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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

A.S. BOPANNA; J., PAMIDIGHANTAM SRI NARASIMHA; J.

March 19, 2024

CRIMINAL APPEAL NO(S). /2024 (ARISING OUT OF SLP (CRL.) NO(S). 5463-5464/2023
APOORVA ARORA & ANR. ETC. versus STATE (GOVT. OF NCT OF DELHI) & ANR.

Indian Penal Code; Section 292 and Information Technology Act, 2000; Section 67 – Obscenity – Profanity is not per se obscene – Vulgarity and profanities do not per se amount to obscenity. While a person may find vulgar and expletive-filled language to be distasteful, unpalatable, uncivil, and improper, that by itself is not sufficient to be ‘obscene’. The specific material which the High Court found to be obscene, was “foul, indecent and profane” language and nothing more. The High Court has equated profanities and vulgarity with obscenity, without undertaking a proper or detailed analysis into how such language, by itself, could be sexual, lascivious, prurient, or depraving and corrupting. (Para 35)

Indian Penal Code; Section 292 and Information Technology Act, 2000; Section 67 – Standard to determine obscenity – ‘Community standard test’ – The Supreme Court in Aveek Sarkar v. State of West Bengal markedly moved away from the Hicklin test to the “community standard test”. The standard of determination is that of an ordinary common person and not a hypersensitive person such as an adolescent’s or child’s mind, who is susceptible to influences. The High Court has incorrectly used the standard of “impressionable minds” to gauge the effect of the material and has therefore erred in applying the test for obscenity correctly. (Para 7. 1 & 39) Aveek Sarkar v. State of West Bengal, (2014) 4 SCC 257; referred.

Indian Penal Code; Section 292 and Information Technology Act, 2000; Section 67 – Objective consideration while assessing whether the material is obscene – The court must consider the work as a whole and then the specific portions that have been alleged to be obscene in the context of the whole work to arrive at its conclusion. The High Court has taken the meaning of the language in its literal sense, outside the context in which such expletives have been spoken. While the literal meaning of the terms used may be sexual in nature and they may refer to sexual acts, their usage does not arouse sexual feelings or lust in any viewer of ordinary prudence and common sense. Rather, the common usage of these words is reflective of emotions of anger, rage, frustration, grief, or perhaps excitement. By taking the literal meaning of these words, the High Court failed to consider the specific material (profane language) in the context of the larger web-series and by the standard of an “ordinary man of common sense and prudence”. Neither did the creator of the web-series intend for the language to be taken in its literal sense nor is that the impact on a reasonable viewer who will watch the material. Therefore, there is a clear error in the legal approach adopted by the High Court in analysing and examining the material to determine obscenity. (Para 36 & 37)

Indian Penal Code, 1860; Section 292 – Obscene material – Section 292 defines ‘obscene’ as a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object that is lascivious, appeals to the prurient interest, or has such effect, if taken as a whole, that tends to deprave and corrupt persons who are likely to read, see or hear the matter contained in it. The provision criminalises the sale, distribution, public exhibition, circulation, import, export, etc of obscene

material. The provision excludes such material when the publication is justified as being for public good on the ground that it is in the interest of science, art, literature, or learning or other objects of general concern; such material is kept or used for bona fide religious purposes; it is sculptured, engraved, painted or represented on or in ancient monuments and temples. (Para 12)

Information Technology Act, 2000; Section 67 – Criminalises the publication and transmission of obscene material in electronic form, covers material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. (Para 7.1)

Information Technology Act, 2000; Section 67A – The facts of the present case certainly do not attract Section 67A as the complainant’s grievance is about excessive usage of vulgar expletives, swear words, and profanities. There is no allegation of any ‘sexually explicit act or conduct’ in the complaint and as such, Section 67A does not get attracted. Section 67A criminalises publication, transmission, causing to publish or transmit – in electronic form – any material that contains sexually explicit act or conduct. Though the three expressions “explicit”, “act”, and “conduct” are open-textured and are capable of encompassing wide meaning, the phrase may have to be seen in the context of ‘obscenity’ as provided in Section 67. (Para 46 & 47)

Quashing of FIR – A court must exercise its jurisdiction to quash an FIR or criminal complaint when the allegations made therein, taken prima facie, do not disclose the commission of any offence. (Para 48)

WITH CRIMINAL APPEAL NO(S). /2024 (Arising out of SLP (Crl.) No. 6786/2023 CRIMINAL APPEAL NO(S). /2024 (Arising out of SLP (Crl.) No. 5532/2023 CRIMINAL APPEAL NO(S). /2024 (Arising out of SLP (Crl.) No. 8385-8387/2023

(Arising out of impugned final judgment and order dated 06-03-2023 in CRLMC No. 2399/2020 and 06-03-2023 in CRLMC No. 2215/2020 passed by the High Court of Delhi at New Delhi)

For Petitioner(s) .Mr. Mukul Rohatgi, Sr. Adv. Mr. Sajan Poovayya, Sr. Adv Mr. Mahesh Agarwal, Adv. Mr. Ameet Naik, Adv. Mr. Ankur Saigal, Adv. Ms. S. Lakshmi Iyer, Adv. Ms. Madhu Gadodiaya, Adv. Mr. Chirag Nayak, Adv. Ms. Sanjanthi Sajan Poovayya, Adv. Mr. Madhu Gadodiaya, Adv. Ms. Misha Rohatgi, Adv. Mr. Devansh Srivastava, Adv. Ms. Raksha Agarwal, Adv. Ms. Kajal Dalal, Adv. Mr. Abhishek Kakker, Adv. Mr. Raksha Agarwal, Adv. Ms. Pallavi Mishra, Adv. Mr. Sujoy Mukharji, Adv. Ms. Tarini Kulkarni, Adv. Mr. E. C. Agrawala, AOR Mrs. Madhavi Divan, Sr. Adv. Mr. Harish Salve, Sr. Adv. Mr. Ameet Naik, Adv. Mr. Raghav Shankar, Adv. Ms. Madhu Gadodia, Adv. Mr. Harshvardhan Jha, Adv. Mrs. Yugandhara Pawar Jha, AOR Mr. Sujoy Mukherjee, Adv. Ms. Tarini Kulkarni, Adv. Ms. Pallavi Mishra, Adv. Mr. Aman Pathak, Adv.

