

**THE HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE****S.B. HON'BLE JUSTICE SHRI SHAILENDRA SHUKLA**

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| Case No.                         | : | <b>M.Cr.C.No.28386/2020</b>  |
| Parties name                     | : | <b>Ekta Kapoor v. State of M.P. &amp; Anr.</b>   |
| Date of Judgement                | : | 11/11/20   |
| Bench constituted of             | : | Hon'ble Justice Shri Shailendra Shukla   |
| Order passed by                  | : | Hon'ble Justice Shailendra Shukla  |
| Whether approved for reporting   | : | Yes  |
| Name of counsels for the parties | : | <p>Heard the learned counsel through video conferencing.</p> <p>Shri Siddharth Luthra, learned Senior Advocate with Shri Nitesh Jain, Advocate, Shri Anand Soni, Advocate and Shri Manoj Silawat, Advocate for the petitioner.</p> <p>Shri Pushyamitra Bhargava, learned Additional Advocate General with Shri Aniruddha Gokhale, Public Prosecutor and Shri Yash Tiwari, Advocate for the respondent/State.</p> <p>Shri B. Gautam, Advocate with Shri Neeraj Gautam, Advocate for the respondent No.2.</p> <p>Shri Valmik Sakargayen, Advocate present-in-person.</p> |
| Law laid down                    | : | <p>Facts of the case :- The petition filed under Section 482 of Cr.P.C, seeking quashment of FIR filed under Section Sections 294, 298 and 34 of IPC, under Sections 67 and 67-A of I.T. Act and Section 3 of State Emblem Act.</p> <p>The impugned episode is episode 1 of season 2 in XXX uncensored shown on ALT Balaji platform was claimed to have been published/transmitted, or caused to have been done by the</p>   |

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|  | <p>petitioner.</p> <p>As per complainant, the aforesaid episode was obscene and caused annoyance to complainant, hurt his religious feelings and tendered the dishonesty the National Emblem.</p> <p><b><u>Contentions raised</u></b></p> <p>(1) That petitioner was not having the knowledge of the contents of episode because she is not the producer or the director and her name is not reflected in the credits for the episode.</p> <p><b>Held :-</b> The episode was released on ALT Balaji platform of which the petitioner was Managing Director. She is presumed to have knowledge about the contents of the episode <b><u>Ranjit D. Udeshi vs. State of Maharashtra reported in AIR 1965 SC 881.</u></b></p> <p>(2) That the petitioner cannot be prosecuted in isolation without impleading the company ALT Balaji as co-accused in view of the citation in the case of <b><u>Aneeta Hada vs. Godfather Travels and Tours Private Limited reported in 2012(5) SCC Page 661.</u></b></p> <p><b>Held –</b> the submission is premature, as the matter is still under investigation, the charge-sheet has yet not been filed and the matter is distinguishable from the case of <b><u>Aneeta Hada's</u></b> case (supra).</p> |
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|  | <p>The complainant in his FIR has sought action against ALT Balaji as well which may be impleaded as an accused in the charge sheet (Para 55 to 59).</p> <p>(3) That the episode does not depict obscenity.</p> <p><b>Held</b> :- The episode contains depiction of simulated copulation and it cannot be stated outrightly that material is not obscene in nature.</p> <p>In order to determine whether the matter is obscene or not objective assessment of the material is required. In order to do away the chance of subjective attitude of a Judge involving his personal preference, recording of evidence would be necessitated (Para 72 to 73).</p> <p>(4) That the impugned material is available to be watched only by adults.</p> <p><b>Held</b> :- if the material is obscene, it is immaterial that a subscriber is major in terms of age (Para 81).</p> <p>(5) That inappropriate restrictions would infringe the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India.</p> |
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|  | <p><b>Held :-</b> Freedom is subject to reasonable restriction and if the material is against public decency and morality and the impugned material is obscene as per Section 292 of IPC, such freedom is liable to be curtailed under Article 19(2) of the Constitution <b><u>Ranjit D. Udeshi</u></b> (supra) relied upon (Para 82).</p> <p>(6) That forewarning by way of disclaimer and terms of use itself absolves the petitioner and that the user should exit from the episode if he finds it contents to be inappropriate.</p> <p><b>Held :-</b> Such disclaimer and terms of use do not insulate the petitioner if the material itself invokes provision of Section 67 of I.T. Act (Para 90 and 91).</p> <p>(7) That a person who has paid the subscription fees and has watched the material cannot complain later on that the material is obscene, in view of the maxim of '<i>Volenti Non-Fit Injuria</i>'.</p> <p><b>Held :-</b> The principle of '<i>Volenti Non-Fit Injuria</i>' is applicable in matters of tortuous liability and not criminal liability (Para 93).</p> <p>(8) That the provisions of Section</p> |
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|  | <p>294 of IPC are not applicable because the episode is not shown on public space.</p> <p><b>Held :-</b> In view of Section 80(1) of I.T. Act containing the words “accessible to public”, the platform on which the material is being shown would be a public place. Contention rejected (Para 101 to 102).</p> <p>(9) That the episode depicts dishonor of National Emblem.</p> <p><b>Held :-</b> contention is accepted in view of the terminology of Section 3 of the State Emblem of India (Prohibition of Improper Use) Act, 2005 (Para 105 to 109).</p> <p><b>(10) After due deliberation the petition under Section 482 of Cr.P.C stands dismissed.</b></p> |
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**HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE**

**S.B : HON'BLE JUSTICE SHRI SHAIENDRA SHUKLA**

**M.Cr.C. No.28386/2020**

**EKTA KAPOOR**

*versus*

**STATE OF MADHYA PRADESH & ANR.**

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Heard the learned counsel through video conferencing.

Shri Siddharth Luthra, learned Senior Advocate with Shri Nitesh Jain, Advocate, Shri Anand Soni, Advocate and Shri Manoj Silawat, Advocate for the petitioner.

Shri Pushyamitra Bhargava, learned Additional Advocate General with Shri Aniruddha Gokhale, Public Prosecutor and Shri Yash Tiwari, Advocate for the respondent/State.

Shri B. Gautam, Advocate with Shri Neeraj Gautam, Advocate for the respondent No.2.

Shri Valmik Sakargayen, Advocate present-in-person.

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**ORDER**  
**(11.11.2020)**

This order seeks to dispose of the petition filed under Section 482 of Cr.P.C for quashment of FIR bearing Crime No.02142020, registered at police station Anapurna, Indore (M.P.), under the provisions of Sections 294, 298 and 34 of IPC, under Sections 67 and 67-A of I.T. Act and Section 3 of State Emblem Act.

2. Facts which are relevant for discussion in this matter are that the respondent No.2 filed a complaint against the petitioner with regard to transmission of an episode in web series (XXX Uncensored) on Zee 5 which is being promoted by ALT Balaji, a concern owned by petitioner and her mother.

3. The web series contains different stories or episodes which the complainant has mentioned as obscene and vulgar to an extent that it calls for penal action. Of specific reference is an episode entitled as 'Pyar Aur Plastic' which is episode 1 of season 2.

4. The story revolves around 3 characters Dr. Sanjay who is a plastic surgeon, his girl friend namely Priya and one another lady who is step mother of Priya. The step mother visits Dr. Sanjay for cosmetic treatments for her body transformation as a gift to her husband on his 60<sup>th</sup> birthday who is a retired Army Officer. During the course of interaction the step mother and Dr. Sanjay grow close to each other and become physically intimate with each other. On the other hand, Priya, the girl friend of Dr. Sanjay decides to introduce him to her parents. When Dr. Sanjay meets Priya's parents, he is left dumb founded, as the step mother of Priya is the same lady who had earlier become intimate with Dr. Sanjay. However, Dr. Sanjay and Priya eventually get married. The step mother, however entices Dr. Sanjay to continue physical intimacy with her. This intimacy is discovered by Priya. Shocked Priya files divorce case against Dr. Sanjay and her step mother claims that it was Dr. Sanjay who was

forcing himself on her. Priya claims Rs.5.00 Crores along with life time of free Botox treatment from Sanjay as alimony.

5. The complainant submits that the sole purpose of making the episode is to titillate and arouse the baser instincts of audience, that such obscene depiction on public platform has caused annoyance, that it intentionally hurts religious feelings when the male protagonist expresses disgust on knowing about '*Satyanarayan Katha*' in the house of his love interest and that a particular scene breaches the sanctity of National emblem amounting to its dishonour.

6. The petitioner submits that during the moments of physical intimacy of step mother of Priya with Dr. Sanjay, the step mother is shown to have made Dr. Sanjay wear her husband's uniform and later during the course of intimacy she unbuttons the said blazer. This scene has been objected against by the complainant saying that it tarnishes the reputation of Indian Army.

7. The petitioner in his petition filed under Section 482 of Cr.P.C submits that the web series is about interpersonal relationship and different circumstances/situations arising therefrom. The petitioner submits that the web series is a drama/comedy/parody, which explores schemes of romance and human sexuality in different modern day scenario. The web series and episode are not remotely connected with Indian Army or religion.

