
(1996) 03 DEL CK 0010

In the Delhi High Court

Case No : Letters Patent Appeal No's. 39, 43 and 51 of 1996

Amitabh Bachhan Corporation Ltd.

APPELLANT

Vs

Om Pal Singh Hoon

RESPONDENT

Date of Decision : 26-03-1996

Acts Referred:

Citation : (1996) 37 DRJ 352

Hon'ble Judges : M. Jagannadha Rao, C.J;Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : Kapil Sibal, S. Murlidhar, Soli J. Sorabjee, Shridhar Chitale, M. Mudgal, D.N. Sawhney, Ashok Gumani, Rajeev Dhawan, Susan Mathews, A.K. Kaul, Rakesh C. Aggarwal, K.K. Aggarwal, E.X. Joseph and A.K. Vali, for the Appellant;

Judgement

M. Jagannadha Rao, C.J.

(1) These appeals arise out of the Judgment of the learned Single Judge dated 7.3.1996 in C.W.P. No. 383 of 1996. Lpa 39/96 is preferred by M/s Amitabh Bachhan Corporation Ltd. Lpa 43/96 is filed by M/s Bobby Art International, which is the sole distributor of the film "Bandit Queen" for the Delhi and U.P. region. L.P.A. 51/96 is preferred by M/s Kaleidoscope (India) Pvt. Ltd and another. M/s Kaleidoscope is the, producer of the film. By this Judgment we propose to dispose of all the three appeals before us.

(2) In the writ petition the main question is whether the certificate granted by the Censor Board, as modified by the Appellate Tribunal, conforms to the basic principles of law. The film was initially examined by the Examining Committee which recommended about 10 cuts and a general cut of deletion of expletives throughout the film. On 19.7.1995 the Revising Committee examined the film and recommended grant of "A" certificate to the film subject to certain cuts. Aggrieved by the decision of the Revising Committee, the Director the film, carried the matter in appeal to the Appellate Tribunal. When the matter came up before the Appellate Tribunal, it accepted the cuts which were in conformity with

the. compromise arrived at in Court between Phoolan Devi and the Producer and the Director. Vide its order dated 14.8.1995 the Appellate Tribunal retained some of the cuts imposed by the Revising Committee and set aside some of the other cuts imposed by the Revising Committee and partly allowed the appeal and directed that the film be given an "A" Certificate after the cuts/reductions mentioned by it were carried out by the appellant.

(3) Learned Judge considered the question whether the Appellate Tribunal was right in setting aside the decision of the Revising Committee in respect of the three cuts. Learned Judge came to the conclusion that the Appellate Tribunal was wrong in setting aside the decision of the Revising Committee in regard to the three cuts including the one relating to the use of expletives in the film. Learned Judge quashed the certificate granted in respect of the film and directed that the Board will consider afresh the grant of "A" Certificate after the respondents have made the appropriate excisions/modifications in accordance with the Judgment.

(4) The arguments before us covered a very wide canvas. But, before we refer to the submissions, it is necessary to have an idea of the story as depicted in the film.

THE story of the film:

(5) The film portrays the pain and suffering of a humiliated woman on whom untold indignities were heaped. Still a child she was married off to a man who would have been fit to be her father. She was beaten and raped by him. After having been robbed of her childhood she was tormented by the village boys. She was beaten by them when she foiled the advances of one of them. In the Panchayat, which followed after the incident, she was blamed for trying to entice the boy belonging to the higher caste. As a consequence of the decision of the Panchayat, she had to leave the village. As if that was not enough, she was arrested by the police. In the police station, she was subjected to fresh round of indignity and humiliation. She was released on bail at the intervention of some persons, who were not moved by compassion for her but for their carnal pleasure. Thereafter, she was kidnapped by dacoits and sexually brutalized by their leader, a character called "Babu Gujjar". While she was being sexually assaulted by him, another member of the gang Vikram Mallah, who had developed felling for her, shot him dead in a "fit of rage. She was attracted towards Vikram and joined his gang. Along with Vikram she visited her husband, tied him up with a tree and took her revenge by brutally beating him. Her days of happiness with Vikram were transitory. The Thakur leader of the gang Sri Ram, who was released from Jail, felt insulted by her as she spurned his advances. He treacherously killed Vikram Mallah. Having lost the protection of Vikram Mallah, she was gang raped by Sri Ram and Lalaram, another member of the gang, and their associates. She was also stripped naked and was made to get water from the village well in full gaze of the villagers but none came to her rescue. Burning with desire to take revenge from her persecutors, she joined Baba Mustkin gang. While seeking out Sri-Ram, she humiliated and killed twenty

Thakurs of the village Behmai. Ultimately she surrendered and remained incarcerated for number of years, (quoted from the Judgment of the learned Single Judge).

CONCLUSIONS and directions of the learned Single Judge

(6) Learned single Judge came to the conclusion that three particular items must be removed from the picture as they violated the statutory guidelines issued by the Government u/s 5-B. The first one was a scene of frontal and total nudity wherein the heroine is made to fetch water from a well. Learned Judge felt that this scene offended para 2(ix) of the guidelines "inasmuch as it was a scene where a woman was "denigrated or degraded"". The second scene was one which showed the naked posterior of Babu Gujjar, while subjecting the woman to rape. This offended para 2 (ix) as it again amounted to denigration or degradation of women and it was "indecent and obscene". (If obscene, it would offend para 2(vii) and if it involved scenes of sexual violence like attempt to rape or rape, it would offend para 2(x)). Learned Judge came to the above conclusion by taking an overall view of the whole film apart from considering the scene separately. This he has stated expressly, Obviously, Counsel for the appellant has not noticed that particular sentence. Learned Judge observed that the fact that, out of three sequences in this rape scene, the second was cut while the first and third were reduced to a "flash", indicated that all three sequences were obscene. Then the third cut which the learned Judge directed related to certain "expletives" used in the film and these, according to him, violated the guidelines. The learned Judge finally concluded:

"BY considering frontal nudity, abusive language which is so liberally used in the film and the aforesaid first and third sequences (which may have been reduced to a flash) one will be setting up new standards for the films, which are totally opposed to the guidelines. Already, contemporary cinema has changed the values in our country. The youth, after independence, has been fed on sex and violence in films. Giving a go-bye to the guidelines will further erode the standards in the films."

(7) Consequently, the learned Judge directed the Censor Board to consider the issue of "A" certificate afresh, after the above scenes were appropriately excised. Till such time, the screening of the film was to be stopped.

FUNDAMENTAL issues under Article 19(1)(a) & (2) arise:

(8) Several important issues concerning the fundamental right to speech and expression under Article 19(1)(a) and the scope of the restrictions in Article 19(2) in the interests of "decency and morality" arise in this case. Question arises as to what is "obscene". The scope of judicial review in this area also falls for consideration. Having regard to the importance of these issues in today's society, it has become necessary to go into certain fundamental issues.

(9) We have heard Sri Kapil Sibal, Sri Soli Sorabji for the appellants and Dr.

Rajeev Dhawan for the interveners and Dr. A.K. Koul for the writ petitioner.