For Respondent(s) Mr. K M Nataraj, A.S.G. Mr. Shreekant Neelappa Terdal, AOR Mr. Sarath Nambiar, Adv. Mr. Sanjay Kr. Tyagi, Adv. Mr. Sridhar Potaraju, Adv. Ms. Nidhi Khanna, Adv. Mr. Karthik Jasra, Adv. Dr. Arun Kr. Yadav, Adv. Mr. Arvind Singh, Adv. Ms. Indira Bhakar, Adv. Mr. Vinayak Sharma, Adv. Mr. Vatsal Joshi, Adv. Mr. Chitransh Sharma, Adv. Mr. Anuj Srinivas Udupa, Adv. Ms. Satvika Thakur, Adv. Mr. Yogi Rajpurohit, Adv. Mr. Aayush Saklani, Adv. Mr. Shubham Mishra, Adv. Mr. Mukesh Kumar Maroria, AOR Mr. V V V Pattabhi Ram, Adv. Mr. Prashant Rawat, Adv. Mr. Purnendu Bajpai, Adv. Mr. Rajat Nair, Adv. Ms. Khushboo Aggarwal, Adv.

J U D G M E N T

PAMIDIGHANTAM SRI NARASIMHA, J.

1. Leave granted.

2. The appellants/accused are the actors, casting director, script writers, creator of the web-series 'College Romance'¹, and the media company that owns the YouTube channel on which the web-series was hosted². They are sought to be investigated and prosecuted for production, transmission, and online publication of obscene and sexually-explicit material under Sections 67 and 67A of the Information Technology Act, 2000³. The appellants' petition under Section 482 of the Code of Criminal Procedure, 1973⁴ for quashing the orders of the Additional Chief Metropolitan Magistrate and Additional Sessions Judge directing registration of FIR against them was dismissed by the High Court by the order impugned before us.⁵ Having considered the matter in detail and for the reasons to follow, we have allowed the appeal, set aside the judgment of the High Court, and quashed the FIR bearing number 403/2023 dated 16.04.2023 at PS Mukherjee Nagar, Delhi against the appellants under Sections 67 and 67A of the IT Act.

3. **Facts:** The short facts leading to filing of the present appeal are as follows:

3.1 A complaint was filed by respondent no. 2 before the Assistant Commissioner of Police that Season 1, Episode 5 of the web-series, titled 'Happily F****d Up', has vulgar and obscene language in its title and various portions of the episode, constituting an offence under Sections 292, 294 and 509 of the Indian Penal Code⁶, Sections 67 and 67A of the IT Act, and Sections 2(c) and 3 of the Indecent Representation of Women (Prohibition) Act, 1986⁷. On 13.03.2019, the complainant filed an application under Section 200 read with Section 156(3) of the CrPC before the ACMM seeking registration of FIR. The Investigating Officer conducted an enquiry and filed an Action Taken Report on 09.04.2019 stating that no cognisable offence is made out and in fact, there is no obscenity in the allegedly offending content.

3.2 However, the ACMM, by order dated 17.09.2019, allowed the complainant's application and directed the registration of an FIR against the appellants under Sections 292 and 294 of the IPC and Sections 67 and 67A of the IT Act as the vulgar language used is prima facie capable of appealing to prurient interests of the audience and is hence obscene.

3.3 The appellants filed a revision petition before the Additional Sessions Judge, who by order dated 10.11.2020 partially modified the order of the ACMM and directed the registration of FIR only under Sections 67 and 67A of the IT Act by relying on the decision of this Court in *Sharat Babu Digumarti v. Government (NCT of Delhi)*⁸.

3.4 The appellants then filed a petition under Section 482 CrPC before the High Court for quashing the abovementioned orders, which came to be dismissed by the judgment dated 06.03.2023, impugned herein. Against the dismissal and the consequent direction to register FIR under Sections 67 and 67A of the IT Act, the present appeals are filed by all the accused/appellants.

3.5 Pursuant to the directions of the High Court, an FIR was registered under Sections 67 and 67A of the IT Act against the appellants on 16.04.2023.

¹ TVF Media Labs Private Ltd.

² Contagious Online Media Network Pvt Ltd.

³ 'IT Act' hereinafter.

⁴ 'CrPC' hereinafter.

⁵ In Criminal Miscellaneous Case No. 2399 of 2020, Criminal Miscellaneous Case No. 2215 of 2020 and Criminal Miscellaneous Case No. 2214 of 2020, judgment dated 06.03.2023 ('Impugned judgment' hereinafter).

⁶ 'IPC' hereinafter.

⁷ 'IRWP Act' hereinafter.

⁸ (2017) 2 SCC 18, 2016 INSC 1131.

4. *Reasoning of the High Court:* The High Court, while dismissing the petition for quashing, held that the object of Sections 67 and 67A of the IT Act is to punish the publication and transmission of obscene and sexually explicit material in the cyber space. It relied on the ‘community standard test’ to determine whether the material is obscene, as laid down by this Court in *Aveek Sarkar v. State of West Bengal*⁹ and followed in decisions of various High Courts¹⁰. By applying this test, the High Court held as follows: *First*, applying the standard of a common prudent man, it found that the episode did not use civil language and there was excessive use of profanities and vulgar expletives, and a clear description and reference to sexually explicit acts. The determination of how the content impacts a common man must be determined in the Indian context, as per Indian morality, keeping in mind contemporary standards of civility and morality.¹¹ In the allegedly offending portion (in Season 1, episode 5 from 5:24 to 6:40 minutes and 25:28 to 25:46 minutes), the male protagonist in a conversation with the female protagonist uses terms describing male and female genitalia and sexual acts, thereby making them sexually explicit and arousing prurient feelings. While the female protagonist is heard objecting to the language and expressing disgust over it, she does so by repeating the same to the male protagonist. The male protagonist then uses more vulgar expletives and indecent language, which is repeated by the female protagonist in a later part of the episode. The High Court held that the depiction of a sexually explicit act is not necessarily through filming but can also be through spoken language. It was found that the persons who are likely to be affected or persons whom such content can deprave or corrupt are impressionable minds in the present case, as there is no disclaimer or warning that classifies the web-series as being suitable only for persons who are 18 years or above. The content crossed the threshold of decency considering its availability to the public, including children. Further, the Court felt that the episode could not be heard in the courtroom without shocking or alarming the people and to maintain the decorum of language.

5. *Second*, a representation that the language used in the episode is the one used in the country and by its youth in educational institutions is not protected under the guarantee of freedom of speech under Article 19(1)(a). *Third*, that the online content curator and the intermediaries are in violation of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 as the content has not been correctly classified as ‘A-rated’ and there is no warning regarding the use of profanities and expletives. *Lastly*, the Court took note that vulgar language, profanities, and swear words must be regulated in the public domain and on social media platforms as they are a threat to impressionable minds like children of tender age. Further, a representation that the use of such language in general parlance is the “*new norma*” is a distortion of facts as it is still not spoken in the presence of the elderly, women and children, or at religious places. To maintain linguistic morality, the sanctity and reverence of languages must be protected.

