

**THE CASE OF DEVIDAS RAMACHANDRA TULJAPURKAR V. STATE OF MAHARASHTRA: A
NEW CHAPTER IN LAW ON OBSCENITY IN INDIA**

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“The relation between reality and relativity must haunt the Court's evaluation of obscenity, expressed in society's pervasive humanity, not law's penal prescriptions”

- Krishna Iyer, J.¹

Freedom of speech and expression is a quintessential right in any democratic system to ensure free flow of thoughts and ideas. The “reasonable restrictions” allowed on this right by the Constitution have been put under the gavel myriad time over the past few decades. One of these reasonable restrictions is “decency or morality” which prohibits publication of obscene speech. It is a cardinal principle of Constitutional law that speech should not be restricted due to the reason of it being offensive. However, offensive speech or expression that trespass the reasonable restrictions under Article 19, has no constitutional protection. This gives rise to obscenity as an exception to freedom of speech, as obscene material is considered extremely offensive to the community standards of the society and hence enters the domain of the “decency or morality” exception mentioned in Article 19(1). There is a fine line differentiating offensive and obscene material. The decision of the Supreme Court in Devidas Ramachandra case, further blurs this line by including speech mocking “historically respected personalities” as obscene. This case note discusses the flaws in the reasoning of the Apex Court in this case.

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¹Raj Kapoor and Ors. v. State and Ors, (1980) 1 SCC 43.

Introduction

In India, freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution.² This right is subject to the riders provided under Article 19(2) which states that, the State can restrict the right provided under sub-clause (a) of clause (1) by imposing any reasonable restriction on the speech in light of “*the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence*”³

For the purpose of this case note, the ground of “decency or morality” is relevant. The basis for this exception is to control proliferation of indecent or morally degrading material, as the right to freedom of speech was not intended to protect such material.⁴ However, the question that arises is, who sets the standard for indecency or immorality in the society? Is it the average man who may be exposed to the work or a child who may accidentally stumble upon it? As highlighted by the opening lines of this note which quote J. Krishna Iyer, the problem of ascertaining the standard for decency and morality has been troubling courts for a long time.⁵

²INDIAN CONSTITUTION, Art. 19(1)(a), “(1) All citizens shall have the right to: (a) freedom of speech and expression” See *Bennett Coleman v. Union of India*, AIR 1973 SC 106; H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 711 (Universal Law Publishing Company, 4th ed. 1991).

³INDIAN CONSTITUTION, Art. 19(2), “(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence” See V.N. SHUKLA, CONSTITUTION OF INDIA, 124 (M. P. Singh ed., 11th ed. 2008); See also *Ajmer State through Police, Ajmer v. Ratanlal Udailal*, AIR 1956 Ajmer 52, ‘words decency or morality are not well understood. There may be wide difference of opinion as to the precise meaning of these definitions and if the Legislature intended to impose any restrictions on the freedom of speech and expression in the interest of decency and morality those prohibited acts and restrictions should be clearly specified so that it could be decided whether these restrictions are reasonable or not”.

⁴See M. Hidayatullah, *Thoughts on Obscenity*, 2 S. ILL. U. L. J. 283, 283(1977); Analisa Ciracusa, *Obscenity*, 6 GEO. J. GENDER & L. 347, 348 (2005).

⁵See William B Lockhart & Rober C McClure, *Obscenity in Courts*, 20 L. & CONTEMP. PROBS, 587, 587 (1955) (“The statutory law of obscene literature is peculiar. Though obscenity is one of the most elusive and difficult concepts known to the law, legislative bodies have seldom made any effort to provide a workable definition of the term... In consequence, courts confronted with the concrete cases for decision are left to work out for themselves their own meaning for obscenity, with little or no guidance from the legislature. They have no choice but to do the best they can with an extremely difficult and complex subject”).

In India, the law of obscenity is governed by Section 292 of the Indian Penal Code, 1860 ('IPC') which imposes criminal sanctions for the distribution, sale etc. of obscene materials.⁶ This section was added by the Obscene Publications Act, 1925 to give effect to Article 1 of the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923, to which India is also a signatory. However, even the IPC does not define "decency" or "morality" and hence the burden comes to the courts to determine the standards for obscenity.⁷ The extent of success of the courts while doing so is a matter of study and will be discussed in later parts of this note.

Recently, in the case of *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*⁸ ('Devidas'), the Supreme Court held that any speech that is offensive to "historically respected personalities" is obscene. In other words, any kind of satire or parody that mocks these personalities has been declared as obscene by the Apex Court. There are

⁶INDIAN PENAL CODE, 1860 § 292, "(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".