8. The petitioner submits that he is a Managing Director of ALT Digital Media Entertainment Ltd, registered under the Companies



Act, 2013 and having registered Office at C-13, Balaji House Dalai Industrial Estate (Opposite Laxmi Industrial Estate), New Link Road, Andheri (West), Mumbai (Maharashtra). This Company is a subsidiary of Balaji Telefilm, which is a Prominent Media and Entertainment Company registered under the Companies Act, 1956, which produces and has produced some well known Indian soap operas and entertainment programmes and shows in various Indian languages. On 16.4.2017, this Company launched an OTT (Over the Top) digital platform named ALT Balaji, which is a subscription based video on demand service that offers content to consumers using an internet connection over mobile, tablet devices and web browsers etc. Browsing the content transmitted on this platform is commenced by a request and viewer is required to pay a recurring subscription fee or one time subscription fee in exchange for right to view the content. The transmission of the content by SOVD (Subscription Based Video on Demand) is termed as narrow casting which is fundamentally different in nature from broadcasting. While in broadcasting, the time for transmission is chosen by broadcaster, while in narrow casting the consumer chooses the time and extent of content at place of their convenience with additional facility to play, pause and resume watching their chosen content without being interrupted by advertisements and having ability to exercise parental control. The frame work, rules, law and regulations applicable to broadcast services is completely inapplicable to the SOVD services. Certain policy issues that are of fundamental importance to

broadcasters such as interconnect, licensing, QoS etc are completely inapplicable to SOVD services. The content which is streamed on OTT platform is not regulated by Central Board of Film Certification. Further, ALT Balaji, being an OTT platform is not covered under Cinematograph Act. The OTT service providers like ALT Balaji comes under the aegis of “Internet and Mobile Association of India” and have adopted a voluntary censorship code, which is called “Code For Self-Regulation of Online Curated Content Providers”. This Code regulates the dissemination of the content, ensures that age appropriate content is made available to the audience and restrict the OTT service providers including ALT Balaji from executing and/or promoting obscene internet content. The aforesaid Code has been annexed as Annexure P/2. The petitioner submits that the allegations contained in the impugned FIR do not prima facie constitute any offence. The impugned FIR contains certain allegations against the web service. Hence, the petitioner has thought it appropriate to discuss the episode in brief.

9. The petitioner denies the aforesaid allegations and states that the scene refers to a specific incident in the plot of episode (1) and relates to one particular lady, ie., step mother of Priya. This scene is not primal focal point of the story, as per the petitioner, but is merely a part of the whole story and does not revolve around the scene. This scene is necessary to portray the fictional intimate relationship between Dr. Sanjay and Mrs. Parmindar Roy, ie., the step mother of Priya. This scene in no manner amounts to obscenity under the law.

There has been no insult/harm/derogation, actually or intended to the National Emblem or any institution of India. This scene does not even touch upon the character of Indian Army or the families of Indian Army or the Uniform of the Indian Army or the National Emblem. It purely depicts the attitude of the character of Mrs. Parminder Roy towards her sexual desire in the said scene under certain peculiar circumstances. The petitioner, however submits that there is no depiction or slightest reference to any Hindu gods, costumes or tradition in the scene and there was no intention to wound the religious feelings. The web series is purely work of fiction and as stated even in its disclaimer that it is aimed only to be viewed by viewers of age 18 years or above. The web series is purely a work of fiction and does not relate to any person, sex, section, community or any event and is not intended to harm or damage their reputation or feelings. The disclaimer further states that any resemblance to real person dead or alive or other real live entities, past or present is purely coincidental. The disclaimer also states that the web series contains strong language, mature contents and intimate scenes between the characters, which are creatively placed in the programme to support the story line of the programme. It further records that parental guidance is strongly advised. The disclaimer states that ALT Balaji does not intend to offend, criticize or prejudice any group of people through the content of the programme. A copy of the disclaimer has been placed as Annexure P/5. In the description of the web series, it is specifically mentioned that the content is suitable

to be viewed by viewers above the age of 18 years. The web series is rated as 18 + on the platform. Further, the viewer is required to digitally give a declaration that he/she is 18 years or above in the age. Only upon making such declaration, it is possible for a viewer to watch the web series. The disclaimer clarifies that the strong language, mature and intimate scenes between the characters are necessary and indispensable for correct portrayal of the story line. These aspects are depicted in the “terms of use” flashing on the screen. The content of the web series does not breach any Indian law.

**10.** The petitioner further makes submission regarding her role in the creation of the aforesaid web series and states that she is not involved in the day to day creative decision in making the web series. The petitioner is not involved in the conceptualization and dramatization etc of the episodes. The petitioner is mainly involved in Balaji motion pictures limited and Balaji tele films. No credits are also given to the petitioner of the episode one of the season two of the web series. The company ALT Balaji engages writers who develop the concept, write the scripts (story, screen play and dialogues) and then engages a production house for production and post production of the show.

**11.** The petitioner submits that the scenes depicted in the web series does not cause depravity of a mind of a person with normal state of mind, therefore, nothing in the series satisfy the definition of obscenity. There is substantial safeguard against the same being viewed by minors. The episode is a creative work of art that deals

with certain themes of sexuality in the 21<sup>st</sup> Century and is in no manner offensive to public decency and morality and is not likely to pander to lascivious, prurient or sexually precocious minds. The petitioner further submits that in order to attract the provision of Section 67-A of I.T. Act, the impugned material should contain sexually explicit act, which is missing in the present case. The word “explicit” would be justified when there is description or representation of sexual activity in a direct and detailed way. There is no such explicit sexual activity. The Court must take an over all view of the matter complained of as obscene in the setting of a whole work, which is a work of artistic value. Such scene should not be considered in isolation and the episode must be judged as a whole. Whether a particular scene is obscene or not is the standard of an ordinary man of commonsense and prudence and not an “out of the ordinary or hypersensitive man”.

**12.** The petitioner further submits that in order to invite the penal provision of Section 294 of IPC, the prosecution is obliged to make out that the obscene acts were performed at a public place whereas, the web series in question is accessible on ALT Balaji platform which is only for adults who have selected to pay for the subscription and cannot be construed as a public place. It is further submitted that the provision of Section 67-A of I.T. Act are parts of a special law and the prosecution of petitioner cannot be liable under both, i.e. general law of IPC and special law of I.T. Act. The warranties/representation in terms of Clause IV of the terms of use includes express

representation that the viewer/subscriber “*has voluntarily chosen to access such content because he wants to view the same and does not find the said content to be offensive or objectionable*”. The petitioner further submits that the respondent has failed to disclose the manner in which the web series had annoyed him. Thus, prima facie offence under Section 298 of IPC is not made out. Regarding disrespect of the State Emblem of India, the petitioner submits that the scene does not include an emblem, ie., similar or deceptively similar to the State Emblem of India. There is not even the colourable imitation of the State Emblem. In the Cinematography Act also there is no mention of the State Emblem Act. The petitioner submits that State Emblem Act is different from Emblems and Names (Prevention of Improper Use) Act, 1950. Thus CBFC guidelines provides that CBFC shall ensure that national symbols and emblems are not shown except in accordance with the provision of the Emblems and Names Act, which is an entirely separate statute. In the Cinematograph Act also Emblems and Names Act is applicable. The Cinematograph Act and the guidelines do not apply to ALT Balaji. ALT Balaji cannot be subjected to a higher degree of scrutiny and censorship which include the application of the State Emblem Act to its content. More so, under the Code For Self-Regulation of On-line Curated Content Providers, the Emblems and Names Act has been included. The State Emblem Act specifically provides that the prosecution for any offence punishable under the Act can be instituted only with the previous sanction of the State Government. The provisions of

Section 34 of the IPC are not applicable because the petitioner does not play any role in the conceptual script and dramatization of the scenes episode or web series. Thus, under no stretch of imagination, can there be any meeting of minds or a prearranged plan by the petitioner to commit an offence. The petitioner cannot be held vicariously liable for the alleged offence under the IPC, I.T. Act and the State Emblem Act. The petitioner is only involved in the policy and planning of the business of the company and she is in no way concerned or involved in the episode or its conceptualization, dramatization or its script.

**13.** The petitioner further submits that the impugned FIR has been filed after a substantial and an unexplained delay of 118 days from the date of release of the scene. The said scene was telecasted on 8.2.2020 whereas, the FIR has been filed only on 5.6.2020. The FIR contains misleading allegations and proceedings have been instituted maliciously and with ulterior motives.

**14.** The respondent has misconstrued and twisted the story line by setting that it shows pictures of family members of the Indian Army as being characterless and involved an illicit relationship and that it insults the State Emblem of India and uniform of Indian Army.

