

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Decided on: 31.05.2018

1. CRM-M No.1490 of 2013 (O&M)

Messrs Sony India Private Limited	Petitioner
Versus	
Sunil Sharma	Respondent

2. CRM-M No.22387 of 2013 (O&M)

Ubisoft Entertainment India Private Limited	Petitioner
Versus	
Sunil Sharma	Respondent

3. CRM-M No.22418 of 2013 (O&M)

Shri Kishor Dudhal	Petitioner
Versus	
Sunil Sharma	Respondent

4. CRM-M No.23956 of 2014 (O&M)

Electronic Arts Games (India) Private Limited	Petitioner
Versus	
Sunil Sharma	Respondent

5. CRM-M No.24056 of 2014 (O&M)

Ms. Sucharita Singh	Petitioner
Versus	
Sunil Sharma	Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present : Mr. R.S. Rai, Sr. Advocate
with Mr. Gautam Dutt, Advocate
for the petitioner (in CRM-M No.1490 of 2013)

Mr. Akshay Bhan, Sr. Advocate
with Mr. Harparteek S. Sandhu, Advocate
and Mr. Angad Kochhar, Advocate
for the petitioner(in CRM-M Nos.22387 & 22418 of 2013)

Ms. Puneeta Sethi, Advocate
with Mr. Vijay Pal Dalmia, Advocate
and Mr. Chander M. Maini, Advocate
for the petitioner(in CRM-M Nos.23956 & 24056 of 2014)

Mr. S.N. Sharma, Advocate (Legal Aid Counsel)
for the respondent (in all the petitions)

ARVIND SINGH SANGWAN, J.

Vide this common order, I intend to dispose of 05 petitions
i.e. CRM-M Nos.1490, 22387 and 22418 of 2013 and 24056 and
23956 of 2014, as common questions of law and facts are involved for
adjudication.

It may be noticed that counsel for the
respondent/complainant had stopped appearing in Court and vide order
dated 10.10.2017, a legal aid counsel was appointed to assist the Court.

Prayer in all the aforesaid 05 petitions is for quashing of
criminal complaint No.87 dated 04.06.2012 titled as 'Sunil Sharma vs
Sony India Private Limited and others' (Annexure P1) and the
subsequent proceedings arising therefrom as well as the summoning
order dated 19.07.2012 (Annexure P3) passed by the trial Court vide
which the petitioners have been summoned under Sections 292 and 293
of the Indian Penal Code (in short 'IPC') and 6 of the Indecent
Representation of Women (Prohibition) Act, 1986 (in short 'the Act of
1986') as the complaint do not disclose commission of any criminal
offence and the proceedings would amount to abuse and misuse of
process of law and result in failure of justice.

The brief facts of the case noticed in Para Nos. 1 to 11 of the complaint (Annexure P1) are being reproduced as under, as the petitioners have heavily relied upon the contents of complaint to argue that a bare perusal of the same do not disclose any offence:-

“1. That the accused No.1 is Sony India Company and accused No.2 is the North Branch of the accused No.1, indulged in selling of gaming console known as playstation and also developing/producing/selling certain games like “God of War” (a series of games) and “Heavy Rain”, as both are indulged in doing the same, act, in the same manner, so both have been made party in this complaint.

That the accused Nos.3 and 5 are the companies, indulged in developing, testing and distributing/selling games in India, and accused No.4 & 6 are the concerned officers of both the companies, mentioned here as accused No.3 & 5 respectively.

2. That accused No.1 & 2, being the same company, i.e. Sony India, are famous for its games known as “God of War” (a series of games) and “Heavy Rain”, accused No.3 is Electronic Arts (EA Games), which is the maker/seller of the game called “Dante's Inferno”, and accused No.5 is Ubisoft, the maker/seller of game called “Beowulf”.

That accused No.4 & 6 are the concerned officers of the companies mentioned here as accused No.4 & 6 are the concerned officers of the companies, mentioned here as accused No.3 & 5, respectively, who are to be liable for the acts committed by their respective company, as laid down under Cr.P.C. & Section 7 of the Indecent Representation of Women (Prohibition) Act, 1986 as they were found to be the officers concerned in the company's

offices in India, when the company was communicated through Telephonic Calls, E-mails and legal notice, by the complainant.

