



Short Article

Obscene Act and Song

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Abstract: *India being a land of diverse culture and ethnical background possess within a history of variation among its art, culture and ideological yardstick. Our contemporary magnificent culture, honors arts from the Indus valley civilization to the modern era that depicts Kamasutra as an integral part of Indian diverse culture. This sentence can be illustrated from the fact that number of temples, sculpture, painting portrays an explicitly erotic, alluring and humanly intimate positions and feminine figures which has been celebrated as an object of beauty and art. However, the colonial upsprings along with imposition of a totally new culture brought a change. Legislative enforcement in the form of Indian Penal Code 1870 went ahead to criminalize action that are exotic and explicit in public place. In light with the same legislative change, this paper tends to analyze the legal provisions pertaining to obscene act and songs under Section 294 of Indian Penal Code, 1860, in addition to that this article also provide landmark judgements that tends to redefine sections with different judicial interpretation over the period of time and the global perspective on the same domain.*

Keywords: *Obscene Act, Criminal Offense, Morality, Society, Decency.*

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1. Introduction

Obscenity is any utterance or action that strongly offends the moralist of the time. Though, it's tough to provide any particular and precise definition of obscenity when it comes to culture, custom, religion, and social diversity. Yet, according to the definition prescribed by Oxford dictionary, “*obscene is the portrayal or description of sexual matters is offensive or disgusting by accepted standards of morality and decency*”. This word is extracted from the French terminology ‘obscene’ or Latin word ‘obscene’. But at last, its definition is dynamic and it is a subject to the cultures and custom of every nation.

Different countries across the world have different provision and rules to define or take action on the acts committed in the preview of obscenity. Nonetheless, the evolution of this law dates back to the 4th century when the Roman Catholic Church took its very first step toward prohibiting agnostic things. Pope Paul III in year 1542 founded the Sacred Congregation of the Roman interrogation department which was entrusted to vanquishing atheistic and unethical books and wicked acts in Protestant nations like England. Before 18th century, prohibitions were imposed solely to seditious and irreligious acts and publication. The technological advancement during 15th century in the form of printing press gave a boon to the modern obscenity law. After the invention there had been a widespread expansion of sexually explicit materials like book and posters throughout the Europe which instigated sovereign authorities and church to respond to the matter by arresting and prosecuting distributor along with the publisher.

In line with the same sequence of change. Development of colour woodblock printing in Japan lead to the creation of sizable industry in titillating picture. This development forced the Japanese government to institute the first of several edicts against unlicensed materials, whether political or erotic. Back in year 1720s, Edmund Curll a bookseller by profession in England was convicted on a charge of obscenity¹. Since then, there have been number of precedents that follows the conviction on the ground of obscenity and immoral acts.

2. Obscene Act or Song in Context of India

In the context of India, Indian laws especially Indian Penal Code (IPC) codified the obscene act and song as a cognizable, *offence in which police has the authority to make an arrest without a warrant and to start an investigation with or without the permission of the court*, bailable but not compoundable offence and is triable by any Magistrate

¹ Soma Sarkar, ‘Obscenity Under IPC’ (*Law Times Journal*, 29 November 2018) <<https://lawtimesjournal.in/obscenity-under-ipc/>> accessed on 26 August 2021

summarily under Section 294 under IPC, 1860. Thought the word ‘obscene’ or ‘obscene act or song’ has not clearly been defined under IPC. As the notion of obscenity is dynamic and is greatly dependent upon the class of persons whose sensitivity is associated in the matter. For instance, slimy abuses are not *per se* obscene under Section 294 of IPC. Speaking anything in a private place for instance personal room does not amount to or fulfil the criteria of Section 294. Section 294 of IPC cites that Obscene act or song, whoever, to the annoyance of others —

a) *does any obscene act in any public place, or,*

b) *sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.*²

As per the provision, to count an action under the realm of obscene act, that act or song firstly cause annoyance to other in the public place. Fulfilment of essential ingredients can impose a criminal charge on a person wherein the person might be imprisoned for the extent of three month or fine or both. Even though creating annoyance is the essential condition for this offence to be constituted, this offence being related to the mental condition requires to be proven through the facts. A sensitive person cannot claim any act to be immoral or obscene if it is not same for the public at large.