CINEMA a powerful medium which arouses aural and visual senses:

(10) Cinema is a powerful medium and it arouses the aural and visual functions of the human body. The impact of a cinema cannot be compared with that of a book. The Supreme Court has emphasised this fact in more than one decision. In *K.A. Abbas Vs. The Union of India (UOI)* and Another, Hidayatullah, C.J. observed that "the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its co-ordination of the visual and aural senses. The art of the cameraman, with trick photography, vista-vision, and three dimensional representation thrown in, has made the cinema picture more true to life than even the theatre or indeed any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women". His Lordship emphasised:

"THEY also remember the action in the picture and try to emulate or imitate what they have seen."

(11) A person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing a motion picture.

(12) Soon thereafter, in 1969, the Khosla Committee warned: (p.108) The impact of the film is so vivid, so immediate and so penetrating and the extent of identification with episodes displayed on the screen so complete that all but a few of the more cultured and balanced individuals can discount the compulsive or persuasive force of what they see. The vast majority of the film audiences are possessed of minds which are readily influenced by the pseudo-realism of screen shows, and not only are their minds affected by what they see, but their conduct, their habits and their behavior towards other fellow-beings are, in a large measure, influenced and shaped by it. The written word is understood by a small fraction of our people. The spoken word reaches even fewer persons, but the film contains a complete and immediate appeal for everyone - men, women and children, whether literate or illiterate or unintelligent. It makes its impact by simultaneously arousing the visual and aural senses.

(13) The Committee rightly said that 2 million people can see a film in a single day and before a criminal action against producers reaches an end, the picture could have done irreparable damage to society at large.

(14) Krishna Iyer, J in *Raj Kapoor Vs. Laxman*, observed: "Cinema is a great instrument for public good if geared to social ends and can be a public curse if directed to anti-social objectives." Again Sabyasachi Mukherjee, J (as he then was) in *Ramesh Dalal Vs. Union of India (UOI)* and Others, observed that motion picture was a powerful instrument with a much stronger impact on the visual and

aural senses of the spectators. Evil as well as beneficial impressions could be conveyed. Jagannatha Shetty, J in *S. Rangarajan Vs. P. Jagjevan Ram and Others*, emphasised this aspect with greater force saying that cinema "motivates thought and action" and assures a high degree of attention and retention", the combination of act, speech, sight and sound in semi-darkness of the theatre with the elimination of distracting ideas, will have an impact on the minds of the spectators; the influence is complete and immediate. His Lordship referred to "Reader in Public Opinion and Communication" (2nd Ed) by Bernard Berelson and Morris Janowitz where the authors had referred to scientific tests conducted on the spectators in this behalf; cinema caters not to a selective audience but a mass audience. The above views were reiterated by Ahmadi, J (as he then was) in *Life Insurance Corporation of India and Union of India and another Vs. Prof. Manubhai D. Shah and Cinemart Foundation*, .

IS Decency and Morality" different from Obscenity ?:

(15) As we shall show presently, the Censor Boards and the Appellate Tribunal have not been keeping in mind that the Constitution granted freedom of expression subject to reasonable restrictions in the interests of "decency and morality". A law was made to impose such reasonable restrictions when the Cinematograph Act, 1952 was passed and Section 5-B contains the identical words "decency and morality". What today the Censors appear to have forgotten is that the standards are not the standards of "obscenity" as set in Section 292 of the Indian Penal Code, where the prosecution has to prove that the cinema viewed as a whole tended to "deprave or corrupt" the viewers. The Censors have to see whether the picture taken as a whole or the scenes taken separately are "not decent or moral". In the case of a censorship certificate in England, the same mistake was committed by the Greater London Council and was set right by Lord Denning M.R. in *R vs. Greater London Council, ex-parte Blackburn* 1976 (3) All E.R. 184. Question also arises as to what is the true meaning of "obscenity" and whether, the tests laid down by our Courts as to obscenity have been properly applied.

(16) As we are concerned with a scene of total frontal nudity from face to toes for about 2 minutes, an explicit violent rape with exposure of the posterior of the man for 20 seconds; and lastly free use of expletives, the point arises whether there is "obscenity" leading to depravity and corruption or at least there is breach of "decency and morality", i.e. amounting to what is shocking, disgusting and revolting, - even if sexual impulses are not aroused.

(17) Obviously Realizing the difficulty, learned counsel for one of the appellants, Sri Soli Sorabji argued towards the end of his submissions that "indecent" and "obscenity" were synonymous. Reference was made to certain meanings given to the words "obscenity and decency" in *Sreeram Saksena Vs. Emperor*, . We are unable to accept this submission.

(18) Recently, our Supreme Court had occasion to consider the meaning of the

words "decency and morality" occurring in Article 19(2), in *Bal Thackeray vs. Shri Prabhakar K. Kunte* J.T. 1995 (8) 609 and their Lordships adopted the meaning given to "indecent" in *Kneller (Publicity, Printing and Promotion) Ltd. vs. D.P.P.* (1972 (2) All E.R. 898 as: "shocking, disgusting and revolting". In that case appeal to voters on basis of religion was itself held to violate the Constitutional mandate regarding "decency and morality". Decency was not restricted to sexual decency. It had a larger connotation. Laying stress on the words "in the interests of in Article 19(2), and on propriety ,modesty or quality of being decent, Verma,J observed:

"THE words "decency or morality" do not require a narrow, or pedantic meaning to be given to these words. The dictionary meaning of "decency" is "correct and tasteful standards of behavior as generally accepted; conformity with current standards of behavior or propriety; avoidance of obscenity; and the requirements of correct behaviour: (The Oxford Encyclopedic English Dictionary); "Conformity to the prevailing standards of propriety ,morality,, modesty etc; and the quality of being decent (Collin's English Dictionary)".

(19) Therefore, it is clear that "indecent" is not equated with "obscenity".

(20) In this context, we may also refer to Lord Parker's Judgment in *R vs. Stanley* 1965 (2) Q.B. 327 where the words "indecent or obscene" in Section 11 of the Post Office Act,1953 were interpreted. Observing that "indecent" was at the lower end of the scale while "obscene" was at the upper end, the argument that "indecent" and "obscene" were synonymous was rejected. In that case, Counsel Mr. Ross-Munro contended that "indecent" meant "obscene" and if the Jury came to the conclusion that the words were not obscene, there should be an acquittal. Counsel relied on *Galletty vs. Laird* 1953 SCJ 16 where it was said that the words "indecent or obscene" were employed tautologically to convey a single idea. But Lord Parker,C.J. rejected Mr. Ross-Munro's contention quoting Lord Sands in *McGowan vs. Langmuir* 1931 SCJ 10 to the following effect:

"I do not think that the two words "indecent" and "obscene" are synonymous. The one may shade into the other, but there is a difference of meaning. It is easier to illustrate than define and I illustrate thus. For a male bather to enter the water nude in the presence of ladies would be indecent, but it would not necessarily be obscene. But if he directed the attention of a lady to a certain member of his body, his conduct would certainly be obscene. They might perhaps be roughly expressed thus in ascending scale - positive, immodest; comparative- indecent; superlative- obscene. These, however ,are not rigid categories. The same conduct, which in certain circumstances may merit only the milder description, may in other circumstances deserve a harder one. Indecent" is a milder term than "obscene", as it satisfies the purposes of this case, if the prints in question are indecent, I shall apply that test."