⁷P.S.A. PILLAI, CRIMINAL LAW, 701, 703 (K.I. Vibhute ed., 2009).

⁸(2015) 6 SCC 1.

serious ramifications of this holding on the freedom of speech in India. This case note is divided into the following parts - Part I puts forward the facts of this case and the issues that arose before the Apex Court. Part II discusses the manner in which political satire has been treated in the United States and how *Devidas* would have been treated in the U.S. Supreme Court.⁹ Part III analyses the law on obscenity in the United States. Part IV lays down the development of law on obscenity in India and analyses the flaws in the decision of the Supreme Court in *Devidas*. The note ends with the concluding remarks in Part V.

I. Facts and Issues

The case arose pursuant to a complaint filed by V.V. Anaskar, a resident of Pune and a member of ‘Patit Pawan Sangthan’ (a Pune based right wing Hindu organization),¹⁰ with the Commissioner of Police, regarding the publication of the poem titled “Gandhi Mala Bhetala” (‘I Met Gandhi’) written by Vasant Dattatraya Gujar. In the poem, Gujar talks about his imaginary encounters with Gandhi at various places including the Kremlin, churches, mosques and even a red-light area in Mumbai.¹¹ The poem at various points portrays Gandhi as hurling abuses and performing untoward activities.¹² According to the author, the point of such expression was to present a satirical critique of the people who claim to follow Gandhi’s principles.¹³

It was published in 1994 and was meant for private circulation¹⁴ amongst the members of the All India Bank Association Union. An FIR was registered against him, for writing the poem

⁹**Express Newspapers (Private) Ltd. v. Union of India**, A.I.R. 1958 S.C. 578, Justice Bhagwati stated, “[that] the fundamental right to the freedom of speech and expression enshrined in our constitution is based on (the provisions in) Amendment I of the Constitution of the United States and it would be therefore legitimate and proper to refer to those decisions of the Supreme Court of the United States of America in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by this court against use of American and other cases.”

¹⁰Devidas, ¶ 7; See Nitin Sethi, *Of Gandhi and the limits of Poetic license*, BUSINESS STANDARD, May 8, 2015, available at http://www.business-standard.com/article/beyond-business/of-gandhi-and-the-limits-of-poetic-licence-115050800008_1.html (last visited on June 11, 2016).

¹¹Alka Dhupkar, *My poem talks about how we have destroyed Gandhi’s values*, MUMBAI MIRROR, May 16, 2015, available at <http://www.mumbaiirror.com/mumbai/cover-story/My-poem-talks-about-how-we-have-destroyed-Gandhis-values/articleshow/47304204.cms> (last accessed on April 15, 2016).

¹²Rushikesh Aravkar, *Translation of Vasant Dattatreya Gurjar’s poem Gandhi Mala Bhetla (Gandhi Met Me)*, KRACTIVISM, available at <http://www.kractivist.org/translation-of-vasant-dattatreya-gurjars-poem-gandhi-mala-bhetla-gandhi-met-me/> (last visited on June 11, 2016)..

¹³*Supra* note 12..

¹⁴Devidas, ¶ 7.

and a charge sheet was filed for offences under Sections 153-A, 153-B and 292 read with Section 34 of the IPC.¹⁵ The Chief Judicial Magistrate, Latur, held that no case was maintainable under Sections 153-A and 153-B and discharged the accused of the said offences. However, the learned Magistrate did not do so for the charges under Section 292 of the IPC. A revision petition was filed, but the Additional Sessions Judge did not interfere with the aforesaid order. The accused sought to invoke the jurisdiction of the Bombay High Court under Section 482 of the Criminal Procedure Code ('CrPC'),¹⁶ but the Aurangabad bench of the Bombay High Court, dismissed the application. The said decision became the subject matter of a special leave at the instance of the publisher.

The main issue before the Apex Court was, “*whether in a write-up or a poem, keeping in view the concept and conception of poetic license and the liberty of perception and expression, use of the name of a historically respected personality by way of allusion or symbol is permissible*”.¹⁷ In its final holding the Supreme Court refused to interfere with the original charge and sent the case back to trial. However, the Court subjected the poetic license to a vague test that any speech should not mock any “historically respected personality”. This test indirectly bans political satire, which is one of the most effective tools to critique public officials in the mass media.

The next section discusses how political satire has been treated in the U.S. and whether political satire constitutes obscenity in the American context.