**15.** The petitioner submits that contrary to this, the actual facts shown in the episode is that the Army Officer is a retired Army Officer aged 60 years. The entire plot does not even in the remotest, touch upon Army Officials or disrespects the Army Officers or their

families or any institution or State Emblem of India. It is mere coincidence that one of the fictional character plays the character of an Ex-Military Officer. The respondent No.2 does not talk about existence of the disclaimer in the web series and has intentionally suppressed the information. The petitioner submits that the so called objectionable scene is in accordance with “Code for Self-Regulations of Online Curated Content Providers”, which is applicable to ALT Balaji. The provisions of Cinematograph Act are not applicable to films transmitted through internet therefore, certifications of a film by CBFC are not applicable to the contents streamed on OTT platforms. The petitioner seeks protection enshrined under Article 19(1)(A) of the Constitution of India and the Right of Creative Liberty. Writers of various film and Indian Television Series have taken the creative liberty to portray characters from various professions in a negative role. However, this does not *ipso-facto* imply that the profession itself is tainted and drawing any such conclusion would not be logical as such portrayal is small creative expression of the writers. There are reasonable restrictions imposed under Article 19(2) of the Constitution of India but the aforesaid scene in the web series does not fall under any of the said grounds justifying any restriction on the creative freedom in terms of Article 19(2) of Constitution of India. Accordingly, it is only logical that what is sanctioned by the Indian Constitution cannot be deemed to be an offence under the Penal Law or any other law. Dissenters of free speech and expression have no censorial right in respect of



intellectual, moral, religious, dogmatic or other choices of all man kind and the Constitution of India does not confer or tolerate such individualized, hypersensitive, private censorial intrusion into and regulation of the guarantee of freedom of others.

16. The petitioner refers to the citation of the Supreme Court in the case of *State of Haryana & Ors. V/s. Bhajanlal, 1992 Suppl. (1) SCC 335* in which it has been held that where the allegations made in the FIR, even if taken at the face value and accepted in its entirety, do not prima facie constitute an offence and “where allegations made in the FIR are so absurd and inherently improbable on the basis of which no prudent man can ever reach a just decision, that there is sufficient ground for proceeding against the accused”. The petitioner ultimately makes a prayer that this Court exercising the inherent powers under Section 482 of Cr.P.C read with Section 226 of the Constitution of India may be pleased to quash and set aside the impugned FIR No.0214/2020 dated 5.6.2020, which has been registered against the petitioner by the Police Station Anapurna, Indore (M.P.) under Sections 294, 298 and 34 of IPC, 67 and 67-A of I.T. Act and Section 3 of the State Emblem Act.

17. In its reply, the State has submitted that ALT Balaji has claimed itself to be under the aegis of “*the Internet and Mobile Association of India*” which is governed by a Code for regulation of contents posted online. As per the State, this bylaw of a society cannot override or to be repugnant to a statutory law. The Code itself

provides for prohibition of content which is disrespectful to the National Emblem and the National Flag–Annexure-P/2. It is submitted that Code also prohibits the contents which deliberately and maliciously intends to outrage the religious sentiments of caste and community. As per the State, the content of web-series being displayed by the petitioner is in-contravention of the Code itself inasmuch as the content displays the use of National Emblem embedded in the Army Uniform to be torn during intimate scene. It is further submitted that Section 3 of State Emblem of India (Prohibition of Improper Use) Act, 2005, prohibits the use of National Emblem for commercial purposes or as a part of patent title, trademark or design, except, in-case as specified by the Central Government. The Act also prohibits the restriction of any such intellectual property. A bare perusal of this Act would show that the National Emblem of India is not be used at all except in cases specified by the Central Government. A bare perusal of relevant scene would demonstrate that an Army Officer's Uniform carrying National Emblem has been used with utmost disrespect and immorally corrupt manner and hence a prima-facie case is made out against the petitioner. In the reply, it has been further submitted that the story line around the web-series is not only obscene but is truly perverted in its spirit which would certainly have the tendency of inciting lustful thoughts. In the case of *Director General of Doordarshan and Another vs. Anand Patwardhan reported in 1996 8SCC 433*, the Hon'ble Apex Court has held that a film must be

judged from an average healthy and common sense point of view. However, in the aforesaid web series, the story line is neither healthy nor does it carry any sense. The message of the film scene portrayed is totally perverse, obscene and contrary to the ethics and morality of Indian society and hence the petitioner cannot take recourse to the contention that the work was purely fictional. In such story line, where mother-in-law is shown to be in physical relationship with her daughter's husband is socially and morally corrupt and would by all means come under the definition of obscenity and hence offence under Section 294 of Indian Penal Code, 1860 and Section 67 of Information Technology Act, 2000 are clearly made out.

**18.** In its reply, the State further submits that the Information and Technology Act, 2000 was brought in force with an aim to curb and penalize the publication of sexually explicit contents in electronic media. Section 67 of the said Act deals with punishment for publishing or transmitting such obscene material in electronic form. A bare perusal of Section 67 of IT Act makes it very clear that any material which is sexually explicit cannot be circulated or transmitted through cyber space. The word '*obscene*' has not been defined clearly under IPC or any such other law and hence the recourse will have to be taken to the judgments passed by the Hon'ble Supreme Court on various occasions upon the subject matter. The Hon'ble Apex Court has adopted two tests initially in order to see if the contention would be categorized as obscene, the first test is **Hicklin test** and the second

test is **Roth test**.

19. In the case of **Regina vs Hicklin**, it was laid down that the publication can be judged for obscenity, based on isolated part of the work considered out of the content. While applying Hicklin Test, the work is taken out of the whole context of the work and then it is seen that if that work is creating any apparent influence on the most susceptible readers/viewers such as children or weak minded adults. In the Roth test which was developed by US Courts in 1957 to judge such obscenity, it was held that only those sex related materials which had the tendency of exciting lustful thoughts were found to be obscene and the same has to be judged from the view of an average person by applying contemporary community standards. This test was sharper and narrower than the Hicklin test as it does not isolate the alleged contents but limits itself to the dominant theme of the whole material and checks whether if taken as a whole, it has redeeming social value or not.

20. The State has pointed out that the Hon'ble Apex Court in the matter of **Aveek Sarkar vs State of West Bengal reported in AIR**

**2014 SC 1493 reported in AIR 2014 SC 1493** held as under:

*“The correct test to determine the obscenity would be the community standard test i.e. Roth Test and not Hicklin Test and in order to check whether there is obscenity or not the material in question is to be taken as a whole. When the material taken as whole, it is found to be lascivious and tends to deprave a person who reads or sees or hears that material only can be said to be obscene. The Court observed that Hicklin test is in contravention to the Indian Penal Code. Further the Hon'ble Court observed that as the term 'obscene and obscenity' is not defined in Indian law. This makes the*

*community standard test to be more suitable for Indian law regime. Also, the community standard test is more adaptive in need of changing the society.”*

**21.** Based upon the aforesaid principle, the State submits that it can be deduced that the content uploaded on the OTT platform would certainly deprave and totally corrupt a person who reads or watches such contents. The content would certainly fall in the category of obscenity inasmuch as even if the content is taken as a whole taken into consideration the same would excite lustful thoughts, would deprave a person who watches or sees such contents. The message that such web series is likely to spread is that the wife of an Army Officer is open to illicit extra-marital affair. This cannot be allowed to be done as having illicit relationship within the family is morally corrupt and ethically perverse and does not happen in Indian society. Whether the predominant theme or purpose of the series is an appeal to the unhealthy interest of “average person of a community as a whole” is a judgment which must be made in light of contemporary standards as would be applied by a average person with an average and normal attitude and mind towards interest in sex. By no stretch of imagination, it can be held that the depiction of mother-in-law having sex with her son-in-law shall not affect the moral values of an average person which is not acceptable to the Indian society. The content and script itself demeans and deteriorates the social and moral values.

**22.** The State in its reply then refers to the petitioner's contention that any intervention in transmission of such web series would

violate Article 19 of the Constitution of India i.e. freedom of speech and expression which is a fundamental right guaranteed to every citizen of the country. The State submits that Article 19(2) of the Constitution of India is a provision of Constitution which provides for curbing the freedom of speech and expression if such expression is against the interests of sovereignty and integrity of India, security of State, friendly relations with foreign States, public order, decency or morality or in relation to Contempt of Court, defamation or incitement to offence is the result thereof.

**23.** It is submitted by the State that a bare perusal of the aforesaid provision of Constitution would make it clear that right to freedom of expression is open to reasonable restrictions and in the present matter, the content which is uploaded in the OTT Platform is in total disregard to the law of land. The web series has tendency to corrupt the minds of people watching the content and hence unrestricted right to freedom cannot be allowed. It is further submitted in the reply that FIR cannot be a encyclopedia of the entire events. It is further submitted in reply that the petitioner has suppressed the fact that there are many complaints which have been filed against the petitioner in various cities throughout the country. The complaint has been filed in **Bandra Court (Mumbai)** and thereafter a PIL before the **Hon'ble Allahabad High Court** has been filed which is still pending. The petitioner has also contended that the complainant voluntarily chose to cause injury to him.

24. Regarding, the defence of *Voluntati Non Fit Injuria* taken by the petitioner, the State submits that the content which is being screened depicts intimate scenes of the people bounded by degree of prohibited relationship and it was not a simplicitor case of possible intimacy depicted on screen. Hence proper disclaimer by petitioner would not come to the aid of petitioner.

25. Regarding the submission of petitioner, that the provision of Section 294 IPC is not attracted because OTT platform is a subscription based platform which is not a public place and which is prerequisite for bringing the case under Section 294 of IPC, the State submits that the term “public place” has not been defined under IPC and hence the definition of public place shall have to be borrowed from the Information Technology Act, 2000.

26. Section 80(1) of IT Act, 2000 defines it to be a place as any place which is intended to be used by public or which is accessible to the public. The explanation of Section 80(1) of IT Act 2000 is being reproduced as under:-

**Explanation:-**

**For the purposes of this sub-section, the expression "public place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public.**

27. As per the reply, a bare perusal of explanation would make it clear that the definition of “public place” has weighed enough to cover all such places intended for the use of public which is accessible to the public.