(21) It was thus held by the English Court that "indecent" and "obscenity" were not synonymous. \\nR vs. Greater London Council 1976 (3) All E.R.184 already

referred to, which was a case of censorship, Lord Denning, M.R. said that "indecent" was a wider concept than "obscenity" and anything which was "indecent" may not be obscene, in the sense of "tending to deprave and corrupt the reader". We will come back to this case a little later again.

(22) Question also arose before the U.S. Supreme Court in *F.C.C. VS. Pacifica Foundation* (1978) 438 U.S. 726 as to the meaning of the word "indecent". It was contended, relying on certain rulings that the particular words used in the radio broadcast were not "obscene" and therefore not "indecent", as both words were synonymous. The majority of the Court rejected the contention. The argument was stated as follows: "Pacifica argues, however, that this Court has construed the term 'indecent' in related statutes as obscene". Rejecting the same, Stevens, J. held:

"THE words 'obscene, indecent or profane' are disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to non-conformance with accepted standards of morality."

HE quoted the meaning from Webster's Third New International Dictionary (1960) : "Unseemly, not conforming to generally accepted standards of morality".

(23) K. RAMASWAMY, J. (as he then was) echoed the same distinction in *B.K. Adarsh Vs. Union of India and others*, when he said that indecency is at the lower end of the scale and obscene is at the upper end of the scale.

(24) In other words, what is "obscene" is certainly "indecent" but what is "indecent" is not necessarily "obscene". "Indecency" means not being in conformity with prevailing standards of propriety, modesty or quality of being decent or what is shocking, disgusting or revolting. We are not here confronted with a combination of words "obscene or indecent" so as to permit a plea that the words are intended to convey a single idea. We are having a situation where the Constitution has deliberately omitted the word "obscene" and Parliament has also omitted the said word in Section 5-B.

(25) Because of overwhelming authority of the Supreme Court, and of the English and American Courts, we hold that "indecent" is not the same thing as "obscenity" and it has a broader connotation as explained above. In the case before us, the appellants argue that the three items are not "obscene". Respondent contends and the learned Single Judge found, in so many words, that these are obscene. Even if these three items are not obscene, question arises whether they are not "decent or moral", even on the basis of the findings of the Tribunal.

THE Hicklin-Udeshi tests : Obscenity - "taken as a whole" and "in particular" principles:

(26) The next important question is whether the scenes in a film or passages in a book ought to be examined only in the context of the whole theme or so called

social purpose of the entire book or cinema or whether, in addition, we have to consider the passages or scenes in their separate identity. Appellants' counsel, Sri Kapil Sibal, Sri Sorabji and Dr. Rajeev Dhawan for interveners contended that the scenes should be considered in the context of the whole cinema and its theme and not individually. It is argued that Hicklin's test 1968 (3) Q.B. 360 requiring examination of the effect of each scene or sequence by itself is no longer good law and that such a theory was expressly rejected by the U.S. Supreme Court in Roth vs, U.S. (1957) 354 U.S. 476). It is said that in 1959 the English statute (Obscene Publications Act, 1959) modified Hicklin by using the words "taken as a whole". It is pointed out that though in Ranjit D. Udeshi Vs. State of Maharashtra, , Hicklin's test was expressly accepted by our Supreme Court, the Court emphasised the "overall test" and this principle was also brought into Section 292 of the Indian Penal Code in 1969 by way of amendment, when the words "taken as a whole" were introduced. Reference is also made to para 3 of the guideline-rules notified in 1991 u/s 5-B of the Cinematograph Act, 1952 which uses the words "overall impact". On the other hand, the Counsel for the writ petitioner argued in favor of the overall and particular tests.

(27) "OBSCENITY" was defined in R vs. Hicklin 1868 (3) Q.B. 360, by Cockburn C.J, as follows:

" I think the test of obscenity is this, whether the tendency of the matter charged as obscene 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 ... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

(28) This definition of "obscenity" was accepted in Ranjit D. Udeshi Vs. State of Maharashtra, , by Hidayatullah, J (as he then was). His Lordship squarely posed the question para 19 at p.888): "the question remains still whether the Hicklin test is to be discharged ?" and answered it saying:

"WE do not think that it should be discarded."

(29) In an earlier paragraph (para 15), His Lordship stated that Hicklin's test "has been uniformly applied in India". The question was a constitutional issue of a far reaching character, (para 16). Art had such varied facets and such individualistic appeals that in the same object, the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross, (para 16). In that case, Counsel Sri R.K. Garg contended (para 19) that Hicklin's test must be modified, that a book cannot be treated as obscene if its overall effect was otherwise. Rejecting the contention, his Lordship observed that Cockburn C.J. did not say that every stray word or an insignificant passage could be taken up for declaring

a book obscene. Cockburn C.J. was dealing with the "pamphlet" in "question. His Lordship very clearly laid down, in the Constitution Bench, (para 24) :

"AN overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall."

(30) Thus the test is two-fold, overall as well as individual, thematic as well as episodic. To that extent our Supreme Court has deviated from the law in England and USA. In paras 23 to 28, the individual passages in the book were examined in great detail and para 29 contains the conclusions on the individual passages.

(31) Again in K.A. Abbas Vs. The Union of India (UOI) and Another, , which was a case under the Cinematograph Act, 1952, Hidayatullah,C.J. referred (p.493) to the Obscene Publications Act,1959 and to the 43 points of T.P.O."Connors Rules of 1918 in England. He then referred to the final recommendations of Khosla Committee,1969 (p.497). We are concerned here with para 4 of the said recommendation. The Supreme Court observed that the Ranjit Udeshi principles have been "adopted" by the Khosla Committee. Recommendation 4 of the Committee in the Judgment as follows:

"AN overall view of the obscene matter in the setting of the whole work would of course be necessary but the obscene matter must be considered by itself and separately to find out whether it is gross and its obscenity is so decided that it is likely to deprave or corrupt those whose minds are open to influence of this sort and Into whose hands the book is likely to fall."

(32) This recommendation of the Khosla Committee is a word for word extract from para 21 of the Judgment in Ranjit Udeshi's case, already referred to.

(33) Even in a later decision in Samaresh Bose and Another Vs. Amal Mitra and Another, on which a lot of reliance was placed by the appellants" counsel, the same principle was laid down and the particular passages in the book were separately considered to find out if they were "obscene" within Section 292 Indian Penal Code At page 977, (col.2), the passage sage from Ranjit Udeshi's case requiring the "overall" as well as the "particular" test to be applied was extracted. It was held (page 980) that in India, the responsibility of deciding on obscenity "rests essentially with the Court", and it was clearly stated ((page 980): "The decision of the Court necessarily must 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. It was again laid down clearly (para 28):

"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..."

(34) The Court then examined individual passages in detail-(paras 29 to 33).

