

Customs Confiscation of Artworks Quashed

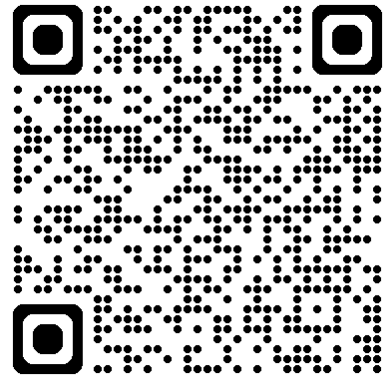
Case Name: M/S. B. K. Polimex India Private Limited

Citation: 2024:BHC-AS:42748-DB

Act: Customs Act, 1962.

Case Brief & MCQs on this case is available in the eBook:

["Bombay High Court Cases in October 2024"](#)



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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14437 OF 2024

M/s. B. K. Polimex India Private Limited]
903, AG Park, A Wing,]
Prabhat Colony, Santacruz East]
Mumbai 400055]
Maharashtra]
Through its Authorized Representative]... Petitioner.

Versus

1] Union of India]
Ministry of Finance]
Department of Revenue]
Through its Secretary, Delhi]
]
2] Central Board of Indirect Taxes &]
Customs]
North Block, Central Secretariat]
New Delhi – 110001]
Through its Chairman]
]
3] Assistant Commissioner of Customs]
Courier Cell/APSC, Mumbai Customs]
Zone – III]
International Courier Terminal]
Sahar, Andheri East,]
Mumbai – 400099]
]
4] Principal Commissioner of Customs,]
Airports Special Cargo]
Commissionerate,]
International Courier Terminal]
Sahar, Andheri East,]
Mumbai – 400099]... Respondents.

Mr Shreyas Shrivastava, a/w Mr. Saurabh Shrivastava and Ms. Shradha Swarup for the Petitioner.

Mr Jitendra B Mishra, a/w Mr. Abhishek Mishra and Mr. Rupesh Dubey for the Respondents.

CORAM

M.S. Sonak &

Jitendra Jain, JJ.

Reserved on

21 October 2024

Pronounced on

25 October 2024

JUDGMENT: (*Per M. S. Sonak, J.*)

1. Precisely sixty years ago, in *Ranjit D Udhesi Vs State of Maharashtra*¹, the Supreme Court of India, speaking through Justice Hidayatullah, declared that in India, the angels and saints of Michealangelo do not need to be made to wear breeches before they can be viewed. Still, in 2024, the Assistant Commissioner of Customs prohibited the import and ordered confiscation (and possibly destruction) of seven drawings by world-renowned artists, viz. Mr. F N Souza and Mr. Akbar Padamsee on the ground that such artworks, in his opinion, were obscene.

2. Accordingly, we issue Rule. The rule is made returnable immediately at the request and with the consent of the learned counsel for the parties.

3. The Petitioner challenges the order dated 01 July 2024 issued by the Assistant Commissioner of Customs (Respondent No.3) confiscating the drawings by world-renowned artists, viz. Mr. F N Souza and Mr. Akbar Padamsee on the ground that such artworks were “obscene”. Apart from confiscating the artworks, the impugned order dated 01 July 2024 also imposes a fine of

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1964 SCC OnLine SC 52

Rs.50,000/- on the Importer/Petitioner. There is no clarity on whether the impugned order directs the “destruction” of these artworks because at least the show cause notice issued to the Petitioner had referred to the destruction of these artworks.

4. In 2022, the Petitioner purchased three drawings by Mr Akbar Padamsee at an auction by Rosebery’s London and four by Mr Francis Newton Souza from the auctioneers Lyon and Turnbull London. The payments were made to the auctioneers through usual banking channels.

