DEVIDAS RAMACHANDRA TULJAPURKAR V. STATE OF MAHARASHTRA: WHO IS BEING PROTECTED BY THE SUPREME COURT?

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I. INTRODUCTION

Over the course of years, the right to freedom of speech and expression (Hereinafter "the Right") has gone through numerous debates. Some of which have led to its development and liberalization. Even though the right to freedom of speech and expression has existed in the constitution since its inception, thescope of the Right is not the same today as it was ten years ago.

The case under question, *Devidas Ramchandra Tuljapurkar v. State of Maharashtra*[2], came before the Supreme Court of India with a very pertinent question of freedom of speech and expression in its bag. It's one of the recent cases, which has created immense confusion due to its reasoning and self-contradicting judgment making one wonder as to which side is the court taking.In this case, the issue that the Supreme Court faced was whether the poem titled '*Gandhi Mala Bhetala*', which was published for circulation amongst the members of a private union, could lead to framing of charges under §292 of the Indian Penal Code[3] against the poet, publisher and printer[4] if being of obscene nature.

This paper will first look into which test the court applied to determine obscenity and why the application of the test was fundamentally flawed. The latter half of the paper will look into the consequences of adding a new exception to a universally accepted test for obscenity without properly defining it and the specific reference to the

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[2] Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported).

[3] Indian Penal Code, 1860, §292.

[4] Westlaw India, *By bringing in a historically respected personality to the arena of s. 292 of IPC, neither a new offence is created nor an ingredient is interpreted*, (June 1, 2015), http://www.indlaw.com/newsletter/NewsletterArchives/June,%2001%202015.htm (last visited on July 27, 2015).

'chilling effect' such rulings create. The conclusion will question the judgment's 'progressive nature'.

II. THEQUESTION OF OBSCENITY

The first question before the court was that which test should be appliedto determine the obscenity of the material. The part in succession will look at how the court actually applied the test.

A. THE TWO TESTS

The court started by mentioning the Hicklin test[5], which states that a certain material is obscene if it has the tendency to 'deprave and corrupt' the minds of those whose minds are open to such immoral influences[6]. The Supreme Court followed this test in *Ranjit Udeshi v. Union of India*('Ranjit Udeshi')[7]. The problem being that Hicklin test was a Victorian era test and *Ranjit Udeshi*[8]was decided when the test was discarded in England itself[9]. One of the problems with this test was that the words 'deprave or corrupt' had too wide an ambit. Other problem being that the material was to go through the 'morally weakest people'. Firstly, the court left 'morally weakest people' undefined and even if the obscene material were to go through the morally weakest people of the society, it would be setting the bar very low[10].

After decades of following the Victorian age law, the Supreme Court in 2014[11], for the first time used the Roth test, which was developed in the United States of America through the case of *Roth v United States*[12] and later was held to be the dominant test[13].The court in the present case followed this precedent after extensively analyzing

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[5] Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported). ¶ 12.
[6]Regina v. Hicklin, [1868], L.R. 2 Q.B. 360.
[7]Ranjit D. Udeshi vs State Of Maharashtra, (1965) A.I.R. 881.
[8]*Id.*
[9] Gautam Bhatia, *If you mock Gandhi, other 'historically respected personalities', get ready to go to jail.* (May 15, 2015), http://thewire.in/2015/05/15/no-more-free-speech-on-historically-respectable-personalities-1725/ (last visited on July 27, 2015).
[10]SHAH, ROOTS OF OBSCENITY, 75 (1968).
[11]Aveek Sarkar & Anr vs State Of West Bengal And Anr., (2014) 4 S.C.C. 257.
[12] Roth v United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, 1957 U.S.
[13]Brodie v. The Queen,[1962] S.C.R. 681; Regina v. Butler, [1992] 1 S.C.R. 452.

the history of law of obscenity in India and the world[14]. This test being more speech friendly than the Hicklin test defined obscene material[15] as "the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."[16]

B. THE APPLICATION OF THE TEST AS IN THE JUDGEMENT

Later in the case of *Memoirs v. Massachusetts*('Memoirs')[17], the Roth test was further elaborated, listing three essentials of the test. First essential being that the dominant theme of the material should appeal to preruient interest in sex. Secondly, the material should appeal to an average person in the community and thirdly, the material should have no social value[18].