For instance, if a person openly addresses a strange woman in public that express her illicit sexual relationship with him or in case, he asked her to come with him on his bike or other vehicle, this particular action of his come under the preview of an obscene act.

In a very famous case *Nivrutti v. State of Maharashtra*³, the Court observed that filthy message exchanged on personal accounts of two person on WhatsApp cannot be considered to be a public place. Hence, exchanging personal SMS on WhatsApp does not fulfil the ingredient of this offence and therefore, it cannot be charged under Section 294 of the IPC. However, the performance of Cabaret dance without obscenity or nudity as per the Indian cultural and social standards in restaurants or hotels is considered as a private place and it cannot be considered as a crime liable to punished under Section 294.

Nonetheless, it was observed in *Narender H Khurana & Others v. Commissioner of Police & Another*⁴ case that any encompassed area in any fancy hotels or restaurants, where the cabaret is being performed doesn’t constitute

² Indian Penal Code 1860, sec 294

³ *Nivrutti v State of Maharashtra* 2020 SCC Online Bom 410

⁴ *Narender H Khurana & Others v Commissioner of Police & Another* 2004 Cri.LJ 3393, 2004 (2) Mh.LJ 72

private place only because the entry is restricted to those who purchases expensive tickets, drinks, and food. Even though, this countersigns the High Court's previous verdict pertaining to cabaret dances, where filthy and obscene doesn't amount to an Offence under Section 294 so long as, that act has caused annoyance to other people who have 'witnessed' such show.

Merely because an act committed is an obscene act, does not end the matter. The Section itself transparently depicts that it restricts an immoral act to being performed in public which will cause annoyance to the public at large. This clearly means that annoyance to others is a very important ingredient to constitute the offence under the given Section and without that, the act will not be an offence. Also, the act must cause an actual offence and not merely give a scope to it. There must be someone to give a prove that the act has been performed, or the song sung has annoyed him.

Moreover, in order to illustrate this provision with an example, there had been a number of instances where citizen of India as well as foreigner were booked under Section 294 for instance –

- a) An Israeli couple were arrested for kissing in public after they solemnised their marriage under Hindu rituals at Pushkar Rajasthan. A fortnight later, they had to pay a sum of Rs. 500 as fine on the ground of exhibiting obscene act.
- b) A traveller, who belong to Finland was taken into custody as per Section 294 on the ground of going into the Pushkar Lake while she was nude and also because she was flecking on the streets up her hotel.
- c) In fact, validity of Section 292 was also questioned on the yardstick of fundamental right in *Ranjit Udeshi v. State of Maharashtra*⁵. In this case the petitioner along with four others were the owner of Happy Book Stall. They were charged under Section 294 of IPC, for selling a book by D.H. Lawrence named Lady Chatterley's Lover. Following the conviction, the petitioners argued that Section 292 is violating the fundamental right of freedom of speech and expression under Article 19(1)(a). After analysing the argument, the court observed that Article 19(1)(a) is subjected to certain restrictions under Article 19(2). One such restriction is public morality and decency. Obscene act and song given under Section 292 comes under the preview of this exception thereby addressing the problem of public morality and decency. Hence, Section 292 of Indian Penal Code is constitutional.

⁵ *Ranjit Udeshi v State of Maharashtra* 1965 AIR 881, 1965 SCR (1) 65

However, many a time an act committed does not constitute any offence. In number of cases from time to time the judicial jurisprudence has helped our judges to pass verdict that suits the present social standard. *For instance*, suppose a situation when a couple were kissing in a park and was booked by the police on the ground of obscenity. Because of Police and criminal charges, the couple will get afraid and will pay fine that has been imposed on them by the cops. All such and similar situations instigate police to impose any section or laws to harass the general public and fill their own pocket but in many cases the Apex Court has already given certain situations that can cause obscenity and the police cannot harass or extort bribe by explaining the definition of modesty and immoral act.

Similarly in a very famous case *Atul Jain v. State of Haryana*⁶, the petitioners were found kissing each other near a police checkpoint in the presence of police officials. Consequently, they were charged on the ground of Obscenity under Section 294 of IPC however the Court held that kissing by two major people without any intention to annoy anyone cannot be considered an obscene act therefore, and the Court dismissed the case.