**28.** The respondent/State further submits that the definition of “public space” is wide enough to cover cyberspace as well inasmuch as the same being in the virtual world, is available and accessible to the public. Thus, the aforesaid contention of the petitioner is also of no consequence, as per the reply submitted by the State of Madhya Pradesh.

**29.** It has been further submitted that the present matter is still under investigation and the investigation is a vested right with the police officer which cannot be curbed. The present petition is premature in as much as the right to investigate the offence is inherent and is a statutory right guaranteed to a police officer and hence on this count, the present petition deserves to be dismissed. It is also submitted that the present content which was being aired on the OTT platform has been deleted and it also attracts offence punishable under Section 201 of IPC. All the contentions which have been raised by the petitioner bank upon the disputed question of facts which cannot be gone into the provision of Section 482 of Criminal Procedure Code, 1973. Thus, in the wake of the matter, the petition deserves to be dismissed.

**30.** The content of web-series showing involvement of mother-in-law with her son-in-law in sexual activities demolishes the moral fabric of the society and hence falls in the category of obscenity and thus, in the wake of the matter, this petition deserves to be dismissed.

**31.** Learned Additional Advocate General for the respondent/State



in his written submission has laid stress on the limited scope of quashment of FIR by the Court while exercising powers under Section 482 of Criminal Procedure Code, 1973. It has been stated that FIR is at the preliminary stage and the investigation is in progress. Even otherwise the quashment of FIR must be resorted to in the rarest of rare cases and such quashment is permissible if the Court considers that it is necessary for securing ends of justice. This view has been taken by Hon'ble Apex Court in the case of *Parbatbhai Aahir and Others vs. State of Gujarat and Another reported in (2017) 9 SCC* and in the case of *Medehl Chemical and Pharma (P) Limited vs. Biological E. Limited and Others reported in 2000(2) SCC 426* in which it has been held that inherent power under Section 482 of Criminal Procedure Code, to have a complaint or the charge-sheet quashed is an exception rather than rule and a case for quashment at the initial stage must have to be treated as rarest of rare cases, so as not to scuttle prosecution. With the lodging of FIR, ball is set to role and thenceforth the law takes its own recourse and the investigation ensues in accordance with the provisions of law. The jurisdiction, as such, is rather limited and restricted and its undue expansion is neither practicable nor warranted.

**31A.** Submissions of learned counsel of both the sides were considered.

**32.** The celebrated judgment providing guidelines for exercising power under Section 482 of Criminal Procedure Code, 1973 is the

case of *State of Haryana and Others vs. Bhajanlal and Others* reported in 1992 SUPP (1) SCC 335. These guidelines are as follows:

1. *Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
2. *Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
3. *Where the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
4. *Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*
5. *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which, no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
6. *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or, where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
7. *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

33. Thus, this Court is required to tread the course leading to quashment of FIR at the investigation stage with a great deal of care and caution keeping in mind the mandate and guidelines laid down by the Hon'ble Apex Court and in its various other citations

mentioned earlier.

34. Reverting back to the case in hand, it would be apt to recall the provisions of law under which the case has been registered against the petitioner and these provisions are Sections 294, 298 and 34 of Indian Penal Code, 1860 and Sections 67 and 67(A) of Information Technology Act, 2000 and Section 3 of State Emblem Act, 2005.

35. Before dwelling on the applicability of Section 294 of Indian Penal Code, it would be appropriate to first consider as to whether provisions of Section 67 of Information Technology Act are attracted or not because Section 294 IPC talks of obscene acts etc and concept of obscenity figures in Section 292 of Indian Penal Code and Section 67 of Information Technology Act is based on the same principle as Section 292 of Indian Penal Code. The Hon'ble Apex Court in the case of *Sharat Babu Digumarti vs. Government of Delhi (NCT) (2017)2 SCC 18* has held that Information Technology Act, 2000, being a special legislation dealing with obscenity in electronic form has overriding effect on the proceedings under general provisions of Section 292 of Indian Penal Code and an activity emanating from electronic form which may be obscene is exclusively punishable under Section 67 of Information Technology Act and not under Section 292 of Indian Penal Code, nor both under Section 67 of Information Technology Act and Section 292 of Indian Penal Code.

36. The Apex Court in the case of *Ranjit D. Udeshi vs. State of*

**Maharashtra reported in AIR 1965 SC 881** has observed in para no.16 which is as under:-

*“that the Indian Penal Code does not define the word 'obscene' and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by Courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more”.*

37. Now coming to the question as to whether the provisions of Section 67 of Information Technology Act are attracted or not, it would be appropriate to reproduce Section 67 of Information Technology Act, 2000, which runs as under:-

*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.*

38. One can see that the contents of aforesaid section are akin to that of Section 292(1) of IPC which is as under:-

***Section 292(1) in The Indian Penal Code***

*(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.*

**39.** The learned senior counsel for the petitioner has submitted that due care has been taken to ensure that the content of the episode does not breach any existing provision of law pertaining to obscenity and other alleged offences because in absence of any independent censor board etc, responsibility lies heavily upon the producers of such web series to ensure that no such breach occurs.

**40.** It would be appropriate to refer to the written submissions made by the petitioner regarding a regulation pertaining to objectionable scenes on the ground that they are obscene.

**41.** The petitioner in his written submission has submitted that unlike Central Board of Film Certification (CBFC), OTT Platform does not require a CBFC and that the provisions of Cinematograph Act, 1952 are also not applicable to ALT Balaji and OTT Platform. It has been stated that OTT Platform service providers like ALT Balaji comes under the aegis of Internet and Mobile Association of India and have adopted a voluntary censorship i.e. “Code for self regulation of Online curated content providers” which regulates the dissemination of the content ensuring that the age appropriate content is made available to the audience and restricts the OTT service providers from exhibiting the public or promoting inappropriate content.

42. From the above submission, it becomes clear that there is no independent agency or authority having the sanction of Government to oversee the content of such web series, as in the present case. The producers/promoters etc involved in publishing or promoting such contents resorted to self regulation in the dissemination of the content. Needless to say, that such service providers have twin responsibility i.e. of ensuring that the contents of material transmitted are such that it caters to the expectations of targeted audience so that such transmission reaps expected profits monetarily and at the same time care has to be taken that the content may not transgress the thin boundary between the outer limits of decency and obscenity and while dealing with such twin responsibility, such service providers cannot match the self regulation with that of an impartial regulatory authority.

43. The petitioner has submitted that the need for framing guidelines for regulating online platform was agitated in a Public Interest Litigation (PIL) filed before the Delhi High Court in *Injustice for Rights Foundation vs. Union of India, WP (C) No.11164 of 2018*, however, the Delhi High Court has held that in view of the express provisions of Information Technology Act and the rules framed therein, writ of mandamus cannot be issued and a person who is aggrieved can approach the statutory authority under the Information Technology Act for framing guidelines. This order has been challenged before the Hon'ble Apex Court and the matter is still pending.

44. The petitioner submits that no provision of Information Technology Act has been violated and, if at all, the complainant has any grievance, he may seek proper recourse before the competent authority under Information Technology Act.

45. The petitioner further placed reliance upon the decision of Hon'ble Apex Court in the case of *Ashutosh Dubey vs NETFLIX reported in 2020 SCC Online*, wherein the suit for decree of permanent injunction against the defendant against streaming of episodes of web series ('*Hasmukh*') which allegedly contained derogatory remarks against the Advocates. The Court held that this web series is a dark satirical comedy, attempting to expose the ills of various professions and protagonist makes a statement as a stand-up-comedy about the ills of profession. The Court held that it is a known fact that the stand-up-comedian exaggerates particular view point so that it becomes highlighted. The people did not view the comments or jokes made by stand-up-comedian as a statement of truth but take them with a pinch of salt. The Court further held that the plaintiff was not able to show that the impugned comments in any manner referred to the plaintiff or referred to a definite group of individuals or lawyers out of the entire class of lawyers to which the plaintiff belongs. Thus, no injury is caused to the plaintiff.

46. The reason for citing this case by the petitioner is that the Court had observed that the web series, being a work of fiction is only meant to be taken in the context of a figment of imagination and

humour and not as a matter of truth.

47. On perusal of the aforesaid citation, this Court is constrained to observe that no parallel can be drawn between the issues involved in the aforesaid citation and that involved in the present case. Drawing of comparison is ill-conceived and the only common ground is that the facts of present case and that of the citation are both imaginary. This apart, there is no matching elsewhere. The pertinent question involved in the present case relates to obscenity and related offence and also the issue relating to breach of National Emblem and there is no humour involved in tackling these issues.

48. Before determining as to whether the episode prima facie can be considered to be obscene as per Section 67 and 67A of IT Act, the other contentions of petitioner seeking exemption from liability shall be considered.

49. The first contention which has been raised by learned senior counsel for the petitioner is that ALT Balaji is neither producer nor is involved in the day to day activities/decisions involved in the making of web series. No credits are even given to the petitioner of Episode 1 of Season 2 of web series and there is no applicability of Section 34 of Indian Penal Code which may only be fastened on a person who shares a common intention in the sense of a pre-arranged plan.