3. *That all the names of the games mentioned in the para No.2, i.e. “God of War” (all series), “Heavy Rain”, Dante's Inferno, Beowulf, contain scenes/contents of excessive nudity, sexual themes and representing women in indecent manner before the people in India at large, which mostly includes persons of teen age, as gaming is the hobby of teenagers mostly.*

4. *That games are mostly played by teenagers, and the games containing scenes/contents of excessive nudity, sexual themes and indecent representation of women are being sold to young persons in India, with no prior certification or authority from the Government of India.*

5. *That in foreign countries, there is a board known as ESRB, who gives rating to the games, according to the contents of games and direct companies to mention on the games and restrict their sale to certain persons of certain age groups. In India, there is Censor Board, for controlling nudity, sex and such indecent representation of women, in movies released throughout India. Even this board is not allowed by Indian law to allow totally/half naked bodies of girls to be featured in even an A (Adult) Certified movie.*

That India being considered backward in software and technologies by the foreign countries, they entered into our country in the name of selling games of children, teenagers and adults and there being no controlling authority in India, with regard to this gaming section, they have been carrying such illegal activities for many years, in India, and totally ignoring the law of the land.

6. *That the legal provisions, mentioned in the*

headnote of the complaint are very much clear in prohibition of such indecent representation of women in India. And by ignoring the law of the land in India, these companies and their employees, were running their activities throughout India, with a very open heart and mind.

7. That accused No.1 to 4 were contacted by the complainant through legal notice, telephonic calls & e-mails, and accused No.5 & 6 were contacted through telephonic calls & e-mails by the complainant, as to ask them to clear their position with regard to their authority to do such acts in India but after failing to get their response in a positive manner, the complainant had to file this complaint, in good faith, believing they don't have any authority in India, because if there was any, no time was needed to show that. And also believing that there can not be any authority in India to allow nudity and obscenity to be distributed/sold in open market in such manner, and to persons of all the age groups, including children and teenagers.

8. That the complainant is filing this complaint before the expiration of the time period given to reply in the legal notice to the accused No.1 to 4, as the accused no.2 has returned the legal notice unaccepted and rest of the three were communicated by other means also, but no positive reply could be got.

And accused No.5 & 6 were communicated through telephonic calls and e-mails. And even they failed to give any reply to the complainant rather they diverted the matter to their legal counsel, at Paris, France.

9. That there are clear-cut provisions of law, prohibiting publishing/distributing/selling of the objects containing sex, nudity, obscenity and indecent representation of women in any form, and there is a clear-

cut violation of the law by all the accused companies/persons. Hence they are liable to be proceeded against, in accordance with the provisions of the law, mentioned in the headnote of the complaint.

10. *That these games are being sold throughout world, including the territory of India, so every Court in India has got the jurisdiction to try and entertain this complaint.*

11. *That the wrong done by the accused companies/persons is a public wrong and so every citizen of India has got the right to approach the Court against this wrong, as anybody can set the law in motion, and so the complainant has got the locus standi in this complaint.”*

Thereafter, in the preliminary evidence, the complainant himself appeared as a witness and made the following statement:-

“Statement of Sunil Sharma complainant.

It is stated that I have seen the aforesaid video game with my own eyes and I have seen obscenity shown therein I produce 8 video files recorded in two CDs, which are Exhibits C1 to C8. The name of game in Ex.C1 recorded in CD1 is God of War, name of game in Ex.C2 is War 2, name of game in Ex.CD is Gold War, name of game in Ex.C3 and Ex.C4 is God of War Change of Olympus, name of game in Ex.C5 and Ex.C6 is Heavy Rain, which belong to Sony Company accused No.1 and 2. Name of game in Ex.C7 is Dante's Inferno which belongs to accused No.3 Electronic Arts and name of game in Ex.C8 is Beowulf which is of accused No.5. Accused No.4 and 6 Suchitra Singh and Kishore Dudhal who are employees of accused No.3 and 5, who were stated to be responsible for the company in India, when I have contacted accused No.23 and 5.

*RO&AC
Sd/ xx Adv.”*

Sd/- JMIC, 11.6.12.