(35) In B.K. Adarsh Vs. Union of India and others, K.Ramaswamy,J (as he then was) adopted both the "overall" and the "particular" tests after referring to the above cases. If isolated passages or scenes are seen, their effect may by itself be dangerous or offensive, disgusting, offending human sensibility or tending to deprave or corrupt moral standards prevailing in the society of the day (para 21). Each scene said to be "obscene" was separately considered (paras 22 to 34). That was a case under the Cinematograph Act.

(36) Therefore, in our system, the Censor Board or the Tribunal or the Court have to examine the book or the film as a whole and in addition the particular passages or scenes for deciding whether they are obscene or .pn22 whether they are "indecent". If they are obscene, they are hit by Section 5-B of the Act as well as by Section 292 IPC. If they are not "obscene", that is not depraving or corrupting but only shocking and disgusting or causing revulsion, they would be "indecent" and vocative of Section 5-B of the Act and the directives or guidelines issued thereunder.

SECTION 5-B guidelines of 1991 refer both to the overall and "particularity" test:

(37) Guidelines were published u/s 5-B originally on 6.2.1960 and they have been referred to in K.A. Abbas Vs. The Union of India (UOI) and Another, . The guidelines were revised on 7.1.1978 and these have been set out in Life Insurance Corporation of India and Union of India and another Vs. Prof. Manubhai D. Shah and Cinemart Foundation, . Subsequently, fresh guidelines have been issued by the Central Government on 6.12.1991.

(38) Para I of the guidelines refers to the objectives of film certification, including clean and healthy entertainment consistent with values of our society; para 2 refers to the omission of particular scenes or sequences and para 3 refers to the "overall" test. It is very important to note the word "also" in para 3, which means that the Government is clearly conscious of the "particular scenes" test in para 2 as also the "overall test" as an additional requirement. It becomes necessary to refer to the paras 1 to 3 of the guidelines issued in 1991. They read as follows:-

1.The objectives of film certification will be to ensure that -

(A)the medium of film remains responsible and sensitive to the values and standards of society.

(B)artistic expression and creative freedom are not unduly curbed; certification is responsive to social change;

(D)the medium of film provides clean and healthy entertainment; and

(E)as far as possible, the film is of aesthetic value and cinematically of a good standard.

2. In pursuance of the above objectives, the Board of Film Certification shall ensure that -

(I) anti-social activities such as violence are not glorified or justified;

(II) the modus operandi of criminals, other visuals or words likely to incite the commission of any offence are not depicted;

(III) scenes -

(A) showing involvement of children in violence as victims or as perpetrators or as forced witness to violence, or showing children as being subjected to any form of child abuse;

(B) showing abuse or ridicule of physically and mentally handicapped persons; and

(C) showing cruelty to, or abuse of, animals, are not presented needlessly;

(D) pointless or avoidable scenes of violence, cruelty and horror, scenes of violence primarily intended to provide entertainment and such scenes as may have the effect of desensitizing or dehumanising people are not shown;

(V) scenes which have the effect of justifying or glorifying drinking are not shown;

(VI) scenes tending to encourage justify or glamorise drug addiction are not shown;

(VII) human sensibilities are not offended by vulgarity, obscenity or depravity;

(VIII) such dual meaning words as obviously cater to baser instincts "are not allowed;

(IX) scenes degrading or denigrating women in any manner are not presented;

(X) scenes involving sexual violence against women like attempt to rape, rape or any form of molestation, or scenes of similar nature are avoided, and if any such incident is germane to the theme, they shall be reduced to the minimum and no details are shown.

(XI) scenes showing sexual perversions shall be avoided and if such matters are germane to the theme, they shall be reduced to the minimum and no details are shown;

(XII) visuals or words contemptuous or racial, religious or other groups are not presented;

(XIII) visuals or words which promote communal, obscurantist, anti-scientific and anti-national attitudes are not presented;

(XIV) the sovereignty and integrity of India is not called in question;

(XV) the security of the State is not jeopardised or endangered;

(XVI) friendly relations with foreign States are not strained;

(XVII)public order is not endangered;

(XVIII)visuals or words involving defamation of an individual or a body of individuals, or contempt of court are not presented;

Explanation: Scenes that tend to create scorn, disgrace or disregard of rules or undermine the dignity of court will come under the term "contempt of Court" and

(xix) NATIONAL symbols and emblems are not shown except in accordance with the provisions of the Emblems and Names (Prevention of Improper Use) Act,1950 (12 of 1950).

3.The Board of Film Certification shall also ensure that the film -

(I)is judged in its entirety from the point of view of its overall impact; and

(II)is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience.

(39) We have already stated that the word also occurring in para 3 is very important.

(40) From a reading of the above guidelines , it is clear that the Central Government has laid down the proper tests as declared by the Supreme Court right from 1965. While para 2 directs the individual scenes to be avoided or excluded, para 3 deals with the "overall test" as an additional requirement. The word "also" used in para 3 (which deals with the overall test) has been specifically put by us to the learned counsel for the appellant,Sri Sorabji. He tried to submit that even so, para 2 must either be read subject to para 3 .or both of the paras must be read together. We are unable to agree. The use of the word "also" in para 3 is, in our opinion, clearly intended to put into effect the "overall" test prescribed therein as an additional requirement. Para 3 was not intended to override or govern para 2.

(41) Even if these paras 2 and 3 of the 1991 guidelines were not there, neither the Censor Board nor the Appellate Tribunal nor this Court, can disregard the law expressly laid down in the Judgments rendered by the constitution Bench in Supreme Court in Ranjit D. Udeshi and other cases, that the test is both general and particular.

CONTEMPORARY community standards, the average man, and the State:

(42) It has been generally accepted in all countries that for judging "obscenity", or "decency" one has to go by the contemporary community standards.

(43) Standards vary from country to country and ages according to historical, ethnic or social conditions. In Ranjit D. Udeshi Vs. State of Maharashtra, , Hidayatullah,J (as he then was) referred to "public decency and morality" as laid down in our Fundamental Law to be judged by our National standards as basis. It was stated (page 891) that the whole book and the passages taken individually

must pass the permissible limits judged from our community standards. In *K.A. Abbas Vs. The Union of India (UOI) and Another*, , Hidayatullah, C.J. again observed (p.494) that social interests of the people override individual freedom. Whether we regard the State as the *paren patriae* or as guardian or promoter of general welfare, restraints on the freedom are justified by their absolute necessity and clear purpose. Social interests take in not only community interests but also individual interest. A balance has to be struck. The larger interests of the community require the formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and other things of an immoral tendency. Stating that Section 5-B of the Act has given sufficient guidance to Government for issue of directions in the form of guidelines, His Lordship observed (para 49):

"JUDGING the directions from this angle, we find that they are general principles regarding the films as a whole and specific instances of what may be considered as offending public interest" as disclosed in Article 19(2)". "Our standards 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." (para 51)

(44) The standards which we set for our censors must make a substantial allowance of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. The line is to be drawn where the average man or the moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved person sees more in a scene than an average person it cannot be helped:

"IT should be our concern, however ,to prevent the use of sex designed to play a commercial role by making its own appeal. This draws the Censor's scissors."