50. Learned senior counsel for the petitioner submits that platform for publishing the web series has been provided by ZEE Network and the petitioner is not involved in the production or direction of web



series and, hence, there is no liability of the petitioner regarding the above.

51. Regarding this submission, the defendant/State in his written submission has mentioned that ALT Balaji and ZEE 5 have entered in an agreement dated 29.07.2019 for the content alliance to grow the '*Subscription Video On Demand*' ('SVOD'). As per this agreement, ZEE-5 will be authorized to share a '*SVOD*' content owned by ALT-Balaji. The aforesaid agreement has been marked as Annexure-WS/1. The aforesaid document was perused in which it has been mentioned that ZEE 5 and ALT Balaji have collaborated to co-create the original content which will only be made available on both platform. The petitioner—**Ekta Kapoor** who is a Joint Managing Director (JMD) of *Balaji Telefilms Limited* has mentioned that as part of this partnership, ZEE-5 subscribers will get seamless access to ALT Balaji's clutter breaking originals in addition to ZEE 5 existing content.

52. The aforesaid agreement itself shows that ALT Balaji is involved in the creation of episodes which are streamed on ZEE-5 Platform. Thus, ALT Balaji which is an '*SVOD*' platform, is a product of Balaji Telefilms Limited of which the petitioner is a Joint Managing Director (JMD) and the petitioner being one of the co-creators of ALT Balaji would definitely be considered to have the aforesaid episode to be published or transmitted in the electronic form.

53. The petitioner is intrinsically involved in the constitution of SVOD Platform called ALT Balaji would be considered to have caused to publish or transmit the impugned episode in the electronic form. The association of ALT Balaji with ZEE 5 is reflected on screen before the episode begins. The petitioner, thus, cannot state that she was not aware about the content of episode. The Hon'ble Apex Court in the case of celebrated judgment of **Ranjit D. Udeshi vs. State of Maharashtra reported in AIR 1965 SC 881** has held as under:

*10. Before dealing with that problem we wish to dispose of Mr. Garg's third argument that the prosecution must prove that the person who sells or keeps for sale any obscene object knows that it is obscene, before he can be adjudged guilty. We do not accept this argument. The first sub-section of s. 292 (unlike some others which open with the words "whoever knowingly or negligently etc.") does not make knowledge of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. If knowledge were made a part of the guilty act (acts reus), and the law required the prosecution to prove it, it would place an almost impenetrable defence in the hands of offenders. Something much less than actual knowledge must therefore suffice. It is argued that the number of books these days is so large and their contents so varied that the question whether there is mens rea or not must be based on definite knowledge of the existence of obscenity. We can only interpret the law as we find it and if any exception is to be made it is for Parliament to enact a law. As we have pointed out, the difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the book etc., has made the liability strict. Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section.*

*11. Next to consider is the second part of the guilty act (actus reus), namely, the selling or keeping for sale of an object which is found to be obscene. Here, of course, the ordinary guilty intention (mens rea) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the*

*criminal intent and it will be a matter of a proper inference from them. The argument that the prosecution must give positive evidence to establish a guilty intention involves a supposition that mens rea must always be established by the prosecution through positive evidence. In criminal prosecution mens rea must necessarily be proved by circumstantial evidence alone unless the accused confesses. The sub-section makes sale and possession for sale one of the elements of the offence. As sale has taken place and the appellant is a book-seller the necessary inference is readily drawn at least in this case. Difficulties may, however, arise in cases close to the border. To escape liability the appellant can prove his lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene unless he can establish that the sale was without his knowledge or consent.*

54. The aforesaid concept is importable while interpreting Section 67 of Information Technology Act, 2000. In the aforesaid provision, there are no such words that the person who publishes or transmits or caused to be published or transmitted in the electronic form any lascivious material or such material which appeals to prurient interest was having or supposed to be having the knowledge about the content of the material. Thus, even if the content is not known and a person publishes or transmits or caused to do so even without knowledge, provisions of Section 67 of Information Technology Act, 2000, would be attracted. Presumption of knowledge on the part of petitioner shall have to be assumed and onus will be upon the petitioner to rebut such presumption by leading evidence.

55. The next contention of learned senior counsel for the petitioner Mr. Siddharth Luthra is that FIR has been registered only against **petitioner-Ekta Kapoor** but not against her **Company** i.e. **ALT**

**Balaji** and prosecuting the petitioner without prosecuting the Company of which the petitioner is the Joint Managing Director (JMD) is impermissible. He has referred to the citation of *Aneeta Hada vs. Godfather Travels and Tours Private Limited reported in 2012(5) SCC Page 661* in which it has been laid down that the Director of Company cannot be held liable without impleading the Company. In the aforesaid case, the Company was not arraigned as an accused, hence, the proceedings against the Director of Company were quashed.

56. The aforesaid case pertained to offence under Section Negotiable Instruments Act, 1881 (*for short 'NI Act'*) and a particular section involved was Section 141 of NI Act. The Hon'ble Apex Court, while dealing with the case, referred to Section 85 of Information Technology Act, 2000. Section 85 of the Information Technology Act, 2000, reads as under :-

**Section 85 of Information Technology Act, 2000.**  
**Offences by companies :-**

*(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:*

*Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.*

*(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that*

*the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.*

57. The Hon'ble Apex Court held that the word “*as well as the Company*” itself shows that neither the Director nor the Company can be prosecuted in isolation.

58. Responding to the aforesaid submission, learned Additional Advocate General for the respondent/State Mr. Pushyamitra Bhargava has submitted that the present case is only in the initial stage of investigation and charge-sheet has yet not been filed in the matter. He has drawn attention to the FIR lodged by the complainant which can be seen at page-48 of the compilation of petitioner in which it has been prayed by him that appropriate proceedings be instituted against ALT Balaji as well. Thus, the complainant had sought institution of proceedings against ALT Balaji as well but the Investigating Officer has presently named the petitioner only as an accused and it cannot be stated that ALT Balaji/Balaji Telefilms shall not be named as an accused when the charge-sheet is filed in the matter.

59. The aforesaid submission of learned Additional Advocate General for the respondent/State does have substance. The Investigating Officer has not ruled out the prosecution of ALT Balaji Company/Balaji Telefilms Limited and the aforesaid Company may

be named as an accused during the course of investigation. Hence, it is premature to State that the prosecution needs to be quashed because ALT-Balaji/Balaji Telefilms Limited has not been arraigned along with the petitioner. It is to be further reminded that petitioner alone has so far been made accused in the matter on the basis of FIR lodged by the complainant and it was not in the hands of complainant to ensure that the Company is also named as an accused. The case of *Aneeta Hada (supra)* was a complaint case filed under Sections 138 and 141 of NI Act, 1881 and the responsibility was on the complainant to include the Company as an accused. Hence, the analogy of *Aneeta Hada's case (supra)* cannot be taken at this stage of investigation in the present case and it is premature to state that there has been a breach of Section 85 of Information Technology Act, 2000.

**60.** Reverting back to the consideration regarding applicability of Section 67 of I.T. Act, the prosecution should be able to show that the material which is published or transmitted in electronic form “*is lascivious or appeals to the prurient interest or if its effect is such as tend to deprave and corrupt persons who are likely having regard to all relevant circumstances, to read, see or hear the matter content or embodied in it.....*”. As already seen, the aforesaid words contained in Section 67 of I.T. Act are imported from Section 292 of IPC, which deals with obscenity.

**61.** Learned senior counsel for the petitioner has in his written

submission as also in oral submissions stated that the episode does not attract obscenity because the test of obscenity propounded in various Supreme Court citations is not fulfilled. In the written submissions following citations of Apex Court have been referred to and the relevant paragraphs have also been reproduced from these citations :

(i) **Ajay Goswami vs. Union of India, (2007) 1 SCC 143** –

It was held that per se nudity is not obscenity. In addition, inter alia, the Hon'ble Court held that “contemporary standards” and test of ordinary man are parameters to decide obscenity. Paragraphs 61, 67 and 71 of this judgment have been reproduced in the written statements which are as under :-

*61. 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 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."*

*67. 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 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.*

*71. 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 (SCC p. 802, para 49) :-*

*"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."*

(ii) *Chandrakant Kalyandas Kakodkar vs. State of Maharashtra, (1969) 2 SCC 687.* In this case it has been held that the concept of obscenity differ from country to country depending upon the standards of morals of contemporary society. Para 12 of this citation has been reproduced in written submissions as under :-

*"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/or 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. 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 it 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(1) case 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 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.”*

(iii) *Aveek Sarkar vs. State of West Bengal, (2014) 4 SCC*

257 – In this case the Supreme Court has held that for determining obscenity hick-line test is not correct test, but the community standard test is the correct test. Para 23 of this citation has been reproduced in the written submissions, which is as below :-

*“23. We are also of the view that Hicklin test is not the correct test to be applied to determine “what is obscenity”. Section 292 of the Indian Penal Code, of course, uses the expression ‘lascivious and prurient interests’ or its effect. Later, it has also been indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the “community standard test” rather than “Hicklin test” to determine what is “obscenity”. A bare reading of Sub-section (1) of Section 292 , makes clear that a picture or article shall be deemed to be obscene*