6. The High Court also rejected the appellants’ contention that the mandatory procedure under Section 154(3) of the CrPC, which is an important procedural safeguard, was not followed before resort to Section 156(3). The High Court preliminarily negated

⁹ (2014) 4 SCC 257, 2014 INSC 75.

¹⁰ *G. Venkateswara Rao v. State of AP* in Writ Petition 1420 of 2020; *Jaykumar Bhagwanrao Gore v. State of Maharashtra* 2017 SCC OnLine Bom 7283; *Pramod Anand Dhumal v. State of Maharashtra* 2021 SCC OnLine Bom 34; *Ekta Kapoor v. State of MP* 2020 SCC OnLine MP 4581, as cited in paras 23-26 of the impugned judgment.

¹¹ In para 37 of the impugned judgment, the High Court relied on *Samaresh Bose v. Amal Mitra* (1985) 4 SCC 289, 1985 INSC 205 where it was held that the regard must be given to contemporary morals and national standards in judging whether content is obscene.

this submission by holding that Section 154(3) only uses the term “may” and not “shall”, and that the complainant anyways approached the ACP, Cyber Cell, North District, who is the authority higher to the SHO.

7. Submissions of the Appellants: We heard Mr. Mukul Rohatgi, Mr. Harish Salve, Ms. Madhavi Divan, Mr. Sajan Poovayya, Sr. Advocates. Learned senior counsels for the appellants have argued that the allegedly offending portions of Season 1, Episode 5 of the web-series do not meet the threshold for obscenity and that the High Court has erred in characterising the material as obscene. Further, these portions do not contain any sexually explicit act and as such no offence under Sections 67 or 67A of the IT Act is made out. Elaborating their submissions, the appellants’ argued:

7.1 Section 67 of the IT Act, that criminalises the publication and transmission of obscene material in electronic form, covers material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. As per *Aveek Sarkar* (supra), the determination of whether some material is obscene must be made by the ‘community standard test’ by considering the work as a whole and then looking at the specific material that has been alleged to be obscene in the context of the whole work. The web-series is a romantic comedy that traces the life of a group of friends who are in college. Its intention is to paint a relatable picture of college life in a cosmopolitan urban setting. There are two specific portions that have been alleged to be obscene. The first segment is where the male protagonist, named Bagga, indiscriminately uses expletives that are heard by the female protagonist, named Naira. Naira objects to the use of such language and points out that the literal meaning of the terms is absurd. Bagga states that these terms are not meant to be taken literally and are a part of common parlance. Naira reiterates her disapproval and threatens Bagga with consequences if he continues to speak in such a manner. Bagga ‘inadvertently’ uses another expletive, due to which Naira leaves from there. In the second segment, Naira and Bagga are with a wider group of friends where Naira is incensed by the statements of another friend and angrily uses the same expletives as Bagga, at which Bagga is delighted. Learned senior counsel has argued that when these scenes are considered individually and in the context of the web-series as a whole, they are not obscene. They only portray the absurdity of the literal meaning of these terms and show their inevitable presence in common language, including by those who disapprove of their use.

7.2 Relying on *Samaresh Bose v. Amal Mitra*¹² and *Bobby Art International v. Om Pal Singh Hoon*¹³, learned senior counsel has argued that while the alleged portions are vulgar, vulgarity does not equate to obscenity. Mere words cannot amount to obscenity unless they involve lascivious elements that arouse sexual thoughts and feelings, which is not the effect of the scenes in the present case.

7.3 The effect of the words must be tested from the standard of an “ordinary man of common sense and prudence”¹⁴, “reasonable, strong-minded, firm and courageous” person and not from the perspective of a hypersensitive person or a weak and vacillating mind¹⁵. The terms used in the allegedly offending portions do not refer to any sexually explicit act and are not obscene as per the community standard test. Therefore, no offence of obscenity is made out under Section 67 of the IT Act.

¹² (1985) 4 SCC 289, 1985 INSC 205.

¹³ (1996) 4 SCC 1, 1996 INSC 595.

¹⁴ *K.A. Abbas v. Union of India* (1970) 2 SCC 780, 1970 INSC 200.

¹⁵ *Ramesh s/o Chotalal Dalal v. Union of India* (1988) 1 SCC 668, 1988 INSC 44.

7.4 Learned senior counsel has also argued that the scenes do not contain any sexually explicit act or conduct, as is required for an offence under Section 67A. Relying on various cases by this Court,¹⁶ they argue that the words in a penal provision must be strictly interpreted. The term ‘sexually explicit act or conduct’ does not cover profanities/ expletives/ swear words, even if the literal meaning of these terms refers to sexual acts. The literal meaning is not intended through the common usage of these words. Rather, they are an expression of emotions such as frustration, rage, and anger.

7.5 Learned senior counsel has also relied on the 50th Standing Committee Report on the 2006 Amendment Bill to the IT Act that introduced the provision, and various High Court decisions,¹⁷ to argue that the intention of Section 67A is to criminalise the publication and transmission of pornographic material that depicts sexual acts or contains sexually explicit conduct that falls short of actual depiction of sexual acts. Since the alleged segments in this case only contain expletives and do not contain any explicit visual or verbal depiction of sexual activity, there is no offence under Section 67A.

7.6 It is of course rightly argued that the right to freedom of speech under Article 19(1)(a) protects artistic creativity and expression.

7.7 Lastly, the learned senior counsel has argued that a higher threshold of tolerance must apply in the present case as the web-series is a form of “pull media”. In pull media, the consumer has more choice in deciding whether or not they wish to view some particular content. Unlike television or radio, where obscene material may be publicly broadcasted and there is little to no choice to the users in terms of what content is made available, the consumption of pull media over the internet gives the viewer complete control and decision-making over what they watch. Therefore, the web-series is only available and accessible to those persons who wish to view it, and hence a higher threshold of obscenity must be applied to “pull content”.

8. Submissions of the complainant: We have heard learned counsel Mr. Arvind Singh, advocate-in-person, who is the complainant (respondent no. 2). He has argued that the present case is not fit for quashing. The alleged content of the web-series falls within the purview of Sections 67 and 67A of the IT Act and also offends Sections 3 and 4 of the Indecent Representation of Women (Prohibition) Act, 1986, which the High Court has failed to consider. Relying on the community standard test and the judgments of this Court in *Aveek Sarkar* (supra) and *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*¹⁸, learned counsel has argued that the abovementioned portions of the webseries are obscene and sexually explicit. *First*, the material appeals to prurient interest in sex, as determined by the average person applying contemporary community standards. The titles of the episodes and the plot revolves around college students engaging in sexual activity. The content of the episodes also uses sexually explicit language and expletives, which cannot be termed as the “new normal”. *Second*, the material portrays sexual conduct in a patently offensive way. *Third*, the material lacks serious literary, artistic, political or scientific value. *Fourth*, the material tends to arouse sexually impure thoughts. *Fifth*, the material is not in the larger interest of public good or in the interest of art,

¹⁶ *Sakshi v. Union of India*, (2004) 5 SCC 518, 2004 INSC 383; *Sanjay Dutt v. State through CBI, Bombay (II)*, (1994) 5 SCC 410, 1994 INSC 371; *Girdhari Lal Gupta v. D.H. Mehta*, (1971) 3 SCC 189, 1970 INSC 164; *Union of India v. Rajiv Kumar*, (2003) 6 SCC 516, 2003 INSC 320; *US Technologies International (P) Ltd. v. Commissioner of Income Tax*, (2023) 8 SCC 24, 2023 INSC 329.

