our view, any steps to ban publishing of certain news pieces or pictures would fetter the independence of free press which is one of the hallmarks of our democratic setup. In our opinion, the submissions and the propositions of law made by the respective counsel for the respondents clearly established that the present petition is liable to be dismissed as the petitioner has failed to establish the need and requirement to curtail the freedom of speech and expression. The Times of India and Hindustan Times are leading newspapers in Delhi having substantial subscribers from all sections. It has been made clear by learned counsel appearing for the leading newspapers that it is not their intention to publish photographs which cater to the prurient interest. As already stated, they have an internal regulatory system to ensure no objectionable photographs or matters gets published. We are able to see that respondent Nos. 3 & 4 are conscious of their responsibility towards children but at the same time it would be inappropriate to deprive the adult population of the entertainment which is well within the E F G H

A acceptable levels of decency on the ground that it may not be appropriate for the children. An imposition of a blanket ban on the publication of certain photographs and news items etc. will lead to a situation where the newspaper will be publishing material which caters only to children and adolescents and the adults will be deprived of reading their share of their entertainment which can be permissible under the normal norms of decency in any society.

B

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

C

We observe that, as decided by the American Supreme Court in *United States v. Playboy Entertainment Group, Inc*, 146 L ed 2d 865, that, "in order for the State....to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Therefore, in our view, in the present matter, the petitioner has failed to establish his case clearly. The petitioner only states that the pictures and the news items that are published by the respondents 3 and 4 'leave much for the thoughts of minors'.

E

Therefore, we believe that fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law. In addition we also hold that news is not limited to Times of India and Hindustan Times. Any hypersensitive person can subscribe to many other Newspaper of their choice, which might not be against the standards of morality of the concerned person.

F

We, therefore, dismiss the writ petition but however observed that the request made by the Press Council of India to amend the Section should be seriously looked into by the Government of India and appropriate amendments be made in public interest. No costs.

G

V.S.S.

Petition dismissed.