II. Political Satire and the Law on Obscenity in the USA

A. Political Satire

The First Amendment in the U.S. gives the right to freedom of speech¹⁸ and the right to criticize public officials and popular personalities.¹⁹ In 1964, in the *New York Times v.*

¹⁵INDIAN PENAL CODE, 1860§ 153-A., “Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony”; and § 153-B, “Imputations, assertions prejudicial to national-integration”.

¹⁶CRIMINAL PROCEDURE CODE, 1973 § 482, “Saving of inherent power of High Court: Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice”.

¹⁷*Supra* note 9.

¹⁸U.S. CONST., Amendment I, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances”.

*Sullivan*²⁰ case, the U.S. Supreme Court raised the standard for defamation suits filed by public officers by stating that the plaintiff must prove “actual malice” against the defendant.²¹ Similarly in the case of *Gertz v. Robert Welch*,²² the Court held that the protection granted by the First Amendment to defamatory statements should be the strongest when the plaintiff is a public figure.²³ Hence, the U.S. gives full freedom of speech to voice one’s thoughts against “public figures”.

One of the most common tools used to criticize such public personalities is satire, which makes use of several devices like parodies, mockery, hyperbole, irony, wit or sarcasm to achieve its purpose.²⁴ Political satire is a device used to expose popular personalities and their misdeeds through exploitation of physical or mental traits or politically embarrassing events.²⁵ As put by Rosenheim, “satire is not only an attack; it is an attack upon discernable, historically authentic particulars”.²⁶ Rosenheim further states that all satire involves certain departure from literal truth and dependence on satirical truth which is entitled to protection under the First Amendment.²⁷

The U.S. has had a history where satire and parody has been protected under the right to freedom of speech under the First Amendment. In the decision of *Hustler Magazine, Inc v. Falwell*²⁸(‘Hustler’), the U.S. Supreme Court held that satire is a form of an opinion rather

¹⁹New York Times v. Sullivan, 376 U.S. 254 (1964).

²⁰*Id.*

²¹See Jonathan Deem, *Freedom of the Press box: Classifying high school athletes under the Gertz public figure doctrine*, 108 W. VA. L. REV. 799, 803 (2005-2006); Alan Kaminsky, *Defamation Law: Once a public figure always a public figure?*, 10 HOFSTRA L. REV., 803, 804 (1981-1982).

²²418 U.S. 323 (1974).

²³*Gertz v. Robert Welch*, 418 U.S. 323 (1974).

²⁴COMPLETE AND UNABRIDGED WEBSTER DICTIONARY, 3762 (1963).

²⁵M.H. ABRAMS, A GLOSSARY OF LITERARY TERMS 166 (5th ed. 1988). See Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843,860 (2003-2004).

²⁶EDWARD ROSENHEIM, SWIFT AND THE SATIRIST’S ART 25 (1963).

²⁷*Id.*

²⁸485 U.S. 46 (1988).

than a statement of fact and hence cannot constitute defamation.²⁹ The Court held that right to criticize public men is one of the cornerstones of American citizenship.³⁰

Hustler involved an advertisement was published in form of a parody where Rev. Jerry Falwell was describing his “first time” to his mother in a drunken state.³¹ An action for libel, infliction of emotional distress and invasion of privacy was brought against the maker of the advertisement. The U.S. Supreme Court dismissed the action by stating that the First Amendment protected such speech against public officials and political cartoons are often meant to injure the feelings of the subject of the cartoon.³²

In the case of *Watts v. United States*³³ the U.S. Supreme Court dropped the criminal charges against Watts, a young man who had been charged with threatening to kill the President. Watts did not want to join the army in the wake of the Vietnam War and apparently made a statement that, “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.”³⁴ The U.S. Supreme Court held that this was not a “true threat” but rather a political hyperbole made in the context of his opposition against the Vietnam War.³⁵ Thus, political satire has been safeguarded by the U.S. courts as an important aspect in shaping public opinion by ridiculing those who are in public limelight.

B. Law on Obscenity in the U.S.

In the latter half of the nineteenth century, courts in the United States started embracing the *Hicklin* definition of obscenity³⁶ while interpreting state laws on obscenity,³⁷ due to the

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³394 U.S. 705 (1969).

³⁴*Id.*

³⁵Gilbert, *Supra* note 25.