*(i) if it is lascivious;*

*(ii) it appeals to the prurient interest; and*

*(iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene.*

*Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of “exciting lustful*

*thoughts” can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.*

(iv) **Samaresh Bose vs Amal Mitra, (1985) 4 SCC 289-** In

this citation it has been held that obscenity is not the same as vulgarity. Para 35 of this citation has been reproduced in the written submissions, which is as below :-

*“35. We have read with great care. It is to be remembered that Sarodiya Desh is a very popular journal and is read by a large number of Bengalis of both sexes and almost of all ages all over India. This book is read by teenagers, young boys, adolescents, grown-up youngmen and elderly people. We are not satisfied on reading the book that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity. It has to be remembered that the author has chosen to use such kind of words and language in expressing the feelings, thoughts and actions of Sukhen as men like Sukhen could indulge in to make the whole thing realistic. It appears that the vulgar and slang language used have greatly influenced the decision of the Chief Presidency Magistrate and also of the learned Judge of the High Court. The observations made by them and recorded earlier go to indicate that in their thinking there has been kind of confusion between vulgarity and obscenity. A vulgar*

*writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. We may observe that characters like Sukhen, Shikha, the father and the brothers of Sukhen, the business executives and others portrayed in the book are not just figments of the author's imagination. Such characters are often to be seen in real life in the society. The author who is a powerful writer has used his skill in focussing the attention of the readers on such characters in society and to describe the situation more eloquently he has used unconventional and slang words 80 that in the light of the author's understanding, the appropriate emphasis is there on the problems. If we place ourselves in the position of the author and judge the novel from his point of view, we find that the author intends to expose various evils and ills pervading the society and to pose with particular emphasis the problems which ail and afflict the society in various spheres. He has used his own technique, skill and choice of words which may in his opinion, serve properly the purpose of the novel. If we place our selves in the position of readers, who are likely to read this book, and we must not forget that in this class of readers there will probably be readers of both sexes and of all ages between teenagers and the aged, we feel that the readers as a class will read the book with a sense of shock, and disgust and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness. It is quite possible that they come across such characters and such situations in life and have faced them or may have to face them in life. On a very anxious consideration and after carefully applying our judicial mind in making an objective assessment of the novel we do not think that it can be said with any assurance that the novel is obscene merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language. Some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not*

*sufficient to bring home to the adolescents any suggestion which is depraving or lascivious. We have to bear in mind that the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and will have to read books which are purely religious . We are, therefore, of the opinion that the Courts below went wrong in considering this novel to be obscene. We may observe that as on our own appreciation of the novel, we are inclined to take a view different from the view taken by the Courts below, we have taken the benefit of also considering the evidence given in this case by two eminent personalities in the literary field for proper appreciation and assessment by us. It has already been held by this Court in two earlier decisions which we have already noted that the question whether a particular book is obscene or not, does not altogether depend on oral evidence because it is duty of the Court to ascertain whether the book offends the provisions of S.292 I.P.C. but it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the book is in a language with which the court is not conversant . It is indeed a matter of satisfaction for us that the views expressed in course of their evidence by the two eminent persons in the literary field are in accord with the views taken by us.”*

- 62.** Thus in substance, it has been sought to be stated by way of written submissions that stray portrayal in the impugned material should not be yardstick for determining obscenity, that the test for judging is that of an ordinary man of commonsense and not that of a hypersensitive man, that the impugned material should be seen from the standards of contemporary society, which in India is fast changing and that vulgarity should not be confused with obscenity.
- 63.** The test of contemporary society would be that what may have

been considered obscene in the past may now not be considered so since the standards of society does not remain the same in the matter of considering as to what is obscene and what is not [vide *Ajay Goswami* (supra)].

64. Reverting back to the episode under consideration, the story revolves around aspects of sexuality wherein a lady desiring physical enhancements from a plastic surgeon, approaches him and is immediately shown to be enticing him and indulging in physical intimacy with him. The scenes of physical intimacy depict acts of copulation which are although not graphic in nature but are simulated which have been termed to be obscene. As per the complainant, depiction of such simulated sexual activity between these two persons who do not even know each other indulging in raw animal passion without involvement of emotions exposes the intent of the director/producer to arouse similar feelings in the minds of audience. Such scenes are shown on more than one occasion. Allegedly, similar act of indulgence in sex is shown between love interest of male protagonist and the male character. wherein the male is shown to be taking advantage without being emotionally involved with his love interest.

65. The question is whether such depiction would be considered to be obscene or not. In the written submissions, it has been stated that the web series is about interpersonal relationship and different circumstances/situations arising there from and does not depict sexual conduct in a patently offensive manner and that there is no

graphic sexual intercourse.

66. The Apex Court in various cases has made observations in respect of discerning as to whether the material in question is obscene or has an artistic value.

67. The Supreme Court in the case of *Ajay Goswami vs. Union of India* (supra) has observed as under :-

*“66. 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 881 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".*

68. Further in the case of *Ranjit D. Udeshi (supra)*, the Apex Court has observed as under:-

*28. This is where the law comes in. The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treating with sex by an artist and hence there is some poetry even in the ugliness of sex. But as Judge Hand said obscenity is a function of many variables. If by a series of descriptions of sexual encounters described in language which cannot be more candid, some social good might result to us there would be room for considering the book. But there is no other attraction in the book. As J.B. Priestley said, "Very foolishly he tried to philosophize upon instead of merely describing these orgiastic impulses; he is the poet of a world in rut, and lately*

*he has become its prophet, with unfortunate results in his fiction, (The English Novel p. 142 (Nelson)). The expurgated copy is available but the people who would buy the unexpurgated copy do not care for it. Perhaps the reason is as was summed up by Middleton Murray:*

*“Regarded objectively, it is a wearisome and oppressive book; the work of a weary and hopeless man. It is remarkable, indeed notorious for its deliberate use or unprintable words.”*

69. The aforesaid citations show that the Court should be careful in reading the true intent of the author of impugned material and should see to it that a patently obscene material is not being passed off euphemistically in the garb of study reflecting upon the psychological aspect of sexual behaviour in persons.

70. As per the complainant, in the depicted scenes of the episode under consideration, scenes of physical passion run through out the story line which discloses the intention of the producers and promoters of the episode to cater to the baser instinct of audience.

This submission was considered.

71. The Indian audiences have of course come of age from the times of two flowers cuddling each other symbolizing male and female union to more explicit manners of displaying such activity. Still, the acceptable norms of permissiveness in the society cannot be equated with declining moral values. What is patently obscene from an ordinary person's point of view, would remain to be so for all times to come. There is always a thin line between what are acceptable limits of display of physical intimacy and obscenity.

72. In the case of *Samaresh Bose vs Amal Mitra's* (supra) it has been held that for determining whether the impugned material is

obscene or not, an objective assessment of the material is required. It has been warned that in the matter of objective assessment the subjective attitude of a judge hearing the matter is likely to influence his mind and his decision on the question and in order to eliminate any subjective element or personal preference on the part of the judge, the evidence on record ought to be considered and also the views expressed by a reputed or recognized authors of literature may also be taken help of. The following paragraph of the case of **Samaresh Bose vs Amal Mitra's** (supra) is being reproduced below :-

*"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 Section 292 of 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 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 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".*

73. The above observation shows that in order to determine as to whether a particular matter is obscene or not, recording of evidence may be an important exercise. As far as the present case is concerned,

it cannot be stated outrightly that the impugned episode is not obscene.

74. The learned counsel for the respondent/State has stated that not only the aforesaid episode is available for only persons above 18 years of age but any one can see the aforesaid episode without subscribing to the web series and thus the episode is extremely harmful and outrightly obscene from the point of view of minors also who are more prone to be influenced by such scenes.

75. If the aforesaid submission is true, then there would be little doubt that such unrestricted display of material would come in the realm of obscenity because minors are more prone to depravity of their minds on watching such material.

76. However, one must hasten to add that it is not intended that such dramas be written only in such a manner which are proper from the point of view of minors. The Apex Court in the case of *Chandrakant Kalyandas Kakodkar vs. State of Maharashtra*, (supra) has observed as under :-

*“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.”*

77. Even in the case of *Ranjit D. Udeshi's* (supra), it has been held that barely a reference to sex by itself if were to be considered obscene, then no books can be sold except those which are purely religious. In the case of *Samaresh Bose vs Amal Mitra's* (supra) it has been observed in para 35 that if a reference to sex by itself in any

novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and will have to be read books which are purely religious.

78. The aforesaid excerpts of the Apex Court judgments are drawn in order to put across a view that in the present time it is not possible not even expected to shield adolescence from depictions of sensuality in pictorial form or in books. However, as already observed earlier, a line has to be drawn so that such depictions do not transgress such boundaries which may involve depravity of the minds of minors in a manner which impedes their wholesome growth of impressionable minds.

79. Coming now to the concept of obscenity in respect of persons who are more than 18 years of age, the Hon'ble Apex Court in the case of *Samaresh Bose (supra)* has laid down that 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 that its obscenity was so pronounced that it is likely to deprave and corrupt and those minds are open to influence of this sort and into whose hands the book is likely to fall.