Further, in *Aveek Sarkar v. State of West Bengal*⁷ case the Supreme Court observed that the publication of exotic nude photo of a German tennis player with his black girlfriend cannot be considered as an Obscene act. The court held that “*we should... appreciate the photograph and the article in the light of the message it wants to convey...*” Along with that, the Court emphasizes on the message that “*the photo is intending to convey that the colour of skin does not matter, what matters is the love one has*”.

Moreover, Kerala High Court in *Felix M.A v. P.V. Gangadharan and Anr*⁸ where on the cover page of the magazine a woman was breastfeeding her new-born was alleged to be an obscene picture and was contended to be against the provisions of the Protection of Children from Sexual Offences Act and Rules, Section 45 of the Juvenile Justice Act, Representation of Women (Prohibition) Act, and Articles 39(e) and (f) of the Constitution. The Court denied to categorize the magazine cover as Immoral or obscene, on the ground that “*shocking one’s morals*” is an “*elusive concept*”, and that “*one man’s vulgarity is another man’s lyric*” Further there had been a number of cases where the court deviated and showed a true picture of what a judicial interpretation and intellect can be.

After analysing the cases and judicial interpretation the first question that strikes the conscience of a man is, what is the parameter that decides or categorize an act to be an obscene. The answer to this question is rapped

⁶ *Atul Jain v State of Haryana* 1988 SCC OnLine P&H 749

⁷ *Aveek Sarkar v State of West Bengal* (2014) 4 SCC 257

⁸ *Felix M.A v P.V. Gangadharan and Anr* W.P.(C) No. 7778 of 2018

in the United State Supreme Court's juristic intellect that has provided us with a test to determine Obscene act. That test is Miller test which includes the following criteria –

- i. The first ingredient of this case is that if 'the general public', by using current social 'standards' will consider certain act, 'in its entirety', appeals to 'licentious interest'.
- ii. The second ingredient is that whether the work highlights, in a manifestly offensive way, sensual conduct especially given by any specific law of the land. and,
- iii. Whether the act or work, 'in its entirety is deprived of any serious artistic, literary, scientific, or political, value'.⁹

In the Indian context the Apex Court utilised Hicklin test in *Ranjit Udeshi v State of Maharashtra* case¹⁰. However, in year 2014 the Court voluntarily dismissed this test in *Boris Becker* case¹¹. In that case the Supreme Court of India adopted the contemporary community standards test and observed that the ratio should be determined by contemporary social standard and just nudity by itself will not amount to immoral or obscenity. The Court also highlighted that the law should transform itself with the changing community standards.

3. Conclusion

The historical background of obscenity had a different connotation with the passage of time. Indian Judiciary have stipulated that the understanding of obscenity would change with time, and the act that might have been obscene at one point of time will not be same later. Greatest sculptures, paintings and dances of the world. Indian gleaming heritages, like *Konaraks* and *Khajurabos*, soaring epics, succulent in patches, might get extinguished by legal provisions, in case *fuddy-duddies*, and State moralists give the meaning of obscenity. Here it is important to understand that the comprehending level of obscenity in photographs, cinemas, literature, and paintings is still not settled in India which can be illustrated from a petition filled before the Supreme Court of India to regulate online streaming video content. On the ground that these platforms contain exotic and sexually explicit content.

Taking into consideration that, since a satisfying illustration cannot be incorporated to obscenity and as already mentioned, about the fluctuating social standard, it can be extracted that the law by restricting obscene act

⁹ Tala Esmaili, 'Obscenity' (*Wex - Cornell Law School*, 2017) <<https://www.law.cornell.edu/wex/obscenity>>

¹⁰ *Ranjit Udeshi* (n 5)

¹¹ *Aveek Sarkar* (n 7)

worked discrepantly, if not inaccurately. Section 294 of Indian Penal Code, 1860 cannot be used as an apparatus for annexation of civil liberties. Public disapprobation of certain acts cannot lead to diminution of fundamental rights. Public morality should not countermand constitutional morality. The Supreme Court's verdict in these matters is the outcome of judges' own clairvoyance and interpretations of the matter and such a kind of base for the judiciary is dangerous and against the jurisprudence of legal framework.