The problem in the present judgement is that the Roth test is being partially applied as all the three essentials were not scrutinised. This was done by keeping 'community standards' in mind but completely ignoring 'prurient interest'.It should be noted that in the case of *Roth v. United States*[19], the lordships opined that the material would be obscene only if it appealed to 'prurient interest'[20].The position of the courts was cleared in thecases that followed, especially after 1957[21]. These cases made it clear that certain material would be obscene only if it was hardcore pornographic in nature and not otherwise[22].By this the court ignored the core essential of the test.

Also the question of social importance of the literature is left unanswered in the judgment.In the case of *Roth v. United States*[23]it was said, "book cannot be proscribed unless it is found to be utterly without redeeming social value." Later which was upheld in *Memoirs* case[24]. The judgment at several instances[25] referred to the

[14]Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported). ¶ 12. – 72.
[15] Gautam Bhatia, *Free Speech Obscenity and respected historical personalities a new troubling doctrine,* (May 14, 2015), http://www.livelaw.in/free-speech-obscenity-and-respected-historical-personalities-a-troubling-new-doctrine/, (last visited on July 27, 2015).
[16] Gautam Bhatia, *If you mock Gandhi, other 'historically respected personalities', get ready to go to jail.* (May 15, 2015), http://thewire.in/2015/05/15/no-more-free-speech-on-historically-respectable-personalities-1725/ (last visited on July 27, 2015).
[17]Memoirs v Massachusetts, (1966), 383 U.S. 413.
[18]David E. Engdahl, *Requiem for Roth: Obscenity Doctrine Is Changing*, MICHIGAN LAW REVIEWVol. 68, No. 2, 91 (Dec., 1969).
[19] Roth v United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, 1957 U.S.
[20]INDER S RANA, LAW OF OBSCENITY IN INDIA, U.K. AND U.S.,100.
[21]Robert C. Mcclure,*Obscenity and the Law*, AMERICAN LAW ASSOCIATION BULLTEIN, Vol. 56, No. 9.
[22]*Id.*
[23] Roth v United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, 1957 U.S.
[24]Memoirs v Massachusetts, (1966), 383 U.S. 413.

importance of social value being absent to determine obscenity but failed to connect it to the literature in question.

If the rule was applied in it's entirety, which the court should ideally have done, the course of the judgment and disposition might have been very different.

III. THE CASE OF A HISTORICALLY RESPECTED PERSONALITY

Apart from applyingthe Roth test with its partial wordings,[26] the court also came up with a new exception[27], ruling that a speech might be obscene if targeting a 'historically respected personality'.

One of the problems with this reasoning is that the court failed to define'historically respected personality'. Contradiction arose when in the judgment the learned judge himself, said he is aware that "the constitution does not recognize any personality whether historically or otherwise" [28]. The court later gave numerous examples of judgments where Gandhian thought was quoted as a reasoning to put Mahatma Gandhi under the ambit of 'historically respected personality'[29]. Although Gandhi is respected by millions of people, saying that he is a universallyrespected personality would still not be right. The court referred to the case of *Bobby Art*[30]where in the movie Bandit Queen, Phoolan Devi was shown in an obscene manner. Although the court missed the point that,even Phoolan Devi can be considered a 'historically respected personality' if this phrase is not defined by the court itself.

The other problem being that the court throughout the judgement reasons the test in favor of the appellant, although the concluding paragraph[31]of the judgement takes the whole reasoning to a different path when the court adds a new concept of 'degree'. The concept of 'degree' is attached by the court to the *Roth* test specifically when

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[25]Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported). ¶ 20, ("court refers to *Memoirs v Massachusetts* and the *Roth v. United States* in respect of the importance of social value").