¹⁷ *Vijesh v. State of Kerala*, 2021 SCC OnLine Ker 854; *Pramod Anand Dhumal v. State of Maharashtra*, (2021) SCC OnLine Bom 34; *Majeesh K. Mathew v. State of Kerala*, 2018 SCC OnLine Ker 23374; *Ritesh Sidhwani v. State of U.P.*, 2021 SCC OnLine All 856; *Jaykumar Bhagwanrao Gore v. State of Maharashtra*, 2017 SCC OnLine Bom 7283.

¹⁸ (2015) 6 SCC 1, 2015 INSC 414.

literature, science and therefore, the obscenity is not justified. Learned counsel has also pointed out that the material in the present case is freely available on the internet and is accessible to any person, including children and hence must be regulated in the interests of public order, morality, and decency.

9. Analysis: The central issue is whether the use of expletives and profane language in the titles and content of the episodes of the web-series 'College Romance' constitutes an offence of publication and transmission of obscene and sexually explicit content under Sections 67 and 67A of the IT Act. We will examine each of these provisions in the context of 'obscenity' for the purpose of Section 67 and 'sexually explicit material' for the purpose of Section 67A.

A. Whether the material is 'obscene':

10. We will first deal with the contention that the material is obscene. Section 67 of the IT Act is as follows:

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

11. This Court has laid down the meaning, test, standard, and method for determining whether some material is obscene in the context of Section 292 of the IPC.

12. Section 292 defines 'obscene' as a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object that is lascivious, appeals to the prurient interest, or has such effect, if taken as a whole, that tends to deprave and corrupt persons who are likely to read, see or hear the matter contained in it. The provision criminalises the sale, distribution, public exhibition, circulation, import, export, etc of obscene material. The provision excludes such material when the publication is justified as being for public good on the ground that it is in the interest of science, art, literature, or learning or other objects of general concern; such material is kept or used for bona fide religious purposes; it is sculptured, engraved, painted or represented on or in ancient monuments and temples. The relevant portion of Section 292 has been extracted for reference:

"292. 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 persons, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

It is evident that "obscenity" has been similarly defined in Section 292 and Section 67 as material which is:

i. lascivious; or ii. appeals to the prurient interest; or iii. its effect tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

However, the difference between them is only that Section 67 is a special provision that applies when the obscene material is published or transmitted in the electronic form.¹⁹ Since the alleged offending material is a web-series, the case must be considered under Section 67 of the IT Act²⁰ but the same test for obscenity as laid down under Section 292 will apply since the provisions are similarly worded in that respect. In this context we will examine how obscenity is understood.

13. Recounting the development through judicial precedents: This Court upheld the constitutional validity of Section 292 as a reasonable restriction on free speech and applied the *Hicklin* test²¹ to determine whether the book ‘Lady Chatterley’s Lover’ was obscene in the decision of *Ranjit D. Udeshi v. State of Maharashtra*.²² As per the *Hicklin* test, a material is obscene if it has the tendency to deprave and corrupt the minds of those who are open to such immoral influences and into whose hands the publication is likely to fall:²³

“... I think the test of obscenity is this, 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 ... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.”

14. This test lays emphasis on the potentiality of the material to deprave and corrupt by immoral influences.²⁴ To determine this, the Court must apply itself to consider each work at a time. It must take an overall view of the obscene matter in the setting of the whole work but also consider the obscene matter by itself and separately to find out whether it is so grossly obscene and it is likely to deprave and corrupt. A mere stray word or insignificant passage would not suffice to qualify the material as obscene.²⁵ The Court also clarified that sex and nudity in art and literature cannot in and of themselves be regarded as evidence of obscenity without something more.²⁶ Sex must be treated in manner that is offensive to public decency and morality, when judged by our national standards, and must be likely to pander to lascivious, prurient, sexually precocious minds, and appeal to or have the tendency to appeal to the “carnal side of human nature” for it to be obscene.²⁷

15. The Court also emphasised its role in maintaining a delicate balance between protecting freedom of speech and artistic freedom on the one hand, and public decency and morality on the other. It held that when art and obscenity are mixed, the art must be so preponderating that the obscenity is pushed into the shadows or is trivial and insignificant and can be overlooked.²⁸ Similarly, if the matter has a preponderating social purpose and gain that outweighs the obscenity of the content (such as medical textbooks), then such material is constitutionally protected by freedom of speech and cannot be criminalised as obscene.²⁹

¹⁹ *Sharat Babu Digumarti* (supra).

²⁰ *ibid.*

²¹ (1868) LR 3 QB 360.

²² AIR 1965 SC 881, 1964 INSC 171.

²³ *ibid.*, para 14.

²⁴ *ibid.*, para 19.

²⁵ *ibid.*, 20, 21.

²⁶ *ibid.*, para 16.

²⁷ *ibid.*, paras 21 and 22.

²⁸ *ibid.*, para 21.

²⁹ *ibid.*, paras 9, 22, and 29.

16. The Court followed the *Hicklin* test and *Ranjit Udeshi* (supra) in *Shri Chandrakant Kalyandas Kakodkar v. State of Maharashtra*³⁰ but it also introduced certain caveats and refined the test to some extent. Considering the material in that case, a Marathi short story *Shama*, the Court held that the story read as a whole does not amount to pornography or pander to the prurient interest. Even if the work is not of high literary quality and is immature and of bad taste, there was nothing that could deprave or corrupt those in whose hands it is likely to fall, including adolescents.³¹ The Court also cautioned that the standard for the artist or the writer is not that the adolescent mind must not be brought in contact with sex or that the work must be expunged of all references to sex, irrespective of whether it is the dominant theme.³² The test for obscenity was stated as: “*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 thoughts aroused in their minds.*”³³

17. In *KA Abbas v. Union of India*³⁴ the Court summarised the test and process to determine obscenity as follows:

“(1) *Treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more.*

(2) *Comparison of one book with another to find the extent of permissible action is not necessary.*

(3) *The delicate task of deciding what is artistic and what is obscene has to be performed by courts and in the last resort, by the Supreme Court and so, oral evidence of men of literature or others on the question of obscenity is not relevant.*

(4) *An overall view of the obscene matter in the setting of the whole work would of course be necessary but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity is so decided that it is likely to deprave or corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall.*

(5) *The interests of contemporary society and particularly the influence of the book, etc., on it must not be overlooked.*

(6) *Where obscenity and art are mixed, art must be so preponderating as to throw obscenity into shadow or render the obscenity so trivial and insignificant that it can have no effect and can be overlooked.*

(7) *Treating with sex in a manner offensive to public decency or morality which are the words of our Fundamental Law judged by our national standards and considered likely to pander to lescivious, purlent or sexually precocious minds must determine the result.*

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

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

³⁰ (1969) 2 SCC 687, 1969 INSC 202.