80. There is no doubt about the fact that the standard of obscenity is not the same in respect of minors and in respect of adult persons and the standard is that of an average person and not highly sensitive person. It would be apt to the Court the observations made by Hon'ble Apex Court in the case of *Director General, Directorate*

**General of Doordarshan vs. Anand Patwardhan reported in 2006 8**

**SCC 433** has held as under:

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

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

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

**81.** Applying the test of obscenity from the point of view of an ordinary person as laid down in citations mentioned above, there is substance in the submissions of the learned counsel for State that the episode could be catering to the prurient interest of any normal major person, although one must hasten to add that it is through leading of evidence only, that the test of obscenity would be affirmed [(as per the observations made in the case of **Samaresh Bose** (supra)]. What is punishable is “obscenity” and once the material comes within the ambit of obscenity, it is immaterial that the person is major in terms of age. The only test would be the test of an ordinary person and not hyper-sensitive person. The word '**prurient**' in Oxford dictionary means “having or engaging an excessive interest in sexual matters, especially the sexual activity of others”. The word '**lascivious**' means “feeling or revealing an overt sexual interest or desire”.

**82.** During the course of argument, much stress has been laid upon the freedom of speech and expression guaranteed under Article 19(1) (A) of the Constitution of India. In the case of **Ranjit D. Udeshi's case (supra)**, the Hon'ble Apex Court has dealt with this aspect but

has stressed upon the fact if the impugned material is such which is not in the interest of public decency or morality, the State may make the appropriate law to restrict such freedom of speech and expression. In para-8 of the above citation, it has been observed as under:-

*“Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality”.*

**83.** Thus, while considering as to whether a particular material is obscene or not, the aspects of morality and public decency will also be required to be kept in mind.

**84.** It has been submitted on behalf of respondent/State that in the impugned episode, a medical practitioner has been shown to be satiating his lust from his own patient/client which demeans and erodes the medical ethics, which is a breach of Hippocratic oath prohibiting such activities by medical practitioners with their patients and depiction of such scenes can only be considered to be against public decency or morality. The lady who approaches the male protagonist for her physical enhancement wants continuation of sexual relation with him even after knowing that he is none but her own son-in-law. Such indulgence by step mother-in-law, though

falling short of incest, still breaches the unwritten code of acceptable moral conduct and decency as per Indian mores. Thus, as per learned counsel, prima facie there is not only a breach of public decency and morality calling for application of Article 19(2) of the Constitution of India, but as discussed earlier, the depicted material is lascivious and appealing to the prurient interest of audience.

**85.** The aforesaid submissions are quite substantial and it would be a matter of deep deliberation and a convoluted exercise to determine as to whether the episode is obscene or not and at this stage, it would be inappropriate to take a final call.

**86.** Learned senior counsel for the petitioner has stated that depictions in the impugned material does not satisfy the *Miller Test* (*Miller vs. California 413 US 25 (1973)*) which is considered as grundnorm in USA for testing as to whether the material is obscene or not. The aforesaid case is based on the standards prevailing in USA, which test, one is afraid cannot be imported for determining obscenity in peculiar Indian conditions.

**87.** It has also been mentioned that Internet is full of much more explicit forms of obscenity and therefore much ado ought not be made about the impugned material.

**88.** The flooding of obscene material on Internet is primarily because the concerned authorities have not been able to devise a mechanism to isolate and prevent such material and such failure ought not to be considered to be valid rationalization on the part of

petitioner. Such submission is akin to an excuse by a person who spreads garbage in a residential colony on the ground that the aforesaid colony is already unhygienic and unclean.

89. The petitioner has submitted that appropriate precautions have been taken by publishing a disclaimer that the programme contains a strong language, mature and intimate scenes between the characters and that neither ALT Balaji nor ZEE 5 intends to endorse, promote, encourage and support any actions.

90. Learned senior counsel for the petitioner submits that apart from the aforesaid disclaimer, terms of use placed at *Annexure-P/6* are also laid down in which it has been mentioned that subscriber has to be at-least eighteen years of age for watching such programme and that such subscribers shall not create a submission that any material transmitted is objectionable on any account. The following part of the terms and conditions were specifically referred to which are as under:-

*“Users hereby acknowledged that certain content on the Site(s)/ App(s) is for use solely by responsible adults over the age of eighteen years or the age of consent in the jurisdiction from which it is being accessed. There are various genres of content suitable for the consumption by the users and also for the users below the age of eighteen years and also for the users above eighteen years of age, have attained the age of majority. Should the user choose to access such content intended for the consumption by the user above the age of eighteen years, then such user shall be making the following representations.”*

*(1) that the user has attained the age of majority or at-least eighteen years of age and has the legal right to access and/or possess the content meant for adults.*

*(2) that the user has voluntarily chosen to access such content, accused he/she wants to view the same and does*

*not find the said content to be offensive or objectionable.*  
(3) *that by view any part or portion of content intended for the consumption by the users above the age of eighteen years available on the application/website, the user agrees that the user shall not hold the owners of the application/website ALT-Balaji, its Directors or its employees responsible for any such material.*  
(4) *that the user will exit this Site(s)/App(s) immediately should he/she be in anyway offended by the adult nature of the content.*  
(5) *that the user understands and agrees to abide by the standards and laws of India or the jurisdiction from which it is being accessed.*

91. Regarding such disclaimer and the terms of use preventing the subscriber from complaining do not insulate the petitioner from action against her if the material itself invokes application of Section 67 of Information Technology Act, 2000. Section 67 of Information Technology Act is a cognizable offence and no condition such as disclaimer etc can prevent a person from lodging the FIR in respect of such offence. In ***Ranjit D. Udeshi's case (supra)***, it has been observed by Hon'ble Apex Court that the offence of obscenity involves strict liability and once the material is *prima facie* considered to be obscene, there can be no escape from the liability.

92. Learned senior counsel for the petitioner submits that a person who has paid the subscription fee is expected to know as to what kind of material would be transmitted and such person cannot later on complain that he or she was annoyed on watching such material. The citation of Bombay High Court in the case of ***State of Maharashtra vs. Joycezed reported in 1973 SCC Online Bombay Page 141*** has been cited in support of such citation.

93. As per the facts of this case, on coming to know that an adult



form of dance i.e. Cabaret Dance show being performed in a hotel, the police department had deputed a police officer who entered the hotel as a decoy customer. The dance was erotic in nature. Later on, the complaint was lodged by the same police officer. The Court held that any customer who goes to a hotel where Cabaret show is run has implicitly given the consent to take the risk of mental harm of being annoyed by obscene sounds and dances which Cabaret performer may give. The maxim '*Volenti Non-Fit Injuria*' must apply to the annoyance, if any. Para Nos.10 and 26 in respect of Cabaret dance, are as under:

***Para 10:*** It is well known that any person above eighteen who enters a hotel where a cabaret show is on the floor, must have so entered either to enjoy the show or to run the tempting risk of the harm of annoyance, if he so feels, as a result of the obscene acts and sounds normally making up such a cabaret show. It is not suggested in this case that any of the customers was below eighteen. Having once entered the floor of the hotel he must know that he will be compelled to run the risk of the alleged harm by way of mental annoyance, if any. Any reasonable and prudent person with average common sense knows or ought to know before entering a hotel like Blue Nile, where cabaret shows are run, that the cabaret artists, whether male or female or both, are bound to show acts and make sounds accompanied by cabaret music, sexual or erotic gestures and revelation and play of parts of male or human bodies normally not exposed to public view on account of modesty or current fashions in society. Any person who desires to avoid the alleged mental harm of annoyance or psychological shocks on seeing what to some may be secret, sacred or profane parts of the male or female body is at perfect liberty not to go to such hotels or buy tickets for such obscene or annoying shows.

***Para 26:*** The question as to whether, in principle, an adult person who buys a seat at a table in a hotel like Blue Nile, knowing that there is a cabaret show and watches the cabaret show, can complain of an offence under section 294 was not raised in that case. In my

*judgment, however, for the reasons stated already such a person can never complain in a Criminal Court of annoyance. Cabaret or similar strip-tease dances are known and done in many big cities "all over the world". They are advised in the newspapers. The hotels try to what public appetites by salacious advertising in their show-cases. A person who enters such a hotel to attend such show, runs the risk of both enjoyment or annoyance according to his own nature and the nature of the cabaret shows. A wise and prudent person who does not like to be annoyed with such dances.*

94. The above submission was considered.

95. Regarding this submission, it may be stated that Bombay High Court in the case of Joycezed's case (supra), had drawn the conclusion on the basis of maxim of *volenti non-fit injuria*. However, I am afraid, this principle applies in a matter involving tortuous liability and not criminal liability. Hence, in my humble opinion, once it is determined that the material is obscene, then person liable for depicting such material or causing to depict such material cannot escape his liability on the ground that the subscriber having opted to watch it cannot make a complaint thereafter. Further, the disclaimer only had warned against scenes of intimacy in the episode but if the depicted scenes transcend into such gross display of lust that transgressing bare depiction of intimacy, such scenes enter into the realm of obscenity, a subscriber would be well within his right to complain.

96. Thus, at this stage it cannot be stated that provisions of Section 67 of IT Act are not attracted. Regarding Section 67-A of IT Act also, one has to decide as to what is the true meaning of **sexually explicit**

**acts** i.e. whether a graphic depiction would only constitute “explicit Act” or whether a simulated act of copulation may also result in invoking this provision.