(45) Rape in all its nakedness may be objectionable. Again, how well the theme was handled by the producer will be important. In *Samaresh Bose and Another Vs. Amal Mitra and Another*, , it was observed (p.979) that the concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in India.

(46) For example, in *Ranjit D. Udeshi Vs. State of Maharashtra*, the book "Lady Chatterley's Lover" was held to be obscene within Section 292 Indian Penal Code But the same book was held to be not obscene in England in *R v. Penguin Books Ltd* (1961 Cr.Law Review). It was held not obscene in U.S.A. (*Kingsley Pictures Corp. vs. Regents*) (1958) 360 U.S. 684. However, in Japan, it was held to be obscene (*Lady Chatterley's Lover*, 1957, Ii Keishu 997). The following passage from the Judgment of Tanaka C.J. of the Japanese Supreme Court is extremely relevant: "in spite of the fact that the social concept concerning sex is

undergoing changes, it cannot be denied that there still exists in any society a demarcation which cannot be overstepped and that that demarcation is still being honoured by the public." (See Basil, Constitution, Silver Jubilee Ed, Vol.C,p.168.)

(47) In *Shaw vs. D.P.P.* 1961 (2) All E.R. 446, Lord Simonds said: "To one of your Lordships, it may appear an affront to public "decency", to another considering that it may succeed in its obvious intentions of provoking libidinous desires, it will be seen as corruption of morals". "The same act will not in all ages be regarded in the same way". We must have regard to the fundamental human values and purposes of society.

(48) Even in America, where the First Amendment is in absolute terms and the principle of "clear and present" danger was evolved by the Courts to read restrictions into the freedom, the problems arising out of "obscene" speech were treated in a more drastic fashion. The majority in *Roth vs. U.S.* (1957) 354 U.S. 476 held that obscenity was not in itself part of the freedom of speech and Therefore it would be not necessary or desirable to bring in the principle of "clear and present danger" so far as obscenity" was concerned. The Court said (p.485) that this principle was based on the "universal judgment that obscenity should be restrained as reflected in the international agreement of over 50 nations (Agreement for the Suppression of the Circulation of Obscene Publications), and in the obscenity laws of the 48 States and the various laws enacted since 1842. Obscenity and the like were of such slight value that "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality". The test of obscenity was (p.490) whether, "to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest". The Court said (p.490): that it was necessary to find out what was the, common conscience of the community and "in determining that conscience, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious men, women and children.

(49) The American Supreme Court laid down that "sex and nudity may not be exploited without limit by Films or pictures exhibited or sold in places of public accommodation any more than live-sex and nudity can be exhibited or sold without limit in such public places. Civilized people do not allow unregulated access, to heroin because it is a derivative of medicinal morphine". (Burger,C.J. in *Miller vs. California*) (1973) 413 U.S. 15.

(50) While Hidayatullah,J (as he then was) called the standard the "National standard" and Tanaka,C.J. of the Supreme Court of Japan (in the case already referred to) called it the "Collective conscience of society", Lord Simonds described it the fundamental assessments of human values and the purpose of society.

(51) Perceptions of the Parliamentary Committee (1994- 95) in its recent Eighth Report of the Standing Committee on Communications (Central Board of Film

Certification) (Tenth Lok Sabha) is of utmost importance in this context. Adverting to a plea for a more liberal approach by the Film Censor Board, so that Indian films could compete with foreign television networks, the Committee observed (para 1.8) :

"ITS acceptance would mean allowing competition in vulgarity."

(52) They said that today, in India, "trends are being set which do not reflect the realities of Indian society. Box office success of a film cannot be taken as an index of popular demand and popular demand by itself cannot confer justification on something patently pernicious."

(53) The above observations of the Parliamentary Committee clearly answer a submission made by Sri Kapil Sibal that the fact that lakhs of people are rushing to see "Bandit Queen" in 130 cities in hundreds of theatres is in itself an index of "contemporary community standards". The Parliamentary Committee said (para 1.8) * that today we are witnessing erosion of traditional Indian values, folk art and culture. Basic moral values of our rich Indian traditions should not be allowed to be compromised, eroded or diluted at any cost; question is how to guard against several Indian films which are posing a danger to the social fabric and communal harmony; there has to be a check on films which have a baneful influence on children and adolescents. We should see that the film media is not abused (para 1.13). The Committee said (para 3.14):

"TODAY more and more films whose themes are primarily dominated by "unrelated sex" and "excessive violence" are being churned and circulated. Crime is increasingly becoming the main theme of the story of the films. It is projected in a manner giving the impression that violence, theft, robbery etc. are normal incidents in ordinary life. Further, vice is shown in a heroic form, even though retribution follows."

THE Parliamentary Committee in fact referred to a letter of the Government of India dated 11.10.1995 to the C.B.F.C. emphasising the need to examine the individual scenes and excising them.

IN 1969, the Khosia Committee had also said (p.139) "Producers will provide only films that sell and sell easily to the largest number of persons. The masses prefer to entertain themselves with literature and art of low taste because these are easy to assimilate; they do not make excessive demands on the thinking faculty and do not put the reader or the viewer to the painful task of discrimination. The discriminatory person knows that a work of aesthetic and artistic excellence gives greater pleasure, but such persons are in a minority. The makers of films can claim the right to pursue their business as long as they keep within the law."

(54) We have yet another Constitutional guidance from Article 51-A which deals with "Fundamental Duties". This is apart from Article 19(2) and Section 5-B. Clause (f) of Article 51-A says that it shall be the duty of every citizen of India "to value and preserve the rich heritage of our composite culture".. Clause (j)

requires us to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavor and achievement.

(55) Para 1 of the guidelines places the Government's objectives before us. The film is to ensure that it remains responsible and sensitive to the values and standards of society, that it does not unduly curb artistic expression and creative freedom; that the certification is responsive to social change, the film provides clean and healthy entertainment and that, as far as possible, the film is of aesthetic value and cinematically of good standard. Para 2 requires certain scenes, - including those which involve sexual violence, or are indecent or obscene, to be excised. Para 3 requires, in addition, the overall impact to be judged and the film is examined in the light of the historical period depicted and the contemporary standards of the country and the people to which it relates and does not deprave the morality of the audience: Thus the standards set by the Government are also evidence of our contemporary community standards.

(56) Film makers are not the final arbiters of what are contemporary community standards. Such standards have been set by the Fundamental Law in Article 19(2) and Section 5-B and Article 51-A(f) & (j). The standard is that the picture as a whole and the individual scenes, taken separately must not be indecent, i.e. shocking or revolting or "causing disgust. The film and the individual scenes should not also be obscene, that is arousing sensual or lasciviousness or prurient interest or stirring such emotions. The State as *parens patriae* has set the guidelines which are consistent with the law laid down by the Supreme Court. The Parliamentary Committee consisting of the representatives of the people has echoed strong sentiments. Our standards are not to be reduced to a level where the protection of the least capable and the most depraved among us determines what the morally healthy cannot view or read. The average standard is of the average moral man (vide para 51 of *K.A. Abbas* case).