³¹ *ibid*, paras 9 and 10.

³² *ibid*, para 12.

³³ *ibid*, para 12.

³⁴ (1970) 2 SCC 780, para 48.

(10) Knowledge is not a part of the guilty act. The offender's knowledge of the obscenity of the book is not required under the law and it is a case of strict liability.”

18. In *Samaresh Bose* (supra), which has been relied on by the appellants, this Court differentiated vulgarity from obscenity. The material in question in this case was a Bengali novel titled ‘Prajapati’. The Court noted that while slang and unconventional words had been used in the book along with suggestions of sexual acts, there was no description of any overt act of sex. The words are vulgar and create a feeling of disgust and revulsion and may shock the reader but this does not necessarily amount to obscenity, which is the tendency to deprave and corrupt.³⁵ It held that the use of slang and unconventional words; an emphasis on sex; a description of female bodies; and narrations of feelings, thoughts and actions in vulgar language in the novel do not render the material obscene.³⁶ Further, a mere reference to sex is insufficient for obscenity and does not make a material unsuitable for adolescents.³⁷

19. The Court also summarised the process that must be followed to objectively assess whether some material is obscene. It held that the judge must first place himself in the position of the author to understand his perspective and what he seeks to convey and whether it has any literary or artistic value. The judge must then place himself in the position of a reader of every age group in whose hands the book (or material) is likely to fall and determine the possible effect or influence of the material on the minds of such persons. The relevant portion reads:

“29. ...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 IPC”. 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 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 viewpoint 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

³⁵ *Samaresh Bose* (supra), para 35.

³⁶ *ibid*, para 35.

³⁷ *ibid*, para 35.

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 IPC 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 subconscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the court to discharge the duty of making a proper assessment.”

20. The Court then applied this test to the novel in question. By placing themselves in the position of the author and judging the work from his perspective, the Court found that his intention was to expose social evils and ills, for which the author has used his own technique. Similarly, the Court placed itself in the position of the readers who are likely to read the book. It held that the book was likely to be read by readers of “both sexes and all ages between teenagers and the aged” and found that while it may create a sense of shock and disgust, no reader would be deprived, debased, or encouraged to lasciviousness by reading the book.³⁸

21. In *Bobby Art International* (supra) the question before the Court was whether certain scenes from the film ‘Bandit Queen’ that depicted rape and nudity were obscene. Here, obscenity was not considered under Section 292 but under the 1991 Guidelines for Censor Board certification under the Cinematograph Act, 1952.³⁹ The Court did not cite or follow the *Hicklin* test as laid down in *Ranjit Udeshi* (supra) and *Chandrakant Kalyandas* (supra). Instead, it relied on the Guidelines and laid down the test for obscenity as follows:

“22. The guidelines aforementioned have been carefully drawn. They require the authorities concerned with film certification to be responsive to the values and standards of society and take note of social change. They are required to ensure that “artistic expression and creative freedom are not unduly curbed”. The film must be “judged in its entirety from the point of view of its overall impact”. It must also be judged in the light of the period depicted and the contemporary standards of the people to whom it relates, but it must not deprave the morality of the audience. Clause 2 requires that human sensibilities are not offended by vulgarity, obscenity or depravity, that scenes degrading or denigrating women are not presented and scenes of sexual violence against women

³⁸ *ibid.*

³⁹ The relevant guidelines, as extracted in *Bobby Art International* (supra), are as follows:

“15. The guidelines earlier issued were revised in 1991. Clause (1) thereof reads thus:

“1. The objectives of film certification will be to ensure that—

- (a) the medium of film remains responsible and sensitive to the values and standards of society;
- (b) artistic expression and creative freedom are not unduly curbed;
- (c) certification is responsive to social change;
- (d) the medium of film provides clean and healthy entertainment; and
- (e) as far as possible, the film is of aesthetic value and cinematically of a good standard.”

Clause (2) states that the Board of Film Censors shall ensure that—

“2. (vii) human sensibilities are not offended by vulgarity, obscenity or depravity;

- (ix) scenes degrading or denigrating women in any manner are not presented;

- (x) scenes involving sexual violence against women like attempt to rape, rape or any form of molestation or scenes of a similar nature are avoided, and if any such incident is germane to the theme, they shall be reduced to the minimum and no details are shown;

*****”**

Clause (3) reads thus:

“3. The Board of Film Certification shall also ensure that the film— (i) is judged in its entirety from the point of view of the overall impact; and

(ii) is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience.”

are avoided, but if such scenes are germane to the theme, they be reduced to a minimum and not particularised.”

22. The Court first considered the plot and theme of the film as a whole and then considered the individual scenes of nudity and rape. Judging the work as a whole and the alleged offending material specifically, the Court held that the scenes are likely to evoke tears, pity, horror, and shame. Only a perverted mind might be aroused in such a situation, and the purpose of censorship is not to protect the pervert or assuage the susceptibilities of the over-sensitive.⁴⁰ Further, the use of swear words and expletives that are heard everyday was also held to be harmless.⁴¹ The Court rather emphasised the overarching social purpose and message of the film – to condemn rape and violence against women by showing the trauma and emotional turmoil of a victim of rape and to evoke sympathy for her and disgust for the rapist.⁴² Thus, the material was held as not being obscene.

23. Similarly, in *Director General, Directorate General of Doordarshan v. Anand Patwardhan*⁴³, the Court applied the test of ‘contemporary community standards’ to determine whether a documentary is obscene for the purpose of certification and telecast on Doordarshan. A three-prong test for obscenity was formulated as follows:

“(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals 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; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁴⁴

24. The Court relied on *Ramesh v. Union of India*,⁴⁵ where it was held that the effect of the words must be judged from the standards of a reasonable, strong-minded, firm and courageous person, and not from the perspective of weak and vacillating minds or those who sense danger in every hostile point of view.⁴⁶ Considering the documentary as a whole to determine its message, which cannot be conveyed by watching only certain bits, it was held that the film portrays social evils and does not seek to cater to the prurient interests of any person.⁴⁷

25. The law on determining obscenity has been summarised and reiterated in *Ajay Goswami v. Union of India*⁴⁸ where the Court cited both Indian precedent and American jurisprudence. The principles that can be culled out from the judgment are as follows:

- i. Obscenity must be judged with regard to contemporary mores and national standards.⁴⁹
- ii. The work must be judged as a whole and the alleged offending material must also be separately examined to judge whether they are so grossly obscene that they are likely to

⁴⁰ *ibid*, paras 27 and 28.