Thereafter, the trial Court vide impugned order dated 19.07.2012 summoned all the aforesaid petitioners under Sections 292, 293 IPC read with Sections 4 and 6 of the Act of 1986. For ready reference, Sections 292 and 293 IPC as well as 4 and 6 of the Act of 1986, are reproduced as under:-

“292. Sale, etc., of obscene books, etc.— [(1) *For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.*]

[(2)] *Whoever—*

(a) *sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or*

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

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

(d) *advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or*

through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees].

[(Exception) —This section does not extend to—

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure—

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

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

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

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

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]]

293. Sale, etc., of obscene objects to young person.

—Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished 2[on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which

may extend to seven years, and also with fine which may extend to five thousand rupees].]

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

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

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

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

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

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

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

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

6. Penalty.—Any person who contravenes the provisions of section 3 or section 4 shall be punishable on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a

second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lakh rupees.”

The present petitions have been filed by different sets of accused persons who for the sake of convenience are referred to with reference to memo of party of the impugned complaint. CRM-M No.1490 of 2013 has been filed by M/s Sony India Private Limited – accused No.1, CRM-M No.22387 of 2013 has been filed by Ubisoft Entertainment India Private Limited – accused No.5, CRM-M No.22418 of 2013 has been filed by Kishor Dudhal – accused No.6, CRM-M No.23956 of 2014 has been filed by Electronic Arts Games (India) Private Limited – accused No.3 and CRM-M No.24056 of 2014 has been filed by Ms. Sucharita Singh – accused No.4.

All the aforesaid petitions are pending since 2013 and proceedings before the trial Court were stayed by this Court vide order dated 01.04.2013.

Reply on behalf of the respondent/complainant has already been filed and in the reply, it is stated that since the video CDs are sold and marketed by the petitioners/accused persons and it contains obscene contents showing excessive nudity with sexual themes, therefore, it is indecent representation of women and these CDs are sold to young persons in India without any prior certification or authority from the Government of India and, therefore, the trial Court has rightly summoned the petitioners under Sections 292 and 293 IPC read with Section 6 of the Act of 1986.

Learned Senior counsel for the petitioner appearing on behalf of M/s. Sony India Private Limited has argued that it is the own case of the complainant that he has produced replica of the gaming CDs before the trial Court and, therefore, the original CDs are never produced before the trial Court. It is further submitted that in the complaint, it is nowhere mentioned from which source or information, the complainant has come to know that the gaming CDs were marketed or sold by petitioner – M/s. Sony India Private Limited and the complaint is silent in this regard. Learned Senior counsel has further referred to the statement of the complaint to submit that the complainant has stated that there is obscenity shown in the video games as the complainant himself has seen the same, therefore, it is the personal opinion of the complainant to hold that the CDs contains objectionable and obscene material. It is also submitted that the 08 CDs which are produced before the trial Court as Exs.C1 to C8 are not the original CDs and are only the replica/pirated version of the video games which are available on internet and can be accessed or downloaded from any part of the world. It is, thus, submitted that in the absence of any receipt produced by the petitioner having purchased the said video CDs from any authorized distributor or retailer before filing of complaint, it cannot be said that these CDs are sold in the Indian market by M/s. Sony India Private Limited.

Learned Senior counsel for the petitioner – Ubisoft Entertainment India Private Limited has argued that the impugned complaint as well as the statement made by the complainant is also

silent from where he has obtained the replica of CDs and this fact is missing in the complaint and the statement of complainant. It is own case of the complainant that these CDs are the copied version of the CDs and therefore, these are available on internet and are sold in various countries. It is further submitted that all the countries have different norms/laws with regard to declaring the contents of the video CDs as obscene and in many countries, the exhibition of nudity or sexual themes, etc. may not be declared indecent by the law of that country whereas it may be different law in another country. It is also submitted that whenever the legalized gaming CDs are sold in the market, these are duly certified as per the norms of the Government of India and if a person download a gaming CD from internet or procure an unauthorized/pirated version of CD which is not having any certification from the Government of India, it cannot be said that the same is either produced, marketed or sold by the petitioners/accused persons.