HOW the Judge should approach the problem:

(57) Primarily, of course, the Judge must examine whether the law made by the legislature in the interests of "decency and morality" has been complied with and not violated. If it is a case involving the validity of the certificate issued by the Censor Board, the Court has to examine the matter in the light of (i) Section 5-B, (ii) the guidelines issued by the Central Government and (iii) the rulings of the Supreme Court. An unduly liberal view of a Judge might become a precedent under the aegis of which there could be a proliferation of obscenity (see here *Ranjit D. Udeshi* Air 1965 S.C. 811). A Judge with rigid or conservative ideas may endanger the freedom, even to the extent it is permissible, and may obstruct development of art and literature. One Judge might assess objectively and arrive at a conclusion opposite to the one arrived at by another equally objective, depending upon the personal outlook of the Judge. The Judge dealing with a book should, therefore, in the first place, try to place himself in the position of the author and from the point of the author, the Judge should try to understand

what is it that the author seeks to convey and whether the matter has any literary or artistic value. The Judge should, thereafter, place himself in the position of a reader of every age-group into 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 is offensive as a whole and in the individual passages. (Samaresh Bose and Another Vs. Amal Mitra and Another,). A similar procedure is to be followed in the case of a film.

CAN the Judge decide what is obscene or indecent ?:

(58) Courts have always exercised power to decide what is obscene or decent. The suggestion that Courts should not decide obscenity is "appealing", observed Brennan, J in *Jacobellis vs. Ohio* (1964) 378 U.S. 184, "since it would lift from our shoulders a difficult recurring task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold constitutional guarantees". Deciding what is "obscene" is a matter of constitutional judgment. Brennan, J observed in *Pans Adult Theatre I vs. Slaton* (1973) 413 U.S. 49 that "One cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so".

(59) Hidayatullah, (as he then was) said in *Ranjit D. Udeshi Vs. State of Maharashtra*, that the question was a constitutional issue of a far reaching character to be decided by the Judge. Krishna Iyer, J in *Raj Kapoor and Others Vs. State and Others*, said that the opinion of the Censor Board is relevant material, important in its impact, though not infallible in its verdict. But the Court is not debarred from trying the case because the certificate is not conclusive. There could be a rebuttable presumption in favor of a certificate issued by the censors but the certificate could be negated by positive evidence. An act of recognition of moral worthiness by a statutory agency is not opinion evidence, but an instance of transaction where the fact in issue has been asserted, recognised or affirmed. The Court will examine and judge the issue (para 15). In *Raj Kapoor vs. Laxman* AIR 1980 S.C. 604 (para II) Krishna Iyer, J said that the censor is not the moral tailor setting his own fashions but a statutory gendarme, policing films under Article 19(2) from the angle of public order, decency or morality. Thus the Censor Board opinion cannot be treated as opinion evidence.

JUDICIAL Review :

(60) It is argued that though for purposes of Section 292 Indian Penal Code the Court has necessarily to give a finding whether offence of "obscenity" has been committed by an accused, such a power to decide "obscenity" or "indecenty" is not vested in writ jurisdiction under Article 226.

(61) We do not think that such a broad generalisation - in regard to the jurisdiction and powers of the High Courts under Article 226 - can be accepted. The very decision relied upon by the appellant, namely, *Tata Cellular Vs. Union of*

India, says that it is the duty of the Court to confine itself to the following questions.

- (1) Whether a decision-making authority has exceeded its powers.
- (2) committed any error of law.
- (3) committed a breach of the rules of natural justice.
- (4) reached a decision which no reasonable tribunal would have reached, or
- (5) abused its powers.

(62) As to "illegality", the Supreme Court explained that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Judicial review is not in the nature of an appeal and the Court cannot substitute its own decision like an appellate tribunal. The Court could review the decision maker's evaluation of the facts and will intervene if the facts taken as a whole could not logically warrant the conclusion of the decision-maker, (para 81). If the weight of facts is overwhelming, then a decision the other way cannot be upheld. The scope of judicial inquiry (see para 82) must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the Judge, the right to review becomes meaningless. The courts will ensure (see para 83) that a statutory body acts in accordance with law. If a question arises as to the interpretation of words, the Courts will decide it. If the order or decision is based on a wrong interpretation of the law, the Court can set it aside. If the body misconstrues the extent of its powers, the Courts can interfere (quoting Lord Denning). Courts usually substitute (para 84) their own Judgment on the kind of questions of law which are within their special competence, but on the other questions, they may limit themselves to deciding reasonableness.

(63) It must be noted that we are here not concerned with exercise of discretion by an administrative or quasi judicial authority. We are concerned with the question whether the Censor Board and the Appellate Tribunal have properly understood the meaning of the words "decency or morality" in Article 19(2) of our Constitution as well as in Section 5-B of the Act; whether they have followed the proper legal tests for determining what is "indecent" in a constitutional sense; whether they have gone against the tests laid down in *Ranjit D. Udeshi* or *KA. Abbas* etc. decided by the Supreme Court on the question of "obscenity"; whether they have not confused between what is "obscenity" leading to depravity or corruption or appealing to the prurient interests - and what is "indecent" which causes revulsion, shock and disgust. Where the Board or Tribunal exercises its statutory powers upon a wrong application of the tests laid down by the Supreme Court, this Court can, as laid down in *Tata Cellular* case, surely set aside the decision and decide the question.

(64) If the finding, even of factual issue, is arrived at by one not properly instructed in the law or if such finding is in the teeth of a statutory provision or is

arrived at in ignorance of binding precedent, the High Court can certainly interfere *Arjun Khiamal Makhijani Vs. Jamnadas C. Tuliani and Others*, .

(65) The question of the High Courts' powers can be considered from another angle. The Board or Tribunal cannot grant a certificate unless it gives a finding the the conditions in Section 5-B of the Act as to "decency and morality" have been satisfied. If, therefore, the said findings are conditions precedent for the exercise of jurisdiction, the Board or Tribunal cannot, by deciding them contrary to law, grant a certificate for public exhibition of the picture. The distinction between illegality and jurisdiction has, in recent times, reached the vanishing point. (See Mathew,J in *Shri M.L. Sethi Vs. Shri R.P. Kapur*, referring to the position after *Anisminic* 1969 (2) A.C. 147.

(66) If the cuts imposed by the Board or appellate Tribunal are imposed by application of a wrong test or if the scenes have been retained by a wrong application of the tests, the High Court after setting aside the decision of the Board or Tribunal can issue consequential directions for either retention or excision of the scenes, as the case may be. The powers of the High Court in this behalf to issue directions consequential to its decision on the scenes, cannot be doubted. For that matter, even in the extreme situation where an administrative authority has discretionary powers, the High Court's jurisdiction to issue mandatory directions in certain situations has been accepted. *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, .

WHERE does the Judge draw the line:

(67) The question arises, where does the Judge draw the line between what is not "decent or obscene" or what is "decent or obscene".

(68) In this behalf,. Hidayatullah,C.J. (as he then was) stated in *K.A. Abbas Vs. The Union of India (UOI) and Another*, .that a line has to be drawn. The statement of Stewart,J in *Jacobellis vs. Ohio* (1964) 378 U.S. 184, is of quoted in this context. He said:

"BUTI know it when I see it, and -the motion- picture involved in this case is not that".