[26]Roth v United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, 1957 U.S. ("*the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.")*

[27]Gautam Bhatia, *If you mock Gandhi, other 'historically respected personalities', get ready to go to jail.* (May 15, 2015), http://thewire.in/2015/05/15/no-more-free-speech-on-historically-respectable-personalities-1725/ (last visited on July 27, 2015).

[28]Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported). ¶ 73.

[29]*Id.*, ¶ 76-79.

[30] Bobby Art International v. Om Pal Singh Hoon and Others, (1996), 4 S.C.C. 1.

[31]Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported). ¶105 ("When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in. To elaborate, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner.").

dealing with 'historically eminent personalities', saying that the Roth test becomes more 'vigour' in such cases and the degree of care to be taken by people has to be increased. The court by saying that the test become more 'vigour', fails to define that at what stage would the test become 'vigour'? This way the court now increased the standard of care to be taken by people when talking about such personalities. This makes the court come up with a new, lower benchmark to punish people which goes against the principle of justice itself,as this newly invented rule can punish people for acts and while remaining vague.

The confusion arising out of the judgment can be looked upon by an example from the judgment itself. Where the learned amicus curie cited the dissenting opinion from the case of[32]*Vereinigung Bildener Kinstler v Austria*[33], which quoted Eric Barendt saying that "a person's dignity should be respected whether the person is a well-known figure or not"[34]. The court took notice of the reference given by the amicus curie. Although when the court decided to invent a new threshold for 'historically respected personalities', it went against the very principle that it took note of, trying to protect the dignity of respectable figures; ignoring the general public.[35]

IV. THE CHILLING EFFECT

The Chilling effect doctrine can loosely be defined as where speech is a regulated activity through the way of a legislation or judgment, without any constitutional provision existing to regulate the same. Thus such a regulation creates a scenario where people get more cautious and are afraid to publish something due to the fear of the legal repercussions of such publications. The underlying proposition of the chilling effect doctrine is that an erronous limitation on speech has a lot more social disutility than an overextention of the right to freedom of speech. It is true to say that a judgement or statute which unconstitutionally penalises or punishes free speech, 'chills' such speech. One of the numerous dangers of speech being 'chilled' being that people cannot express what they 'ought' to express, and are lawfully correct to express, dettered by the fear of punishment. Although the court chooses to ignore it,

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[32]*Id.*

[33]Vereinigung Bildener Kinstler v. Austria, (2007),ECHR 25.

[34]*Id.*,¶ 12.

[35]*See,* Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported). ¶ 105 (court in this Para clearly states that this poem talks about mahatma Gandhi and thus a higher standard of care will be there whereas the same poem talked about someone not so prominent, the case would have been different and not one of obscenity.)

this judgment creates a chilling effect on right to freedom of speech through providing special 'protection' to a "historically respected personality" where the constitution does not in any away provide for the same.

The United States of America, where chilling effect is clearly a first amendment doctrine[36], through a period of time has recognized the negative impact of chilling effect, especially in cases where right to freedom of speech and expression is under question. In regards to obscenity, doctrine of chilling effect has played a major role for courts to determine as to where the line should be drawn so as to not punish people for a constitutional right to freedom of speech which they have. The opinion given by Honorable Justice Brennan in the case of *Roth*[37] was confronted by his own judgement later given in the case of *New York Times v. Sullivan*[38], where the 'chilling effect' was discussed. In this case the past declarations of *Roth* were rejected and Brennan also said that an "erroneous statement is inevitable in free debate" and false statements should also be protected by being provided with a "breathing space" to survive.[39] Brennan also held that such rules, "limit the variety of public debate".[40]The underlying proposition of this ruling was the chilling effect such rules create. The seven year gap between roth and new york times showed the great deal of shift the courts went through with time, as all the judgements which made the core of Brennan's opinion in *Roth* were majorly changed in *New York times*[41] due to the 'chilling effect' doctrine.