Learned Senior counsel has further argued that in absence of production of the original video CDs and in the absence of any evidence produced by the complainant before the trial Court that these are banned, no offence is committed by the petitioners. It is also submitted that complainant has not produced any receipt on record of the trial Court to prove purchase of the aforesaid CDs in India and, therefore, the evidence relied upon by the trial Court is not admissible. Learned Senior counsel for the petitioners has further argued that the complainant has failed to

give the source of the original owner and developer of the video CDs, replica of which are produced before the trial Court and all the video CDs contained the animated version of women and other characters, therefore, it cannot be termed as indecent representation of women. It is further argued that all the accused persons are residing outside the jurisdiction of the trial Court and, therefore, without following the procedure under Section 202 Cr.P.C., the trial Court has wrongly summoned the petitioners as the complaint has been filed at Patiala, where the complainant is residing whereas the accused persons are from New Delhi, Hyderabad and Pune.

Learned Senior Counsel for the petitioner has argued that the trial Court has passed the summoning order only on the basis of the personal opinion formed by the complainant that the video CDs contained obscene characters and is representing the women in an indecent manner. It is further argued that as per the allegation in the complaint, the complainant has communicated with the petitioners on telephones and e-mails, however, no satisfactory reply has been received by him and, therefore, he has filed the present complaint which show that complaint is filed for some extraneous consideration. It is further argued that since it is the own case of the complainant that 08 CDs produced before the trial Court as Exs.C1 to C8 are the replica of the original CDs, there was no occasion for the trial Court to form an opinion that these CDs are the replica of the original CDs, in the absence of any expert evidence or comparison with original CDs. It is also submitted that the opinion formed by the trial Court, that the

contents of the CDs are believed to be obscene and, therefore, the petitioners are liable to be summoned, is not based on judicial application of mind as no expert has been examined to authenticate the contents of the CDs and the source from where the replica was prepared.

Learned counsels for the petitioners – Kishor Dudhal and Ms. Sucharita Singh have submitted that a gaming console is like a desktop computer used to play video games by running a CD and, therefore, the allegations that the petitioners are selling the gaming console, it do not amount to constituting any offence punishable under the Indian Penal Code or the Indecent Representation of Women (Prohibition) Act, 1986. Learned counsel has further argued that all the legalized CDs which are sold in market are certified as U, UA and A Certificate by the Censor Board and in the absence of any such evidence that these CDs are having any such certificate, no *prima facie* offence is made out.

In reply, counsel for the complainant has submitted that the present petitions are not maintainable as the petitioners have an alternative remedy of filing a revision before the Court of Sessions and the trial Court, holding that the *prima facie* offence is made out, has rightly summoned the petitioners. It is also submitted that on a bare reading of complaint and statement of the complainant *prima facie* offence punishable under Sections 292 and 293 IPC read with Section 6 of the Act of 1986 is made out and prayed for dismissal of the petitions.

In reply, learned Senior counsels for the petitioners have

relied upon the judgment passed by the Hon'ble Supreme Court "***Aveek Sarkar and another vs State of West Bengal and others***", 2014(4) SCC 257, wherein the Hon'ble Supreme Court in similar circumstances has held as under:-

6. Complainant also urged that the accused persons should not only be prosecuted under Section 292 I.P.C., but also be prosecuted under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986, since the photograph prima facie gives a sexual titillation and its impact is moral degradation and would also encourage the people to commit sexual offences. The accused persons on 5.3.1993 filed an application before the Court for dropping the proceedings stating that there was no illegality in reproducing in the Sports World as well as in the Anandabazar Patrika of the news item and photograph appeared in a magazine 'STERN' published in Germany. Further, it was pointed out that the said magazine was never banned entry into India and was never considered as 'obscene', especially when Section 79 of Indian Penal Code states that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

7. The Court after seeing the photographs and hearing the arguments on either side, held as follows :-

"Moreover, until evidence comes in it will not be proper to give any opinion as to the responsibility of the accused persons. But I feel it pertinent to mention that though the Section 292 does not define word 'obscene', but my rids of precedents have clustered round on this point and being satisfied with the materials on record, pernicious effect of picture in depraving and debauching the mind of the persons into whose hands it may come and also for other sufficient reasons to proceed further this Court was pleased to issue process against the

accused persons under Section 292 I.P.C. At present having regard to the facts of the case, I find the matter merits interference by not dropping the proceedings as prayed for. It is too early to say that the accused persons are entitled to get benefit of Section 79 I.P.C."