⁴¹ *ibid*, para 29.

⁴² *ibid*, paras 28, 31, 33.

⁴³ (2006) 8 SCC 433, 2006 INSC 558.

⁴⁴ *ibid*, para 32.

⁴⁵ (1988) 1 SCC 668, 1988 INSC 44.

⁴⁶ *Directorate General of Doordarshan* (supra), para 37.

⁴⁷ *ibid*, para 38.

⁴⁸ (2007) 1 SCC 143, 2006 INSC 995.

⁴⁹ *ibid*, para 67.

deprave and corrupt the reader or viewer.⁵⁰ There must be a clear and present danger that has proximate and direct nexus with the material.⁵¹

iii. All sex-oriented material and nudity per se are not always obscene.⁵²

iv. The effect of the work must be judged from the standard of *an average adult human being*.⁵³ Content cannot be regulated from the benchmark of what is appropriate for children as then the adult population would be restricted to read and see only what is fit for children.⁵⁴ Likewise, regulation of material cannot be as per the standard of a hypersensitive man and must be judged as per an “ordinary man of common sense and prudence”.⁵⁵

v. Where art and obscenity are mixed, it must be seen whether the artistic, literary or social merit of the work overweighs its obscenity and makes the obscene content insignificant or trivial. In other words, there must be a preponderating social purpose or profit for the work to be constitutionally protected as free speech. Similarly, a different approach may have to be used when the material propagates ideas, opinions, and information of public interest as then the interest of society will tilt the balance in favour of protecting the freedom of speech (for example, with medical textbooks).⁵⁶

vi. The Court must perform the task of balancing what is artistic and what is obscene. To perform this delicate exercise, it can rely on the evidence of men of literature, reputed and recognised authors to assess whether there is obscenity.⁵⁷

26. In *S. Khushboo v. Kanniammal*,⁵⁸ the issue pertained to quashing of FIR filed against the appellant, inter alia under Section 292 of the IPC, for an interview in a magazine where she called for the social acceptance of premarital sex, especially in live-in relationships, and cautioned women to take adequate protection to prevent unwanted pregnancies and sexually transmitted infections. The Court held that no offence was made out under Section 292 as the content is not lascivious (i.e., expressing or causing sexual desire); does not appeal to the prurient interest (i.e., excessive interest in sexual matters); and does not have the effect of tending to deprave and corrupt persons who are likely to read, hear, or see the material.⁵⁹ It was reiterated that mere reference to sex does not make the material obscene without examining the context of such reference.⁶⁰ The Court held that obscenity must be gauged with respect to “*contemporary community standards that reflect the sensibilities as well as the tolerance levels of an average reasonable person*.”⁶¹ In this case, the appellant had not described any sexual act or said anything that arouses sexual desire in the mind of a reasonable and prudent reader to make the content obscene.⁶² Hence the FIR was quashed by this Court.

27. A Division Bench of this Court in *Aveek Sarkar* (supra) also quashed an FIR under Section 292 against the magazine cover of *Sports World* and *Anandbazar Patrika* that

⁵⁰ *ibid*, para 68.

⁵¹ *ibid*, para 70.

⁵² *ibid*, paras 7 and 61.

⁵³ *ibid*, para 7.

⁵⁴ *ibid*, para 62.

⁵⁵ *ibid*, para 71.

⁵⁶ *ibid*, para 66.

⁵⁷ *ibid*, para 69.

⁵⁸ (2010) 5 SCC 600, 2010 INSC 247.

⁵⁹ *ibid*, para 24.

⁶⁰ *ibid*, para 25.

⁶¹ *ibid*, para 27.

⁶² *ibid*, para 28.

carried the image of Boris Becker, a tennis player, posing nude with his fiancée, who are an interracial couple. The Court held that while judging a photograph, article or book to be obscene, “*regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons*”.⁶³ The Court held that the *Hicklin* test must not be applied as it “*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.*”⁶⁴⁶⁵ Even in the United States, where the test was first formulated, the courts no longer apply the *Hicklin* test and instead apply the test formulated in *Roth v. United States*⁶⁵ where the US Supreme Court held that sex-related material is obscene only when it has the tendency of exciting lustful thoughts when judged from the perspective of an average person by applying the community standards test. Similarly, in Canada, the dominant test is the ‘community standards problem test’ as per which a work qualifies as obscene when the exploitation of sex is its dominant characteristic and such exploitation is undue.⁶⁶ Taking note of these jurisprudential developments, the Court in *Aveek Sarkar* markedly moved away from the *Hicklin* test to the “community standard test” where the material is considered as a whole to determine whether the specific portions have the tendency to deprave and corrupt.⁶⁷

28. Applying this test, it was held that a picture of a nude/seminude woman is not per se obscene unless it arouses sexual desire or overtly reveals sexual desire or has the tendency of exciting lustful thoughts.⁶⁸ In the present case, the posture and the background of the woman posing with her fiancée, whose photograph was taken by her father, does not have the tendency to deprave or corrupt those in whose hands the magazine would fall when considered in light of the broader social message of the picture against apartheid, racism, and to promote love and marriage across race.⁶⁹ We may note that this Court followed the community standards test in *Devidas Ramachandra Tuljapurkar* (supra).

29. Lastly, in *N. Radhakrishnan v. Union of India*,⁷⁰ it was again held that the Court must not be guided by the sensitivity of a pervert viewer and the setting of the whole work, its purpose, and the constituent elements of the character must be kept in mind while judging for obscenity.⁷¹

30. *Application of the principles in the above-referred precedents to the facts of the present case:* The purpose of elaborately tracing the precedents on Section 292 is to identify the essential content of the offence of obscenity, the test and the standard by which the allegedly offending material must be judged, and the oral and documentary evidences and the process that the court must rely on and follow for arriving at its conclusion.

31. For applying the test for obscenity to the allegedly offending portions of the web-series, it is important to take note of the approach adopted by the High Court.

⁶³ *Aveek Sarkar* (supra), para 18.

⁶⁴ *ibid*, para 20.

⁶⁵ US 476 (1957).

⁶⁶ *R v. Butler*, (1992) 1 SCR 452 (Can SC) as cited in *Aveek Sarkar* (supra), para 22.

⁶⁷ *Aveek Sarkar* (supra), para 23.