**97.** Now coming to the submission that provisions of Section 294 of Cr.PC are not applicable. It has already been discussed that a subscriber may also feel annoyed because the portrayal in the episode may have breached his limits of tolerance when the aspects of morality and public decency also get involved along with lascivious character of the episode.

**98.** The other argument is that Section 294 of Indian Penal Code is not applicable because the web series can only be watched by subscribers and not by everyone who has not paid the subscription fees and therefore the episode is not shown in 'public space' but is limited to private space.

**99.** Learned senior counsel for the petitioner has referred to number of citations for interpreting as to what is a public place. He submits that public place is one such place where members of the public have uncontrolled rights to make ingress and exit. The citations are as under:-

**MEANING OF PUBLIC PLACE - INTERPRETATION UNDER VARIOUS ACTS**

|   |  |  |
|---|--|--|
| 1 | Directorate of Revenue vs. Mohammed Nisar Holia<br>(2008) 2 SCC 370                | <b>NDPS Act</b> u/s 43, <b>Hotel room</b> , is not a public place. |
| 2 | Vennapusa Gangireddy @ Sadhu vs. State of A.P. 2007 Indlaw AP 51; 2007 (2) ALT-345 | <b>SC/ST Act</b> – Public place discussed.                         |
| 3 | Malathi vs. State of Kerala (2002) 3 KLT (SN 71) 50 (KERALA HC)                    | Section 133 CrPC – Public place discussed.                         |

|    |   |  |
|----|---|--|
| 4  | Cricket Association of India vs. Calcutta Municipal Corporation 2015 SCC Online Cal 756.<br><b>Follows Calcutta Municipal Corporation, AIR 1959 Cal. 704.</b> | <b>Kolkata Municipal Corporation Act.-</b> <u>Eden Garden Ground, inside of it or the portion which a person enters upon production of valid authority to enter, cannot be considered a public place</u> within the meaning of <b>Section 204 of the Act.</b>  |
| 5  | Corporation of Calcutta vs. Sarat Chandra Ghatak<br><b>MANU/WB/0199/1959</b>  | <b>Calcutta Municipal Act, 1951,-</b> Section 299 of the Act defines Public Place as “Place to which the public has legal right to access.” Cinema house is not a public place.  |
| 6  | Lala and Others vs. Emperor<br><b>AIR 1930 Oudh 394</b>   | <b>Gambling Act,- (S.13)</b> Public place is one which is in full view of public and one to which the public has access.<br>(Set-aside order of conviction)  |
| 7  | In Re: Muthuswami Iyer and Others.<br><b>Criminal Revision Petition 523 of 1936 (Dated 26.11.1936)</b>  | Offence of Affray under Section 159 IPC- Whether a place is public or not does not necessarily depend on the right of public as such to go the place, though of course a place to which public can go as of right must be a public place. (Eg. given of railway platforms, theatre halls, and open spaces resorted to by Public for purposes of recreation, amusement, etc). |
| 8  | Chandrakant Masaram More vs. State of Maharashtra<br><b>Criminal Writ Petition No.1577 of 2010</b>  | Bungalow cannot be said to be a public place as no member of public could freely walk into the bungalow.   |
| 9  | Emperor vs. Babu Ram<br><b>AIR 1927 ALL 560</b>   | <b>Public Gambling Act-</b> A place to which the public had not by right, permission, usage or otherwise, access could not be a public place.  |
| 10 | Marsh v. Arscott<br><b>(1982) 75 Cr. App.R.211</b>  | <b>Public Order Act, 1936, Section 9 as amended by Criminal Justice Act, 1972, Section 33.-</b> Public place includes any highway and other premises or place to which, at the material time, the public have or are permitted to have access whether on payment or otherwise.   |
| 11 | Brannan. vs. Peek<br><b>[1948] 1 K.B. 68</b>  | <b>Street Betting Act, 1906,-</b> A <u>Public house</u> is not a 'public place' withing the meaning of the Act.  |
| 12 | William v. Director of Public Prosecution<br><b>[1992] 95 Cr. App. 415</b>  | <b>Criminal Justice Act, 1967,</b> Section 91.- Distinction between people who gained access or gained access to enter a building went there as member of public or in private capacity.<br><b>The landing of flats that was secure and locked, accessible with a key is not a public place.</b>   |

100. Per contra, learned Additional Advocate General for the respondent/State has submitted that in the aforesaid citations, the term public place has been discussed with reference to the statute involved. However, the same term acquires a different meaning under Information Technology Act, 2000. The explanation of Section 80 of Information Technology Act has been referred to. Section 80 of Information Technology Act is being reproduced here as under:

*“80. Power of police officer and other officers to enter, search, etc.-*

*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any police officer, not below the rank of a Deputy Superintendent of Police, or any other officer of the Central Government or a State Government authorized by the Central Government in this behalf may enter any public place and search and arrest without warrant any person found therein who is reasonably suspected of having committed or of committing or of being about to commit any offence under this Act. Explanation.-For the purposes of this sub-section, the expression "public place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public.*

*(2) Where any person is arrested under sub-section (1) by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a magistrate having jurisdiction in the case or before the officer-in-charge of a police station.*

*(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, subject to the provisions of this section, apply, so far as may be, in relation to any entry, search or arrest, made under this section.”*

101. Learned Additional Advocate General for the respondent/State submits that the word '*accessible to the public*' itself shows that any member of the public who has attained the majority age can access the site on paying the subscription fees and thus, it is accessible to the public of above eighteen years of age on payment of subscription

fees.

**102.** A perusal of aforesaid provision shows that hotel, shop, public conveyance are also *public place* as against some of the aforesaid citations and the word “*any other place intended for use by or, accessible to the public*” would not only include free to air transmissions, but also transmissions based on subscription. Thus, prima facie provisions of Section 294 of Indian Penal Code, 1860, are also attracted.

**103.** Regarding Section 298 of Indian Penal Code, 1860, again number of citations have been put-forth by learned senior counsel for the petitioner. Section 298 of IPC reads as under:

**Section 298 in The Indian Penal Code**

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

**104.** The aforesaid provision has been said to be attracted when the love interest of male physician invites him for attending '*Satyanarayan Katha*'. Hearing this, the physician makes facial expression showing disgust at such invitation. However, such utterance or expressions of disgust has been shown in the background of intentions of male protagonist which is more inclined towards physical intimacy rather than attending the religious function/ceremony. Prima facie it does not appear that there was a deliberate intention to wound religious feelings of the complainant.

Hence, there is substance in the submission that Section 298 of IPC is not attracted.

**105.** Regarding the submission that the episode depicts dishonor of national emblem and thereby an infringement of Section 3 of the State Emblem of India (Prohibition of Improper Use) Act, 2005, was committed by the petitioner, it would be appropriate to reproduce Section 3 which is as under :-

*“3. Prohibition of improper use of emblem.— Notwithstanding anything contained in any other law for the time being in force, no person shall use the emblem or any colourable imitation thereof in any manner which tends to create an impression that it relates to the Government or that it is an official document of the Central Government, or as the case may be, the State Government, without the previous permission of the Central Government or of such officer of that Government as may be authorised by it in this behalf.”*

**106.** As per complainant the objectionable scene attracting the above provision relates to an incident when the male protagonist is made to wear army officer's uniform by the wife of army officer before initiating sexual advancement by her and later on during the course of intimacy, forcibly unbuttons the said blazer of the uniform. As per the petitioner, the aforesaid scene is not intended in any way to harm or tarnished the reputation of Indian Army or uniform of Indian Army and the aforesaid scene is not the primal focal point of the story.

**107.** In the written submissions the petitioner has submitted that the impugned FIR does not disclose any allegations that the episode or the web series contained emblem or any colourable imitation thereof

in any manner which tends to create an impression that it relates to the Government, which is an essential ingredient for constituting an offence under Section 3 of the State Emblem Act.

**108.** A perusal of Section 3 of the Act makes it clear that the breach of this provision would occur only when the emblem is used in order to create an impression that it relates to the Government or it is an official document of the Central Government. This provision could apply in cases where a person actually would use such emblem on his car or uniform, or any other place, thereby giving an impression that the aforesaid car uniform etc relates to the Government, ie., it is Government property and the person shows as if he is authorized to use such property. Only such use of emblem is prohibited under the Act. Section 4 of the Act prohibits use of emblem for wrongful gain pertaining to any trade, business, patent or design etc. No other act or omission provides for punishment under the Act.

**109.** It is pertinent to mention that “The Prevention of Insults to National Honour Act, 1971”, prohibits insulting National Flag and Constitution of India. This Act does not encompass National Emblem, regarding which Act of 2005 is the governing statute, provisions of which have already been discussed earlier.

**110.** After due consideration in view of the aforesaid discussions, it appears that the facts of the case are not such that this court may exercise its extraordinary powers under Section 482 of Cr.P.C for quashing the FIR atleast in respect of Section 67, 67-A of I.T. Act



and Section 294 of IPC. Although, it would be fair enough to state that provision of Section 298 of IPC and the provision of the State Emblem Act are not found to have been breached.

**111.** Consequently, the petition filed under Section 482 of Cr.P.C, stands **dismissed**.

**(SHAIENDRA SHUKLA)**  
**JUDGE**

SS/- Arun