8. The Magistrate after holding so, held the accused persons to be examined under Section 251 Cr.P.C. and ordered that they would be put to face the trial for the offence punishable under Section 292 I.P.C. alternatively under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

9. The Appellants herein preferred Criminal Revision No. 1591 of 1994 before the High Court of Calcutta under Section 482 Cr.P.C. for quashing the proceedings in Case No. C.796 of 1993 (corresponding to T.R. No. 35 of 1994) pending before the learned Judicial Magistrate Court, Alipore. Before the High Court, it was pointed out that the Magistrate had not properly appreciated the fact that there was no ban in importing the German sports magazine 'STERN' into India. Consequently, reproduction of any picture would fall within the general exception contained in Section 79 I.P.C. Reference was also made to letter dated 20th July, 1993 addressed by the Assistant Editor, Sports World to the Collector, Calcutta Customs and a copy of the letter dated 4.10.1993 sent by the Deputy Collector, Calcutta Customs to the Assistant Editor, Sports World. Referring to the picture, it was pointed out that the picture only demonstrates the protest lodged by Boris Becker as well as his fiancée against 'apartheid' and those facts were not properly appreciated by the learned Magistrate. Further, it was also pointed out that the offending picture could not be termed as obscene inasmuch as nudity per se was not obscene and the picture was neither suggestive nor

provocative in any manner and would have no affect on the minds of the youth or the public in general. Further, it was also pointed out that the learned Magistrate should not have issued summons without application of mind. The High Court, however, did not appreciate all those contentions and declined to quash the proceedings under Section 483 Cr.P.C., against which this appeal has been preferred.

*10. Shri Pradeep Ghosh, learned senior counsel, appearing for the Appellants, submitted that the publication in question as well as the photograph taken, as a whole and in the background of facts and circumstances, cannot be said to be per se "obscene" within the meaning of Section 291(1) I.P.C. so as to remand a trial of the Appellants in respect of the alleged offence under Section 292(1) I.P.C. The learned counsel pointed out that obscenity has to be judged in the context of contemporary social mores, current socio-moral attitude of the community and the prevalent norms of acceptability/susceptibility of the community, in relation to matters in issue. In support of this contention, reliance was placed on the Constitution Bench judgment of this Court in **Ranjit D. Udeshi v. State of Maharashtra**, AIR 1965 SC 881. Reference was also made to the judgment of this Court in **Chandrakant Kalyandas Kakodar v. State of Maharashtra**, 1969(2) SCC 687. Few other judgments were also referred to in support of his contention. Learned senior counsel also pointed out that the learned Magistrate as well as the High Court have completely overlooked the context in which the photograph was published and the message it had given to the public at large. Learned senior counsel also pointed out that the photograph is in no way vulgar or lascivious. Learned senior counsel also pointed out that the Courts below have*

not properly appreciated the scope of Section 79 I.P.C. and that the Appellants are justified in law in publishing the photograph and the article which was borrowed from the German magazine. Learned senior counsel also pointed out that such a publication was never found to be obscene even by the State authorities and no FIR was ever lodged against the Appellants and a private complaint of such a nature should not have been entertained by the learned Magistrate without appreciating the facts as well as the law on the point. Learned senior counsel pointed out that the High Court ought to have exercised jurisdiction under Section 482 Cr.P.C.

11. Shri Mohit Paul, learned counsel, appearing for the Respondents, submitted that the Courts below were justified in holding that it would not be proper to give an opinion as to the culpability of the accused persons unless they are put to trial and the evidence is adduced. Learned counsel pointed out that the question whether the publication of the photograph is justified or not and was made in good faith requires to be proved by the Appellants since good faith and public good are questions of fact and matters for evidence. Learned counsel pointed out that the learned Magistrate as well as the High Court was justified in not quashing the complaint and ordering the Appellants to face the trial.

TEST OF OBSCENITY AND COMMUNITY STANDARDS

12. Constitution Bench of this Court in the year 1965 in Ranjit D. Udeshi (supra) indicated that the concept of obscenity would change with the passage of time and what might have been "obscene" at one point of time would not be considered as obscene at a later period. Judgment refers to several examples of changing notion of obscenity and ultimately the Court observed as follows :-

".... The world, is now able to tolerate much more than formerly, having coming indurate by literature of different sorts. The attitude is not yet settled....."

This is what this Court has said in the year 1965.

13. Again in the year 1969, in Chandrakant Kalyandas Kakodar (supra), this Court reiterated the principle as follows :-

"The standards of contemporary society in India are also fast changing."