⁶⁸ *ibid*, para 23.

⁶⁹ *ibid*, paras 27 and 28.

⁷⁰ (2018) 9 SCC 725, 2018 INSC 784.

⁷¹ *ibid*, para 33.

32. The High Court purportedly applied the community standard test as laid down in *Aveek Sarkar* (supra) to arrive at its conclusion.⁷² It correctly states the position of law that to determine whether certain content is obscene, the standard of determination is that of an ordinary common person and not a hypersensitive person.⁷³

33. *Wrong question, wrong answer:* However, the High Court has incorrectly framed the question for inquiry. The issue framed by the High Court is whether the language employed in the episode is contemporarily used by the youth and whether it meets the threshold of decency. The High Court has framed the question for inquiry in the following terms:

“29. As stated above, this Court had watched a few episodes of the web series “College Romance” and the episode in question to decide the case more effectively and fairly. The intent behind watching the said web series was to analyze fairly as to whether the contention raised on behalf of the petitioners that the language used in the web series is “in language”, or is “language used by new generation in colleges”, or “the students in law colleges and the younger generation in colleges uses this language only”, is without merit or not.

30. This Court also wanted to test/examine the test of a common prudent man in practicality, acting itself as a common prudent person, so as to check as to whether such language, in fact, can be heard by a common prudent man without being embarrassed or finding it against decency or against the concept of decency...

(emphasis supplied)

34. From a plain reading of Section 67 and the material that is characterised as ‘obscene’ therein, it is clear that the High Court posed the wrong question, and it has naturally arrived at a wrong answer. At the outset, the enquiry under Section 292 of the IPC or under Section 67 of the IT Act does not hinge on whether the language or words are decent, or whether they are commonly used in the country. Rather, from the plain language of the provision, the inquiry is to determine whether the content is lascivious, appeals to prurient interests, or tends to deprave and corrupt the minds of those in whose hands it is likely to fall.⁷⁴ The High Court embarked on a wrong journey and arrived at the wrong destination.

35. *Profanity is not per se obscene:* The second threshold error is in the finding of the High Court that the language is full of swear words, profanities, and vulgar expletives that could not be heard in open court and also that it is not the language of the youth. Based on this finding, the High Court has held that the content is obscene as it “will affect and will tend to deprave and corrupt impressionable minds”. In its own words, the High Court held:

“30. ...this Court found that the actors/protagonists in the web series are not using the language used in our country i.e. civil language. The Court not only found excessive use of “swear words”, “profane language” and “vulgar expletives” being used, it rather found that the web series had a series of such words in one sentence with few Hindi sentences here and there. In the episode in question, there is clear description and reference to a sexually explicit act. The Court had to watch the episodes with the aid of earphones, in the chamber, as the profanity of language used was of the extent that it could not have been heard without shocking or alarming the people around and keeping in mind the decorum of language which is maintained by a common prudent man whether in professional or public domain or even with family members at home. Most certainly, this Court notes that this is not the language that nation’s youth or otherwise citizens of this country use, and this language cannot be called the frequently spoken language used in our country.

⁷² Impugned judgment, paras 21 and 22.

⁷³ *ibid*, para 28.

⁷⁴ Section 67, IT Act; *Ranjit Udeshi* (supra).

36. *When the entire content of the series is seen in the light of above, it would lead any common person to a conclusion that the language used in the web series is foul, indecent and profane to the extent that it will affect and will tend to deprave and corrupt impressionable minds. Therefore, on the basis of this finding it can be held that the content of the web series will certainly attract the criminality as envisaged under Section 67 of the Information Technology Act.”*

(emphasis supplied)

The specific material which the High Court found to be obscene, i.e., that which tends to deprave and corrupt impressionable minds, was “foul, indecent and profane” language. Nothing more. The High Court has equated profanities and vulgarity with obscenity, without undertaking a proper or detailed analysis into how such language, by itself, could be sexual, lascivious, prurient, or depraving and corrupting. It is well-established from the precedents cited that vulgarity and profanities do not per se amount to obscenity.⁷⁵ While a person may find vulgar and expletive-filled language to be distasteful, unpalatable, uncivil, and improper, that by itself is not sufficient to be ‘obscene’. Obscenity relates to material that arouses sexual and lustful thoughts, which is not at all the effect of the abusive language or profanities that have been employed in the episode. Rather, such language may evoke disgust, revulsion, or shock.⁷⁶ The reality of the High Court’s finding is that once it found the language to be profane and vulgar, it has in fact moved away from the requirements of obscenity under Section 67 of the IT Act. The High Court failed to notice the inherent contradiction in its conclusions.

36. *No objective consideration: Third, the High Court has erred in the legal approach followed by it while assessing whether the material is obscene. In *Samaresh Bose* (supra), this Court has laid down, in great depth and detail, the process and method that must be followed to objectively judge whether the material is obscene.⁷⁷ The court must consider the work as a whole and then the specific portions that have been alleged to be obscene in the context of the whole work to arrive at its conclusion.⁷⁸ Further, the court must first step into the position of the creator to understand what he intends to convey from the work and whether it has any literary or artistic value. It must then step into the position of the reader or viewer who is likely to consume the work and appreciate the possible influence on the minds of such reader.⁷⁹ However, the High Court has not followed this judicial process before arriving at its conclusion, which is as follows:*

“43. Coming back to case at hand, the specific complaint of petitioner is that in Episode 05 of Season 01, airtime starting from 5 minutes and 24 seconds onwards upto 6 minutes and 40 seconds as well as from 25 minutes and 28 seconds upto 25 minutes and 46 seconds, the language of male and female protagonist is full of obscenity, vulgar words and expletives, without there being any warning or filter imposing restriction of age of viewers to whom the content should be visible. The language used in Episode 05 of Season 01 was heard by this Court, and the level of obscenity of the language and sentences used was such that this Court cannot reproduce it in the judgment itself for the purpose of adjudication. The language used in the web series at the abovementioned time referred to a sexually explicit act in spoken language. It is not just an expletive, but is profane and vulgar language being used referring to a sexually explicit act which certainly cannot be termed common or commonly accepted language. Rather the female protagonist in the series itself is heard objecting to the male protagonist and expressing her disgust over use of this language by repeating the same language herself to the male protagonist.

⁷⁵ *Samaresh Bose* (supra), para 35; *Bobby Art International* (supra), para 29; *NS Madhanagopal v. K. Lalitha*, 2022 SCC OnLine SC 2030, 2022 INSC 1323.

⁷⁶ *Samaresh Bose* (supra), para 35.

⁷⁷ *Samaresh Bose* (supra), para 29.

⁷⁸ *ibid*; *Ranjit Udeshi* (supra), paras 20 and 21.

⁷⁹ *Samaresh Bose* (supra), para 29.

