

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL. REVISION PETITION No. 114/2007

Reserved on : 04-04-2008

Date of decision : 08-05-2008

MAQBOOL FIDA HUSAIN

....PETITIONER

Through : Mr. Akhil Sibal, Ms. Bina Madhvan & 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 Madhvan &
Mr. Pradeep Chindra, Advs.

-VERSUS-

DWAIPAYAN V. VARKHEDKAR

...RESPONDENT

Through : Mr. B.B. Varakhedkar, GPA holder

- 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 siege 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 reinterpreted 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 Cri. Rev. P. 114/2007 and Cri. 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 Cri. 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

“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 vs. 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 SCP 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 which 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 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 *Hicklin's* 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:

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