*14. Above mentioned principle has been reiterated in **Samaresh Bose v. Amal Mitra, (1985)4 SCC 289** by laying emphasis on contemporary social values and general attitude of ordinary reader. Again in 2010, the principle of contemporary community standards and social values have been reiterated in **S. Khushboo v. Kanniammal, 2010(2) R.C.R.(Criminal) 793 : 2010(3) Recent Apex Judgments (R.A.J.) 90 : (2010)5 SCC 600.***

15. This Court in Ranjit D. Udeshi (supra) highlighted the delicate task to be discharged by the Courts in judging whether the word, picture, painting, etc. would pass the test of obscenity under Section 292 of the Code and the Court held as follows :

"The 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 the Supreme Court. The test 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. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution.

This invites the court to reach a decision on a constitutional issue of a most far reaching character and it must beware that it may not lean too far away from the guaranteed freedom."

16. Applying the above test, to the book "Lady Chatterley's Lover", this Court in Ranjit D. Udeshi (supra) held that in treating with sex the impugned portions viewed separately and also in the setting of the whole book passed the permissible limits judged of from our community standards and there was no social gain to the public which could be said to preponderate the book must be held to satisfy the test of obscenity.

*17. The novel "Lady Chatterley's Lover" which came to be condemned as obscene by this Court was held to be not obscene in England by Central Criminal Court. In England, the question of obscenity is left to the Jury. Byrne, J., learned Judge who presided over the Central Criminal Court in **R. v. Penguin Books Ltd., (1961 Crl. Law Review 176)** observed as follows :-*

"In summing up his lordship instructed the jury that : They must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was : was the book obscene? Was its effect taken as a whole to tend to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to pervert, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to

deprave and corrupt those likely to read it, not only those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interest of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison with other books. If it was obscene then if the defendant has established the probability that the merits of the book as a novel were so high that they outbalanced the obscenity so that the publication was the public good, the jury should acquit."

18. Later, this Court in *Samaresh Bose (supra)*, referring to the Bengali novel "*Prajapati*" written by *Samaresh Bose*, observed as follows :-

"35. 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....."

We have already indicated, this was the contemporary standard in the year 1985.

19. We are, in this case, concerned with a situation of the year 1994, but we are in 2014 and while judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons.

HICKLIN TEST :

*20. In the United Kingdom, way back in 1868, the Court laid down the Hicklin test in **Regina v. Hicklin, (1868 L.R. 2 Q.B. 360)**, and held as follows :-*

"The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

*21. Hicklin test postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. United States, however, made a marked departure. Of late, it felt that the Hicklin test is not correct test to apply to judge what is obscenity. In **Roth v. United States, 354 U.S. 476 (1957)**, the Supreme Court of United States directly dealt with the issue of obscenity as an exception to freedom of speech and expression. The Court held that the rejection of "obscenity" was implicit in the First Amendment. Noticing that sex and obscenity were held not to be synonymous with each other, the Court 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 point of view of an average person by applying contemporary community standards.*

22. In Canada also, the majority held in **Brodie v. The Queen, (1962 SCR 681)** that D.H. Lawrence's novel "Lady Chatterley's Lover" was not obscene within the meaning of the Canadian Criminal Code

23. The Supreme Court of Canada in **Regina v. Butler, (1992)1 SCR 452**, held that the dominant test is the "community standards problems test". The Court held that explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in the Canadian society and will not qualify as the undue exploitation of sex unless it employs children in its production. The Court held, in order for the work or material to qualify as 'obscene', the exploitation of sex must not only be a dominant characteristic, but such exploitation must be "undue". Earlier in *Town Cinema Theatres Ltd. v. The Queen, (1985)1 SCR 494*, the Canadian Court applied the community standard test and not Hicklin test.

COMMUNITY STANDARD TEST:

24. 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.