In answer to that, the male protagonist further uses more vulgar expletives and indecent language which is bound to disgust a normal prudent man, if heard in public. Later in the said episode, the female protagonist uses the same obscene, sexually explicit language to others and the male protagonist is seen enjoying and appreciating her conduct. The male protagonist uses words describing male and female genitalia and sexual act, thus by words, painting pictures of sexually explicit act which brings it under ambit of arousing prurient feelings by so doing. There's no escape from the same by saying that the said act was not done, shown or filmed. Depiction does not connote filming alone but conveying by a medium, which in this case is spoken language. Therefore, the content as discussed above will attract the criminality as laid down under Section 67 as well as 67A of IT Act.

(emphasis supplied)

37. It is evident from the above passages that the High Court has taken the meaning of the language in its literal sense, outside the context in which such expletives have been spoken. While the literal meaning of the terms used may be sexual in nature and they may refer to sexual acts, their usage does not arouse sexual feelings or lust in any viewer of ordinary prudence and common sense. Rather, the common usage of these words is reflective of emotions of anger, rage, frustration, grief, or perhaps excitement. By taking the literal meaning of these words, the High Court failed to consider the specific material (profane language) in the context of the larger web-series and by the standard of an “ordinary man of common sense and prudence”. When we notice the use of such language in the context of the plot and theme of the web-series, which is a light-hearted show on the college lives of young students, it is clear that the use of these terms is not related to sex and does not have any sexual connotation. Neither did the creator of the web-series intend for the language to be taken in its literal sense nor is that the impact on a reasonable viewer who will watch the material. Therefore, there is a clear error in the legal approach adopted by the High Court in analysing and examining the material to determine obscenity.

38. Furthermore, the objectivity with which a judicial mind is expected to examine the work in question was completely lost when the High Court evidently could not extricate itself from the courtroom atmosphere. The sensitivity and discomfort of the High Court is evident when it held:

“29. ...The Court had to watch the episodes with the aid of earphones, in the chamber, as the profanity of language used was of the extent that it could not have been heard without shocking or alarming the people around and keeping in mind the decorum of language which is maintained by a common prudent man whether in professional or public domain or even with family members at home...”

39. *Application of wrong standard:* The last issue is that of the standard or perspective used by the High Court to determine obscenity. It is well-settled that the standard for determination cannot be an adolescent's or child's mind, or a hypersensitive person who is susceptible to such influences.⁸⁰ However, the High Court has incorrectly used the standard of “impressionable minds” to gauge the effect of the material and has therefore erred in applying the test for obscenity correctly.⁸¹

40. The High Court has made several remarks on the need to maintain linguistic purity, civility, and morality by retaining the purity of language and deprecating the representation of expletives-filled language as the “new normal”. The real test is to examine if the

⁸⁰ Chandrakant Kalyandas (supra), para 12; Samaresh Bose (supra), para 35; Ajay Goswami (supra); Aweek Sarkar (supra), para 20.

⁸¹ Impugned judgment, paras 35, 36 and 74.

language is in anyway obscene under Section 67 of the IT Act. The approach adopted by the High Court, as explained earlier, is based on irrelevant considerations.

41. Similarly, the metric to assess obscenity and legality of any content cannot be that it must be appropriate to play in the courtroom while maintaining the court's decorum and integrity. Such an approach unduly curtails the freedom of expression that can be exercised and compels the maker of the content to meet the requirements of judicial propriety, formality, and official language. Here again, the High Court committed a serious error in decision making.

42. The High Court has also expressed concern and anxiety about the free availability of the web-series on the internet to the youth and that it was not classified as being restricted to those above the age of 18 years. While such anxiety is not misplaced, the availability of content that contains profanities and swear words cannot be regulated by criminalising it as obscene. Apart from being a non-sequitur, it is a disproportionate and excessive measure that violates freedom of speech, expression, and artistic creativity.

43. For the reasons stated above, we are of the opinion that the High Court was not correct in its conclusion that the web-series has obscene content and that therefore the provisions of Section 67 of the IT Act are attracted.

B. Whether the material is 'sexually explicit' for the purpose of Section 67A:

44. Section 67A of the IT Act criminalises the publication and transmission of sexually explicit content. The provision is as follows:

"67A. Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form.– Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of 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 ten lakh rupees."

45. The High Court has not given any reason whatsoever on how Section 67A is attracted to the facts of the present case. In our opinion, the offence of Section 67A is not at all made out.

46. The facts of the present case certainly do not attract Section 67A as the complainant's grievance is about excessive usage of vulgar expletives, swear words, and profanities. There is no allegation of any '*sexually explicit act or conduct*' in the complaint and as such, Section 67A does not get attracted.

47. Section 67A criminalises publication, transmission, causing to publish or transmit – in electronic form – any material that contains sexually explicit act or conduct. Though the three expressions "explicit", "act", and "conduct" are open-textured and are capable of encompassing wide meaning, the phrase may have to be seen in the context of '*obscenity*' as provided in Section 67. Thus, there could be a connect between Section 67A and Section 67 itself. For example, there could be sexually explicit act or conduct which may not be lascivious. Equally, such act or conduct might not appeal to prurient interests. On the contrary, a sexually explicit act or conduct presented in an artistic or a devotional form may have exactly the opposite effect, rather than tending to deprave and corrupt a person.

C. Quashing the FIR:

48. No offence of publication or transmission of any material in electronic form, which is obscene, lascivious, or appealing to prurient interest, and/or having the effect of tending

to deprave and corrupt persons, as provided under Section 67 of the IT act, is made out. Equally, no case of publication or transmission of material containing sexually explicit act or conduct, as provided under Section 67A, is made out from the bare reading of the complaint. It is settled that a court must exercise its jurisdiction to quash an FIR or criminal complaint when the allegations made therein, taken prima facie, do not disclose the commission of any offence.⁸²

49. In view of the above, we allow the appeals against the judgment of the High Court dated 06.03.2023 in Criminal Miscellaneous Case No. 2399 of 2020, Criminal Miscellaneous Case No. 2215 of 2020 and Criminal Miscellaneous Case No. 2214 of 2020, and set aside the judgment of the High Court, and quash FIR 403/2023 registered at Police Station Mukherjee Nagar, Delhi dated 16.04.2023 under Sections 67 and 67A of the IT Act against the appellants herein.

50. Pending applications, if any, shall stand disposed of.

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⁸² *State of Haryana v. Bhajan Lal*, (1992) SCC Supp (1) 335, 1992 INSC 357; *State of AP v. Golconda Linga Swamy*, (2004) 6 SCC 522, 2004 INSC 404; *Zandu Pharmaceutical Works Ltd v. Mohd Sharaful Haque*, (2005) 1 SCC 122, 2004 INSC 628.