(69) Lord Lindley said: "Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals ? And yet who has any difficulty in saying that an oak-tree is a plant and not an animal ?" (*Att.Genl vs. Brighton* 1900 (1) Ch. 276. But what Lord Coleridge said in *Mayor of Southport vs. Morris* (1893) (1) Q.B. 359 makes it very clear. He said:

"THE Attorney-General has asked where we have to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any line that could be reasonably drawn".

THESE words were quoted by Venkatachaliah,J in Collector of Central Excise, New Delhi Vs. Ballarpur Industries Ltd., from Prof. Atiyah's, Hamlyn Lectures.

DID the Appellate Tribunal ignore "decency or morality" and go only by the test of "obscenity" ?:

(70) This appears to us to be the central point or the fundamental error of law apparent on the face of the appellate order in the present case. "Obscenity" requires proof of the ingredients more or less set out in Section 292 Indian Penal Code and the precondition is that there must be proof that the film or the scenes have a tendency to deprave or corrupt the viewer or excite his prurient interest. There it must be established that the tendency was to stir or arouse deep sexual passion or lewdness, or pander to lascivious or sexually precocious minds. That is not so in the case of proof of indecency. A vulgar thing is not necessarily obscene. Vulgarities arouse merely feelings of disgust and revulsion or boredom or shock, but does not have the effect of depraving or debasing or corrupting the morals whereas obscenity has the tendency to open minds to such influences (Samresh Bose and Another Vs. Amal Mitra and Another, .

(71) If the Tribunal applied the narrow test of "obscenity" instead of applying the broader test of "decency" relevant for Article 19(2) and Section 5-B of the Act, surely the finding on the cuts in regard to the three items referred to by the learned Single Judge is vitiated and is liable to be set aside inasmuch as the Tribunal decided the wrong question or applied the wrong test.

(72) An identical situation occurred in R vs. Greater London Council (1976) (3) All E.R. 184 - which is almost very close to the facts of the case before us. The Greater London Council (GLC) licenses cinemas under the Cinematograph Act, 1909 applying common law principles of "decency". It was held that the Glc instead of applying the test of "indecent" at common law, adopted the test of "tendency to deprave or corrupt", although the statute expressly excluded the latter test. A rule adopting such a test was, therefore, held ultra vires and a direction was issued to amend the rule by incorporating the correct test. As to indecency reference was made by Lord Denning M.R. to Kneller (Publishing, Printing and Promotions) Ltd vs. DPP (1972) (2) All E.R. 893 (accepted by Verma,J in Dr Ramesh Yeshwant Prabhoo Vs. Prabhakar Kashinath Kunte and Others, where Lord Reid had said that "indecent" includes anything which an ordinary man or woman would find to be shocking, disgusting or revolting. Referring to permission wrongly granted by Glc in R vs. Jacey & Co. (5.6.75) Denning M.R. said: (p.190)

"WHY did Glc grant their consent to the showing of that film - which was found by the Jury to be grossly indecent - and which was Therefore, unlawful The answer is because they have been applying the wrong test. They have applied the test of "tendency to deprave or corrupt" under the 1959 Act, instead of the test of "indecent" under the common law."

(73) On that basis Glc had earlier framed a rule fitting into "obscenity" rather

than "indecent" and that rule was held to be ultra vires. Direction was given to make a "decency" rule. That case was filed by a rate payer (the case before us is also a public interest case) and on locus standi, it is a leading authority, accepted by our Supreme Court in Janata Dal Vs. H.S. Chowdhary and Others, .

(74) We shall now examine the present case from both angles of indecency and obscenity in regard to the three items.

(A)Indecency and violation of guidelines.:

TRIBUNAL finds revulsion or disgust in regard to these three items:

(75) Like the Glc in R vs. Jacey Ltd, the Appellate Tribunal has here, in effect, applied the wrong test of "depraving or corrupting" the audience and held that these three items merely aroused disgust or revulsion and hence were not "obscene" and Therefore not liable to be excised.

(76) While on this point, we are conscious that this is an "A" Certificate film.

1.The frontal nudity scene

WE saw the picture along with counsel and we measured the length of the scene with a stop watch. This scene runs for full 2 minutes. The heroine is stripped totally naked in the gaze of about perhaps a hundred villagers standing in a circle at a distance around the well and she is paraded nude from face to the toes, all along the circle, with her front exposed including her private parts. She fetches the water from the well.

TRIBUNAL in para 4.9 says: "The word "nudity" appears to be unnecessary fetish on the part of the Revising Committee. These visuals can but create sympathy towards the unfortunate woman in particular, and revulsion against perpetrators of crimes against women in general. This sequence is an integral part of the story. Further, these sequences are not sensual or sexual, and are intended to, as indeed they must, create revulsion in the minds of the average audience towards tormentors and oppressors of women. To delete or even to reduce the climatic visuals would be a sacrilege".

(77) In the face of a finding by the Appellate Tribunal of the scene creating revulsion, the only inference could have been that the scene of total frontal nudity from top to toes was "indecent" within Section 5-B and Article 19(2).

(78) The scene would in addition offend guidelines in para 2(ix): "degrading or denigrating women in any manner presented". We were asked, does the scene really do so. The answer is in the Tribunal's order itself, they say, that it causes revulsion against perpetrators of crimes against women in "general". The intention to portray women in such a helpless condition in "general" would, in addition, fall within the directive in para 2 (xi). It is also "vulgar" offending para 2 (vii). Samresh Bose and Another Vs. Amal Mitra and Another, says "A vulgar thing is not necessary obscene. Vulgarity arouses merely feelings of disgust and revulsion. On the authority of the Supreme Court and on the finding of the

Tribunal) para 2 (vii) is violated. We have already held that the Tribunal has to consider not only the overall impact but also the particular scene to find if it is indecent. In fact, the finding is that particular scene causes revulsion. Hence it is indecent and liable to be excised. (In what other form the producer/director would have shown the well-scene within the frame work of the law is not for us to say.)

II. Naked posterior of Babu Gujjar in the rape scene:

(79) This scene as noticed by us by stop watch runs to about 20 seconds. This scene shows sexual intercourse by the man and his physical movement, with his posterior exposed, in an open area on a slanting mound.

(80) In para 4.5, the Tribunal said: "This sequence is in three parts, the appellant volunteered before us to reduce the first two sequences ... "to the bare cinematic necessity"... Rather than that, we direct that the second of these three sequences be deleted altogether -and that there is a reduction by 30% of the first sequence and by 20% of the third sequence, with the qualification that the visuals of the man's bare posterior in the first and third sequences be reduced to a flash". The deletion/ reduction would leave the audience bewildered either as to what follows or has gone before."

(81) The scene of the man raping the woman in open, both lying on the side of a mound, with his posterior exposed in the first and third sequences with reduction of 30% and 20% respectively, means retention of 70% and 80% of these sequences. The direction that the posterior should be shown as a flash has, in our view, become inconsistent with retention of 70% and 80% as stated above. We are more concerned under "indecentcy" with the depiction of the posterior. (We have grave doubts whether, there is due compliance with the appellate Tribunal's directive, but it is for the said Tribunal or Censor Board to look into this aspect, if need be).