³⁶*R v. Hicklin*, (1868) 3 L.R.Q.B. 360.(This case laid down the infamous Hicklin test of obscenity as, “whether the tendency of the matter charged 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”); *See* Tejus RK Motwani, *Obscenity as a restriction in India*, 2 INT’L JOUR. OF LEGAL STUDIES AND RESEARCH 160, 164 (Hicklin test has been criticized for being vague and too restrictive on the freedom of speech. This 1868 test had been the governing law on obscenity for decades but during the past few years, it has been substituted by more liberal tests all over the world).

absence of any definition in the Comstock Act enacted in 1873.³⁸ In the year 1913, in the case of *United States v. Kennerly*,³⁹ Justice Hand while applying the *Hicklin* test, criticized it as being a severely rigid test and suggested that instead of using the *Hicklin* test which aims at assessing the effect of obscene material on the most impressionable minds, it would be apt to shift the focus on the “average conscience of the time”.⁴⁰

The major shift from the *Hicklin* test occurred in the case of *United States v. One Book Called “Ulysses”*⁴¹ where James Joyce’s *Ulysses* was held on trial for being obscene. The trial judge observed that Joyce’s *Ulysses* has what are “generally considered as dirty words” but these words are “known to almost all men”.⁴² The judge noted that the “dirty words” formed an essential part of the literary work and it was not “dirt for dirt’s sake”. The court, in a major departure from the *Hicklin* test, stated that obscenity should be ascertained according to “its effect on a person with average sex instincts” and subsequently held that the book in question was not obscene.

In 1957, in the case of *Roth v. United States*,⁴³ the United States Supreme Court endorsed the rejection of the *Hicklin* test by the lower courts. The Court stated that the new test to ascertain obscenity was:

*“whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest”*⁴⁴

Interestingly, no lower court had taken precisely the same view as taken in *Roth*. However, the Supreme Court holding built upon the earlier holdings of Justice Hand in *Kennerly* where

³⁷*United States v. Smith*, 45 F. 476, 477 (E.D. Wis, 1891), *United States v. Clarke*, 38 F. 732, 733 (E.D. Mo. 1889), *Commonwealth v. Allison*, 116 N.E. 265, 266 (Mass. 1917).

³⁸ Act of March 3, 1873, ch. 258, 17 Stat 598, amended by Act of July 12, 1876, ch. 186, 19 Stat. 90 (codified as amended in 18 U.S.C. § 1461 (2000)).

³⁹209 F. 119 (S.D.N.Y. 1913).

⁴⁰*Id.*

⁴¹5 F. Supp. 182 (S.D.N.Y. 1933).

⁴²*Id.*

⁴³354 U.S. 476 (1957).

⁴⁴*Id.* at 489.

the learned judge had made reference to the “average conscience of the time” and the ruling in *Ulysses* which referred to the “person with average sex instincts”. Even the “dominant theme of the material taken as a whole” requirement in *Roth* can be traced to Augustus Hand’s opinion in *Ulysses* that the material must be “taken as a whole” in order to ascertain its “dominant effect”. Hence, the “contemporary community standards” test laid down in *Roth* was a synthesis of various standards laid down by lower courts prior to 1957 as an alternative to the *Hicklin* test. *Roth* proved to be a watershed event in the liberalization of the test for obscenity. It marked a shift from the *Hicklin* test, which focused on the impact of select portions of a literary work on a sensitive reader, to the effect of the work as a whole on the average reader.

About ten years after the landmark ruling in *Roth*, the doctrine for testing obscenity was crystallized into three components in the case of *Memoirs of a Woman of Pleasure v. Massachusetts*.⁴⁵ Justice Brennan writing for the majority laid down three elements of the test for obscenity as:

“(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value”.⁴⁶

After the ruling in *Memoirs* the courts in the United States “reviewed and reversed summarily” the tests on obscenity without any further opinion.⁴⁷ Then finally in the case of *Miller v. California*⁴⁸ in 1973, Chief Justice Warren Burger laid down a new constitutional test for obscenity, which is the governing law in the United States even today, as:

“(a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient

⁴⁵383 U.S. 413 (1966).

⁴⁶*Id.*

⁴⁷EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS*, 515 (1992)

⁴⁸413 U.S. 15 (1973).

*interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value*⁴⁹

The tests laid down in *Miller* evolved the tests laid down in *Memoirs* with a major difference being the substitution of “utterly without redeeming value” standard in *Memoirs* by the less liberal requirement of “lacking serious literary, artistic, political or scientific value” in *Miller*. This was done to make the *Memoirs* test stricter, as the court believed that every work has certain social value that can be ascribed to it.⁵⁰ *Memoirs* had held that a work can be obscene only if it is “utterly without redeeming social value”; *Miller* replaced it with not having a “serious” social value attached to it, hereby making the test stricter. On a closer scrutiny, the *Miller* tests also seemed to have shifted the emphasis of the “community standards test”. In prong (b) of the *Memoirs* test, community standards are used to see whether the material is “patently offensive” in the description of sexual matters; however, in prong (a) of the *Miller* test, community standards are used to check whether the material if “taken as a whole” would appeal to the prurient interest. Substantively speaking there is no difference between the two, and this has been made clear by later decisions which have stated that both “appeal to prurient interests” and “patent offensiveness” are to be ascertained as per the community standards.⁵¹

The above cases show that the courts in the United States have gradually shifted from the rigid *Hicklin* test to the much more liberal *Miller* test, which uses contemporary community standards to ascertain obscenity.

C. What if *Devidas* was filed in the U.S.?

The main takeaway from the above discussion is that the courts in the United States treat political satire as part of the freedom of speech as is evident from the *Watts* case and the *Hustler* case. Hence, if a *Devidas* arises in the U.S., it is most likely that the charges against the author would have been dismissed. The question of the poem being declared obscene

⁴⁹*Ibid.*

⁵⁰Motwani, *Supra* note 35 at 166; See D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 2469 (Wadhwa and Company Law Publisher, 8th ed. Vol 2).

⁵¹*Ashcroft v. ACLU*, 535 U.S. 563, 576 n.7 (2002); *Pope v. Illinois*, 481 U.S. 497, 500 (1987).

does not even arise in the U.S. context since it would have clearly failed the second and the third elements of the *Miller* test even if it is assumed that it satisfies the first element of being against the “community standards” of the society.

The next Part discusses the way in which the Indian Supreme Court has developed its own tests of obscenity by misinterpreting the law in the U.S.

III. Development of Obscenity Jurisprudence in India

As stated earlier, there is no specific statute governing obscenity in India. The IPC under Section 292 criminalizes obscenity and provides for punishment for possession, sale, transfer or like of obscene material.⁵² One of the earliest cases in India regarding this subject matter was the case of *Ranjit D. Udeshi v. State of Maharashtra*⁵³ where the accused was found in possession of uncensored copies of the book ‘Lady Chatterley’s Lover’ by D.H. Lawrence. The Supreme Court was faced with the issue of constitutional validity of Section 292 of the IPC. While upholding the validity of the provision, the constitutional bench held that the *Hicklin* test holds good in the Indian context and the test for determining obscenity is to see whether the material would deprave the minds of the readers in whose hands it will fall.⁵⁴

Gradually the test to judge allegedly obscene works was liberalized in India. In *K.A. Abbas v. Union of India*,⁵⁵ the Supreme Court stated that:

*“Our standard must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. Therefore, it is not the elements of rape, leprosy, sexual immorality which should attract the censor’s scissors but how the theme is handled by the producer”*⁵⁶

Hence, it is observed that the Supreme Court liberalized the test laid down in *Ranjit D. Udeshi* by stating that it is not the deprave mind that will determine the standard of obscenity; rather it would be the average reader who will ascertain it. The Court also

⁵²*Supra* note 6, § 292 IPC.

⁵³(1965) 1 SCR 65.

⁵⁴*Id.*

⁵⁵(1970) 2 SCC 780.

⁵⁶*Id.*

emphasized on the intention of the producer of the work by stating that importance should be given on “how the theme is handled by the producer”.

In 2006, the case of *DG Directorate General v. Anand Patwardhan*⁵⁷ came up before the Supreme Court. The case arose when the Censor Board had given an adult certificate to an award winning film and the national television channel Doordarshan issued a circular refusing to telecast any film with an adult certificate on the national television.⁵⁸ The matter was brought up before the Bombay High Court and a select committee of Doordarshan opined that the film had a secular message but at certain instances it had dialogues and speeches that might influence “negative passions”.⁵⁹ The Bombay High Court held that the film should be telecast on the national television, and on appeal to the Supreme Court this decision was upheld. The Supreme Court was faced with two main questions – *first*, is obscene speech constitutionally protected in India and *second*, with regards to the exact scope of the definition of obscene speech. While answering the *first* question, the Apex Court stated that freedom of speech and expression in India is subject to reasonable restrictions. According to the Court, these reasonable restrictions apply to obscene speech as it is in the “societal interest” in preventing harm from the free flow of obscene material. The Supreme Court laid down the “societal interest test” that aimed to protect the interests of the society from the free flow of obscene material.⁶⁰

With respect to the *second* question, the Court accepted the limitations of the *Hicklin* test for determining obscenity and analyzed the *Miller* tests laid down in the United States.⁶¹ However, the Indian Supreme Court did not fully adopt the *Miller* test in the Indian jurisprudence. The Court borrowed the “taken as a whole” criteria and incorporated the “contemporary community standards” requirement into the “societal norms of decency” test.⁶² According to the Court, this test had Constitutional backing in India as decency is one of the “reasonable restrictions” mentioned in Article 19(2). The Court applied this test to the

⁵⁷AIR 2006 SC 3346.