MESSAGE AND CONTEXT

*25. We have to examine the question of obscenity in the context in which the photograph appears and the message it wants to convey. In **Bobby Art International & Ors. v. Om Pal Singh Hoon, (1996)4 SCC 1**, this Court while dealing with the question of obscenity in the context of film called Bandit Queen pointed out that the so-called objectionable scenes in the film have to be considered in the context of the message that the film was seeking to transmit in respect of social menace of torture and violence against a helpless female child which transformed her into a dreaded dacoit. The Court expressed the following view :-*

"First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The

object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film "Schindler's List" was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow- feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. "Bandit Queen" tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her." [Emphasis Supplied]

26. In *Ajay Goswami v. Union of India* 2007(1) R.C.R.(Civil) 633 : 2007(1) S.C.T. 554 : 2007(1) Recent Apex Judgments (R.A.J.) 767 : (2007)1 SCC 143, while examining the scope of Section 292 I.P.C. and Sections 3, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, this Court held that the commitment to freedom of expression demands that it cannot be suppressed, unless the situations created by it allowing the freedom are pressing and the community interest is endangered.

27. *We have to examine whether the photograph of Boris Becker with his fiancée Barbara Fultus, a dark-skinned lady standing close to each other bare bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292 I.P.C. Applying the community tolerance test, we are not prepared to say such a photograph is*

suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Breast of Barbara Fultus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph, in our view, has no tendency to deprave or corrupt the minds of people in whose hands the magazine Sports World or Anandabazar Patrika would fall.

28. We may also indicate that the said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The cover story of the Magazine carries the title, posing nude, dropping of harassment, battling racism in Germany. Boris Becker himself in the article published in the German magazine, speaks of the racial discrimination prevalent in Germany and the article highlights Boris Becker's protests against racism in Germany. Boris Becker himself puts it, as quoted in the said article :

"the nude photos were supposed to shock, no doubt about it..... What I am saying with these photos is that an inter-racial relationship is okay."

29. The message, the photograph wants to convey is that the colour of skin matters little and love champions over colour. Picture promotes love affair, leading to a marriage, between a white-skinned man and a black skinned woman.

30. We should, therefore, appreciate the photograph and the article in the light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white skinned man and a black skinned woman.

When viewed in that angle, we are not prepared to say that the picture or the article which was reproduced by Sports World and the Anandabazar Patrika be said to be objectionable so as to initiate proceedings under Section 292 I.P.C. or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

31. We have found that no offence has been committed under Section 292 I.P.C. and then the question whether it falls in the first part of Section 79 I.P.C. has become academic. We are sorry to note that the learned Magistrate, without proper application of mind or appreciation of background in which the photograph has been shown, proposed to initiate prosecution proceedings against the Appellants. Learned Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of which he would not have ordered the Appellants to face the trial. The High Court, in our view, should have exercised powers under Section 482 Cr.P.C. to secure the ends of justice.

32. We are, therefore, inclined to allow this appeal and set aside the criminal proceedings initiated against the Appellants. The Appeal is allowed as above.”

Learned Senior counsel for the petitioners has further relied upon the judgment of the Hon'ble Supreme Court **“Samaresh Bose vs Amal Mitra”, 1986(1) RCR (Criminal) 210** wherein the Hon'ble Supreme Court has given certain guidelines to decide the question of obscenity. The operative part of the said judgment is reproduced as under:-

“28. In England, as we have earlier noticed, the decision on the question of obscenity rests with the Jury who on the basis of the summing up of the legal principles governing such action by the learned Judge decides

whether any particular novel, story or writing is obscene or not. In India, however, the responsibility of the decision rests essentially on the Court. As laid down in both the decisions of this Court earlier referred to, "the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the Court to ascertain whether the book or story or, any passage or passages therein offend the provisions of Section 292 Indian Penal Code" 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 is 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 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 Indian Penal Code by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment.”

Learned Senior counsel for the petitioners have also relied

upon the judgment passed by the Hon'ble Supreme Court ***“Abhijit Pawar vs Hemant Madhukar Nimbalkar and another”***, 2017(1) RCR (Criminal) 405 to submit that in absence of an enquiry conducted under Section 202 Cr.P.C., either by the Court itself or through the police, the impugned order summoning the petitioner is bad in the eyes of law.

Learned Senior counsel for the petitioners have, lastly, relied upon the judgment passed by the Hon'ble Supreme Court ***“Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others vs State of Gujarat and another”***, 2017(9) SCC 641, wherein also the Hon'ble Supreme Court has given guidelines for the High Court to exercise the powers under Section 482 Cr.P.C. to quash the FIR in given circumstances.