In India, though the effect is less discussed, in the case of *Ram Jethmalani v. Subramaniam Swamy*[42], the court recognized the doctrine of chilling effect and held that the aim of law is to see that there is no chilling effect, as people would not be able to express themselves freely, if they had the fear of being sued. Although briefly, in various other cases[43], the Indian courts have recognized that if a chilling effect is

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[36]New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Schauer, Frederick, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect" (1978). Faculty Publications. Paper 879.

[37]Roth v United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, 1957 U.S.

[38]New York Times Co. v. Sullivan, U.S. 254 (1964).

[39]*Id*, 271-272, ("quoting *NAACP v. Button,* 371 U.S. 415, 433 (1963).")

[40]*Id,* 279.

[41]Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey,*UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1333, 139, (1991).

[42]Ram Jethmalani v. Subramaniam Swamy AIR 2006 Delhi 300.

[43]R. Rajagopal v. State Of T.N, 1995 AIR 264; Shreya Singhal v. union of India, Cri. Writ. 167 of 2012; Petronet LNG v. Indian Petro Group and Anr. (CS (OS) No. 1102/2006). ("court in both the cases recognized that chilling effect has a negative impact on people as it makes them afraid of legal repercussions, while citing the *Sullivan* case.")

created, it would be against the right to freedom of speech and expression. Even though the chilling effect is not discussed in detail in Indian judgements, the footsteps of its recognition are evident.

The case under question again clearly brings about a chilling effect in India as even though no legislation punishes obscene speech against a 'historically respected personallity', this judgement creates a fear amongst people that such speech should not exist in the society as it may be punishable. The basic issue that this judgement ignores to address is that the society will think twice before referring to a well known personality or historically recognized personality because of the legal backlash it might have (which although is perfectly legal).

V. PROGRESSIVE FOOTSTEPS

The case of right to freedom of speech has been a progressive one, *Shreya Singhal v. union of India*('Shreya Singhal')[44]being the latest milestone, also briefly discussed in the judgement[45]. The court argued that *Shreya Singhal*[46]dealt with §66A[47] of the IT Act and not obscenity*per se*. With this argument, the court compelety forgot that the crux of both the cases is the right to freedom and speech.

At various instances the court talks about freedom of speech as an indispensible Right. While trying to uphold the liberal aproach to interperet the right to freedom of speech and expresson[48], cited*Bennet Coleman*[49]saying said that freedom of speech gives people the right to publish, speak and express their views. The court gives the view that this right cannot be absolute, which is absolutely correct. Although the court creates an ambiguous bar to the right to freedom of speech and expression by drawing out a new category of 'respected personalities' directly going against the Right's progressive nature under the umbrella of right not being absoute.

[44]Shreya Singhal v. union of India, Cri. Writ. 167 of 2012.
[45] Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported). ¶ 72. (The counsel for the appellant rightly pointed out that the case raised the bar for the right to freedom of speech and expression, making it as liberal as ever. Court took notice of the fact).
[46]Shreya Singhal v union of India, Cri. Writ. 167 of 2012. (supreme court) (unreported).
[47] Information Technology Act, 2000, §66A (now repealed).
[48] Devidas Ramchandra Tuljapurkar v. State of Maharashtra, Cri. App. 1179 of 2010 (Supreme Court of India) (unreported). ¶ 64.
[49]Bennet coleman v union of India, 1973 SCR (2) 757

Apart from being contradictory and diverting from the progressive path of the recent freedom of speech judgements, the judgement also ignores the 'chilling effect' doctrine and eventually 'chills' the speech of people in regards to such 'historically respected personality' by passing a decision which punishes a person whose right is clearly protected by the constitution.

The court in the course of this judgement forgot that the law should aim to establish minimum and not maximum standards of behaviour, showing respect for tolerance and privacy[50], leaving the courts to use reasoning which should ideally favor the author of the poem throughout but using it in a different manneraltogether.

[50]D.D. BASU, CONSTITUTION LAW OF INDIA95 (Justice Bhagbatiprasod 8thed., 2008).