⁵⁸*Id.* at 3348.

⁵⁹*Id.* at 3349.

⁶⁰*Id.* (This test can be said to be an Indian version of the community standard test).

⁶¹*Id.* at 3352.

⁶²*Id.*

facts of the case and held that the film in question was dealing with gender issues and religious violence, hence there was no case for obscenity.⁶³

The ruling laid down in *Anand Patwardhan*, was expanded in the 2006 case of *Ajay Goswami v. Union of India*.⁶⁴ In this case, the issue before the Supreme Court was protection of minors against materials of sexual nature in newspapers.⁶⁵ The Court reiterated the need to balance the harm arising out of free availability of obscene material and the right to freedom of speech and expression.⁶⁶ While affirming the ruling in *Anand Patwardhan*, the Court held that obscenity in the legal sense implies the expressions that offend the “prevalent sexual morality”.⁶⁷ The Constitution, under Article 19, also provides for morality as a reasonable restriction to freedom of speech and expression. Hence, while *Anand Patwardhan* only talked about decency as the basis for restricting obscenity, *Ajay Goswami* further expanded the test for obscenity by including morality as a criterion for determining it.

In the 2014 case of *Aveek Sarkar v. State of West Bengal*⁶⁸ the Supreme Court was called upon to decide on the obscenity of a semi-nude image, of Boris Becker with Barbara Feltus, that featured in a magazine in 1993 with a caption that “love champions over hatred”. The Court stated that the “contemporary moment of history” asked for a change in the interpretation of obscenity in the country and henceforth rejected the age old *Hicklin* test and replaced it with the “community standard test” as laid down in *Roth*.⁶⁹ While interpreting the image, the Court said that the determination of obscenity of the image has to be done in light of the accompanying caption and in this case, since the sportsmen posed nude for “battling racism”,⁷⁰ it cannot be termed obscene. The Court therefore interpreted the image along with the text accompanying it.

⁶³*Id.* at 3348.

⁶⁴AIR 2007 SC 493 (India).

⁶⁵*Id.* at 494.

⁶⁶*Id.* at 509.

⁶⁷*Supra* note 69.

⁶⁸(2014) 4 SCC 257.

⁶⁹Latika Vashist, *Law and the Obscene Image: Reading Aveek Sarkar v. State of West Bengal*, 5 J. INDIAN L. & SOC'Y, 248, 249 (2014).

⁷⁰*Supra* note 73, ¶ 2.

It becomes evident from the above analysis that there are some similarities and differences between the law in the United States and in India with respect to the law on obscenity.

Indian law and United States law are similar in various aspects. Both the jurisdictions have now done away with the restrictive *Hicklin* test of obscenity and have adopted much more liberal tests. In both the countries, the speech in question has to be judged as a whole. This test was articulated in the United States and was acceded to by the Indian Supreme Court as well. The courts in both countries use community standards prevalent in the society to ascertain obscenity, however Indian courts have done a selective reading of the *Miller* test laid down in the United States by only incorporating the first prong (that is contemporary community standards) out of the three tests. The problems with this selective reading of the *Miller* test will be discussed in the next section.

IV. The Case of *Devidas*: A Critique

Robinson and Nicol state that, the material may “offend or entertain” and “corrupt or enlighten” depending on the tastes and preferences of the audience.⁷¹ As Lockhart and McClure note, the social importance of the freedom for authors to write with “blunt realism” and portray their characters in “vulgar and shocking” language, when that is the most appropriate way to express the author’s point, is far more than the petty harm that a “sensitive soul” might suffer from reading that work.⁷² Feinberg aptly points out that catering to the needs of people, who have arbitrary prejudices and get offended by anything, is detrimental to the interests of the society.⁷³ Unfortunately, the Supreme Court in *Devidas* severely restricted freedom of speech by adopting community standards of an ultra-sensitive group in the society to analyze the offensiveness of the poem.