Learned Senior counsel for the petitioners have further submitted that since the complainant has miserably failed to prove his case as the same is based on pirated version of the video CD; without disclosing any source from where these CDs were copied; without examining any expert evidence to prove that all the CDs are copies of original CDs; it being the animated version, the impugned complaint as well as the summoning order are liable to be quashed as the prosecution of the petitioner is sheer abuse and misuse of process of law and it is in the interest of justice to quash the proceedings against the petitioner.

After hearing the counsel for the parties, I find merit in the present petitions for the following reasons:-

(a) In the light of the judgment passed by the Hon'ble Supreme Court in Aveek Sarkar's case (supra),

I find that prima facie neither offence under Section 292 IPC nor under Sections 4 and 6 of the Act of 1986 is made out. A bare perusal of the complaint show that it is alleged that the complainant has seen the replica of the gaming video CDs i.e. he has not seen the original video CDs either manufactured or distributed by any of the accused which is sold in market, after obtaining the requisite certificate from the Censor Board and, therefore, the complainant has failed to prove that the accused persons have committed the offence punishable under Sections 292, 293 IPC read with Sections 4 and 6 of the Act of 1986.

(b) *It is own case of the complainant that the original CDs from which the replica CDs were prepared and were exhibited before the trial Court, were never produced in evidence. Both the complaint and the statement of the complainant as CW1 is silent about the fact, from where the complainant has acquired the replicas of gaming video CDs and in the absence of such evidence, it cannot be held that same were either manufactured or distributed by any of the accused persons.*

(c) *The complainant has also failed to lead any evidence that even the replica video CDs were purchased by him from any of the authorized dealer or distributor of M/s. Sony India Private Limited as again the complaint is silent in this regard and no receipt/bill is exhibited.*

(d) *It is the case of the complainant that the video CDs Exs.C1 to C8 contains the animated characters of women in the video games and the complainant as CW1 deposed that on seeing such video CDs, in his personal opinion it contains obscenity, therefore, in the absence of any expert opinion to hold that the video CDs contains any obscenity, it cannot be held, only on the personal opinion of the complainant that the offences are made out against*

the petitioners.

(e) A perusal of the statement of the complainant CW1 further show that he has not produced on record any receipt of purchasing of the CDs Exs.C1 to C8 from any of the accused persons or its agencies. All the 08 CDs are exhibited, without producing on record any receipt of purchase and, therefore, I find force in the argument of the petitioners that the CDs Ex.C1 to C8 are the downloaded copies of the games which are available on internet and these were never manufactured, marketed or sold by any of the petitioners as Exs.C1 to C8 are the copied version/replica of the original CDs.

(f) The complainant could not prove that the original video CDs are banned for sale by any law in India as all the countries have different norms/laws with regard to declaring the contents of the video CDs or any other publication as obscene material and a video CDs which is uploaded on a networking site by a country where it is not held to be obscene can be viewed or downloaded in any part of the world which allow access to such sites.

(g) The plea taken by the petitioners/accused is that only those CDs are sold and marketed by the petitioners which are duly certified as per the norms of the Government and are given U, UA and A Certificate by the Board of Censor and, therefore, the CDs which are admittedly not sold by the petitioners/accused, its contents cannot be declared obscene for the purpose of holding the accused persons liable, in the absence of any such evidence produced on record of the trial Court.

(h) Even otherwise, the trial Court has not followed the proper procedure under Section 202 Cr.P.C. as the complaint has been filed at Patiala in Punjab whereas all the petitioners/accused persons are from New Delhi, Hyderabad and Pune and, therefore, the trial Court

*has not followed the proper procedure in the light of the judgment of the Hon'ble Supreme Court in **Abhijit Pawar's case (supra)** as no enquiry was done either by the trial Court or through the police.*

(i) A perusal of the impugned order passed by the trial Court summoning the petitioners also show that the trial Court has even held that video CDs Exs.C1 to C8 are the replica of the original and in the absence of the original CDs before the trial Court, it is difficult to uphold such finding that the CDs produced before the trial Court are correct replica of the original CDs.

In view of the same, the present petitions are allowed and the impugned complaint No.87 dated 04.06.2012 (Annexure P1) and the subsequent proceedings arising therefrom as well as the summoning order dated 19.07.2012 (Annexure P3) passed by the trial Court are ordered to be quashed.

(ARVIND SINGH SANGWAN)
JUDGE

31.05.2018
yakub

Whether speaking/reasoned	Yes/No
Whether reportable:	Yes/No