(82) The deletion in para 4.5 of the 1st sequence and 3rd sequence and direction of reduction of 30% and 20% respectively is obviously based on the Tribunal arriving at a decision that they are "obscene" (because the Tribunal never had the indecency test in its mind). Retention of 70% or 80% was allowed - the only conclusion is because it was not obscene though it could show disgust/revulsion. This theme of revulsion even runs through the finding regarding gang-rape scene (para 4.8 of the Tribunal order). In our view, to say the least, the two sequences show the man's posterior vividly and are absolutely "indecent". Such an open public exhibition of the posterior for 20 seconds showing his physical movements are - assuming they are not obscene - absolutely disgusting, causing revulsion and violate Section 5-B and Article 19(2).

(83) The scene of violent rape taken by itself and in the manner depicted as stated above offends guideline 2 (ix) as it is denigrating and degrading women. It also violates guideline 2(vii) as the scene is vulgar and (as will be stated under the next heading) also obscene. It also offends guideline 2 (x) which deals with

sexual violence and rape. (In what other manner the rape scene could be retained for purpose of the story, without offending the law, is a matter for the director/producer.)

III. Use of expletives:

(84) There is a profuse use of expletives. Their use has been accepted by the Appellate Tribunal in para 3.1 as being nuances locally and habitually spoken in the villages and ravines in Chambal. It is said there is nothing sensual or sexual. The Tribunal approaches the question from the point of view whether they are "sensual or sexual". We have already pointed out that according to Samresh Bose's case, what is vulgar, even if it is not obscene, is indecent. Therefore, once again the wrong test has been applied. (In fact, as shown below, the expletives are obscene.)

(85) In the result, the Appellate Tribunal's order is clearly vitiated by use of a wrong test and, for the reasons given, we uphold the deletions directed by the learned Single Judge, for different reasons.

(B) Obscenity:

Alternatively, the Tribunal apply the overall and particular tests for deciding "obscenity" ?

(86) Our conclusions, on the basis of the test of indecency and as to violation of the guideline Rules, are sufficient to dismiss the appeals. We shall, however ,also examine the matter from the point of view of "obscenity" which was the main plank of arguments of the counsel for the appellants. We move on to deal with this aspect, keeping in mind this is an "A" Certificate film, and contemporary national community standards referred to earlier, the views of our Parliamentarians and placing ourselves in the position of the average moral man.

(87) Here, there is no conflict with our earlier findings in regard to "indecency". Under I, we are here concerned with not with total frontal nudity but with other aspects at different stages of the scene. Under Ii, we are concerned not with the man's posterior, but the actual depiction of rape. Under Iii, we are not concerned with merely indecency but whether the expletives which are at the level of obscenity will not tend to make viewers emulate and use them.

(1) Frontal Nudity scene: We have already extracted the Tribunal's findings while dealing with "indecency". That the scene is considered by the Tribunal from the "overall" angle need not be disputed. But strangely the Tribunal says:

" NUDITY "appears to be an unnecessary fetish on the part of the Revising Committee." and that deletion of this item would amount to "sacrilege".

(87) Let us examine the scene. Initially, the heroine is shown up to the waist on the front side when her clothings are forcibly removed. It is only later that the lower parts of the body are also exposed when she is paraded in a circle before a crowd. There are, therefore ,portions in the scene initially which are surely

sexual and sensual and which, in our view, are obscene. It may be that certain other portions where she is shown totally nude with her private parts exposed, it is revolting or shocking, amounting to being indecent. But the portion referred to earlier, is in our view, capable of arousing sexual or sensual or lascivious feelings in the average man. As a matter of law, the finding of the Appellate Tribunal that it is not obscene is one which, in our view, no average reasonable person could have reached.

(88) While the viewer is supposed to judge from the stand-point of (say) the man on the Clapham Omnibus (see Bose, J in AIR 1947 1 (Nagpur) quoted in Ramesh Dalal Vs. Union of India (UOI) and Others, , - for purposes of applying Wednesbury principles, the test is not that of the man on the Clapham Omnibus. (See Tata Cellular Vs. Union of India, , per Prof. Wade. The Tribunal, by holding that this item is not obscene or will not deprave or corrupt, has arrived at a conclusion which, in our view, no reasonable authority could have arrived at.

(II) Rape Scene: Here we are not dealing with the exposure of the posterior of the man. We are dealing with the explicit rape itself. We do not see how, apart from deletion of the second, retention of 70% of first sequence and 80% of the third would dilute the "obscenity" contained in all the sequences. There is no finding that taken as a whole, along with the whole film, the rape scene is to be ignored. Even the overall test is not applied.

(III) Expletives: The comment of the Tribunal that these words are not to be treated "literally", that there is nothing sensual or sexual as they are used in the villages is no Explanation for retaining them. There is no application either of the overall test or the particularity test. The need of these words in the film for purposes of its social theme is not also referred to. In our view, the manner in which they are expressed is intended to stir immoral emotions. These words tend to make viewers - emulate these persons, which factor is sufficient to say that these words are "obscene".

(89) We, agree with the findings of the learned Judge, alternatively. As already stated, there is no conflict between our findings as to "indecenty" and "obscenity" for we have considered different aspects of each item.

(90) The Appeals are, therefore ,liable to be dismissed.

(91) Before parting with the case, we would direct the Union of India to consider and implement the recommendations of the Parliamentary Committee's Report after following the due procedure, so that the Censor Boards/Tribunals keep "indecenty" in mind rather than obscenity or they may not consider only the overall test while dealing with indecenty and not the particular scene test. As long as Section 5-B contains the words "decency and morality" drafted from Article 19(2) of the Constitution, Censor Boards must see that films conform to Constitutional and statutory provisions and guidelines issued by the Central Government. The Censors should also have an idea of the law as declared by the Supreme Court or High Courts in this behalf. Today we are, unfortunately, faced

with a situation where the wrong tests are being applied by the Censor Board as well as the Appellate Tribunal.

(92) We may also add that the assumption on the part of producers/directors of films that rape scenes or sex and violence can pass through if the picture presents some social theme "taken as whole" is totally fallacious. According to the law as declared by the Supreme Court, the test is thematic and episodic. Taken out of the "overall" theme of the film, the individual scenes must also be "decent". A simple theme of revenge by a woman raped cannot be allowed to be an excuse for any number of violent rape scenes, in a cinema. Such is not the law of the land.

(93) The Parliamentary Committee in its 1994-95 report has rightly stated that box office success of a film is not the index of popular demand by itself nor of contemporary social values. Producers and directors cannot create a taste for sex and violence and contend that there is popular demand for the same. Constitutional values and statutory standards as interpreted by the Supreme Court have to guide us. It is not the shifting popular will but our fundamental assessments of human values and the purpose of society that should govern, Lord Simonds: (Shaw vs. DPP) 1961 (2) All E.R.446.

(94) In the result, the appeals are dismissed subject to the direction given to the Union of India.