The Supreme Court begins with analyzing authorities, dealing with the law on obscenity, from the UK, the USA, and the European Court of Human Rights, in the beginning of the judgment.⁷⁴ Then, the Court starts discussing Indian cases which have shaped the law on obscenity in the country. The discussion starts with *Ranjit D. Udeshi* and carries on till *Aveek*

⁷¹GEOFFREY ROBINSON & ANDREW NICOL, *MEDIA LAW*, 192 (5th ed. Sweet & Maxwell, 2007).

⁷²*Supra* note 5, Lockhart & McClure, at 599.

⁷³As cited in Aoife O’Reilly, *In defence of offence: Freedom of expression, offensive speech, and the approach of the European Court of Human Rights*, 19 *TRINITY C. L. REV.* 234, 240 (2016).

⁷⁴*Supra* note 8.

Sarkar; however the learned judges just state facts and rulings of various cases, one after the other, without highlighting the common thread running through them and how the tests of obscenity have evolved in India.

The Court uses the “community standards test” as laid down in the *Aveek Sarkar* case to ascertain whether the poem in the present case was obscene or not. *Aveek Sarkar* had borrowed the “community standards test” from *Roth* in the United States; however, by applying the standard laid down in *Roth*, the Indian Supreme Court has adopted an ignorant reading of the law on obscenity in the United States, as the rule laid down in *Roth* has been expanded by later United States’ Supreme Court decisions like *Memoirs* and *Miller*. These cases have added new elements to the test for obscenity.⁷⁵ The “community standards” test was one of the three elements of the *Miller* test. The Court in *Devidas* and *Aveek Sarkar* omits the two other elements namely, the work should depict sexual conduct in a patently offensive way and the work, taken as a whole, lacks serious literary, artistic, political or scientific value.⁷⁶ Had the Court in *Devidas* applied the *Miller* test in its entirety, the poem would have certainly failed the second and the third elements, as it did not cater to sexual interests and had significant literary value.⁷⁷

The poem in this case was a classic example of a satire on interpretation of Gandhi’s principles. The satire used mockery⁷⁸ as a device to depict Gandhi hurling abuses and performing other untoward activities. The satire was on the hypocrisy of the people who claim to follow Gandhi’s principles. The United States Supreme Court realized the limitations of an isolated application of the *Roth* test and thereby evolved the *Miller* test. Considering these shortcomings, the Courts in India should apply the *Miller* tests in their entirety.

⁷⁵*Supra* note 48 and 52.

⁷⁶*Supra* note 44.

⁷⁷Anuradha Raman, *Sahitya Akademi to publish satirical poem on Gandhi*, THE HINDU, May 16, 2015 available at <http://www.thehindu.com/news/national/sahitya-akademi-to-publish-satirical-poem-on-gandhi-jnanpith-winner/article7211162.ece> (last accessed on April 16, 2016) (This poem was sought to be included in SahityaAcademi’s collection on Gandhi collection of poems, which shows that the poem had immense literary value).

⁷⁸ MERRIAM-WEBSTER ONLINE DICTIONARY, (2004) available at <http://www.merriam-webster.com/dictionary/mockery> (“Mockery” means insulting or contemptuous action or speech).

The “community standards” test in isolation, as used by the Supreme Court, is a vague and a restrictive test.⁷⁹ As Boyce points out,

*“Community standards cannot yield an intelligible rule that would predict and explain which materials are unacceptable. The most we can expect is an ad hoc determination in each case as to whether a majority of members of the community would consider a given item obscene. And because empirical evidence on this question is typically not introduced, it is almost inevitable that the fact finding judge or jurors will substitute their own views for those of the community.”*⁸⁰

Determination of community standards requires subjective analysis and it ultimately rests on what the judiciary perceives as the prevailing community standards.⁸¹ The legitimacy of the judge in deciding this can be questionable and hence there is a need to adopt certain objective elements for the test. These objective elements can be incorporated from the second and the third elements in the *Miller* test which stipulate that the work should describe sexual conduct in a patently offensive way and should lack in serious artistic or literary value in order to be classified as obscene.

Ironically, the Supreme Court, in its decision in *Devidas*, gives the best example to highlight the problem of subjectivity and vagueness of the “community standards” test by including the speech that mocks “historically respected personalities” as obscene speech. The Supreme Court created a higher degree test by stating that,

*“The judicially evolved test, that is, “contemporary community standards test” is a parameter for adjudging obscenity, and in that context, the words used or spoken by a historically respected personality is a medium of communication through a poem or write-up or other form of artistic work gets signification. That makes the test applicable in a greater degree ”*⁸²

⁷⁹Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT’L L., 299, 345 (2008).

⁸⁰*Id.* at 351.

⁸¹*Id.*

⁸²*Supra* note 9.

This test practically means that if a poet uses abusive language through an “ordinary” person then it would not be obscene. However, if the same expression is voiced using a “historically respected personality” as a medium, then it will be construed as obscene. What does the Court mean by making the “community standards test” applicable in a “greater degree” is not at all clear. The Court cites numerous judgments from its past where Gandhi’s ideas have shaped judicial thought in India.⁸³ This discussion by the Apex Court however is extremely superficial. The Supreme Court’s interpretation of Gandhi’s ideas, can hardly be a ground to restrict the freedom of a poet to present a satire on Gandhi. In a way, instead of using the “community standards” test, the Supreme Court is relying on the “judicial standards” of the perception of Gandhi’s principles. The foundation stone of freedom of speech is the right to express dissent.⁸⁴ If an author or a poet wants to convey his perception of Gandhi’s ideas by mocking him, then he has the freedom to do so under the Constitution. As discussed earlier, satire and mockery are examples of expressions protected by freedom of speech.⁸⁵

The problem with a separate test for obscene speech is accentuated by the fact that it is impossible to define who a “historically respected personality” is. In *Rosanova v. Playboy Enterprises*,⁸⁶ it was stated that “defining public figures is much like trying to nail a jellyfish to the wall.” There can be no criteria to categorize people as “historically respectable”. For a tribal community, their ancestors may be historically respectable, for monks the Dalai Lama may be historically respectable and for the bench in *Devidas*, Mahatma Gandhi was historically respectable. There can never be a uniform test to solve this issue, due to the varying perceptions of what “historically respectable” means.

During the course of the development of Indian law on obscenity, it was observed that the Courts gradually liberalized the tests for obscenity with the *Ranjit Udeshi* standard being substituted with the “community standard test” in *Aveek Sarkar* in 2014. However, the decision in *Devidas* has been a step backwards in the liberalization of the obscenity standard. The Court in *Devidas* ignorantly places a satire by a poet under the head of obscene speech. As was evident from the U.S. experience, such speech is necessary for the formation of

⁸³*Supra* note 9 (Supreme Court referred to several cases including *K. Karunakaran v. T.V. Eachara Warriar*, (1978) 1 SCC 18; *Bangalore Water Supply & Sewerage Board v. A. Rajappa*, (1978) 2 SCC 213 etc).

⁸⁴SEERVAI, *Supra* note 2.

⁸⁵ Gilbert, *Supra* note 26.

⁸⁶411 F. Supp. 440, 443 (S.D. Ga. 1976).

public opinion on important national issues. This judgment certainly curtails the evolution of freedom of speech in India.

V. Conclusion

It was observed that the United States Supreme Court has evolved from the *Roth* test of contemporary community standards to judge obscenity to a more comprehensive and less subjective *Miller* test. The Supreme Court in India has however, still followed the *Roth* doctrine of community standards, which is a very subjective and vague test. In Indian context this was highlighted in the recent outrage against Tanmay Bhat's video mocking Lata Mangeshkar and Sachin Tendulkar. Applying "community standards test" is not an accurate standard of assessing whether the video offended the community as a whole. With most of the speech flowing online on the internet, it becomes even more difficult to ascertain which community's standards should be applied while judging the obscene nature of the work. For some people in the country, the video might have tickled the funny bone, while on the other hand the outrage of others over the video was quite apparent. The best alternative in this case for the Indian Supreme Court is to adopt the *Miller* tests in their entirety, by balancing the subjectivity of the "community standards test" with the objective standards of the *Miller* test. This is backed by the progressive interpretation of law on obscenity by the Indian Supreme Court starting with *K.A. Abbas to Aweek Sarkar*.

Unfortunately, the decision of the Apex Court in *Devidas* does the opposite of what was needed. There is a serious need to review the decision given by the Supreme Court in *Devidas* as it may open a Pandora's Box for restrictions on free speech. The vagueness of the "historically respected personality" exception will allow the courts to trample down speech against any popular personality by bringing them under the umbrella of a "historically respected person". The application of the *Roth* test was one of the primary reasons that lead to this problem. The decision in *Devidas* gives the license to courts to carve out similar exceptions for other demographic groups in the society. Just like "historically respected personalities" have been put on a higher pedestal, it may be possible that similar exceptions may be created for "highly accomplished politicians" or "respected actors" and the floodgates for such arbitrary exceptions might open. The individuals who are in public light must be open to public criticisms as these individuals have the power to shape public opinion on many important policy issues. The earlier this case is reviewed by the Apex Court, the easier it is for fundamental right to free speech to exist in its true form.