5. On 24 March 2023, the Petitioner booked M/s. Stephen Morris Shipping PLC, Greenford City London, United Kingdom, through M/s FedEx via airway bill (AWB) No.771665532428 for the above seven quantities of Padamsee and Souza artworks against the invoices issued favouring the Petitioner. The invoices specifically mention that the consignment from London to India was “*nude drawings*” after considering the provisions of the Customs Act, 1962, and to ward off the charge of any misdeclaration and suppression.

6. The artworks reached India on 27 March 2023. The counsel for the Petitioner submitted that the Customs officials threatened not just confiscation but also destruction of these valuable artworks. The FedEx officials panicked and advised the Petitioner to apply for re-export rather than risk confiscating and destroying these artworks.

7. The Petitioner pleaded that under wrong representation from FedEx that the artworks fall under the category of “obscene material”, the Petitioner, being wholly misled, wrote to the Customs Authorities on 17 April 2023 seeking permission to re-export the said artworks. On 20 April 2023, however, the Airport

Special Cargo Commissionerate (APSC) customs officials seized all the seven Padamsee and Souza artworks vide seizure memo dated 20 April 2023.

8. The Petitioner wrote to the Deputy Commissioner of Customs on 08 May 2023 seeking the release of the confiscated artworks by pointing out that the artworks were not obscene. Along with this letter, the Petitioner also provided a certificate issued by Sakshi Gallery of India and Grosvenor Gallery London to the effect that such artworks were not obscene. Even copies of printouts displayed in the Virtual Tour of the National Gallery of Modern Art, along with opinions of experts from various art galleries in London and India, were enclosed, along with the letter dated 08 May 2023 urging that these artworks by world-renowned artists were by no means obscene.

9. Since the Respondents had not responded by 07 June 2023, the Petitioner requested a personal hearing through its advocate's notice. On 16 June 2023, the Petitioner was informed that a personal hearing would be given on 22 June 2023. The Petitioner's representative was heard on 22 June 2023. He also produced a personal appeal from Ms. Meena Joseph Vari, Art Curator, Educator, and Dean at Srishti Institute of Art, Design, and Technology, to release the artworks since they were by no means obscene.

10. On 19 October 2023, the 3rd Respondent issued the Petitioner a show cause notice requiring the Petitioner to show cause why the artworks should not be confiscated and destroyed and why a penalty should not be imposed. In November 2023, the Petitioner filed a reply followed by written submissions. The Petitioner gave instances of how, in the past, the artworks of world-

renowned artists were similarly blocked without taking cognisance of the correct legal position in such matters.

11. On 01 July 2024, the 3rd Respondent made the impugned order confiscating the artworks and imposing a penalty of Rs.50,000/-. It is unclear whether the impugned order directs the “destruction” of these artworks because at least the show cause notice issued to the Petitioner referred to the destruction of these artworks. Hence the present Petition.

12. Mr. Shrivastava, the learned counsel for the Petitioner, submitted that the Petitioner’s case is not covered by the Notification dated 18 January 1964 since every nude drawing or painting cannot be styled as obscene. He submitted that the artworks in question are national and international treasures certified by experts in the art world. Even the artists are world-renowned and have been granted national and international awards. He submitted that by ignoring all such relevant material and decisions of the various Courts on “obscenity”, the impugned order has been made. Accordingly, he submitted that the impugned order warrants interference. He referred us to the several precedents on the subject.

13. Mr. Mishra, the learned counsel for the Respondents, submitted that the Petitioner has an alternate remedy, and therefore, this Petition ought not to be entertained. He submitted that the Petitioner applied for re-export and accepted that the artworks were obscene. He submitted that the artworks are indeed obscene, and he wondered that if such drawings/paintings were not obscene, what else could be regarded as obscene? Accordingly, he submitted that there was no case to interfere with the impugned order, and this Petition ought to be dismissed.

14. Mr. Shrivastava, with the leave of this Court, filed an Additional Affidavit to place the photographs of 3 additional drawings on record. He submitted that these pictures were of the drawings/paintings ordered to be confiscated, but they remained to be annexed to the Petition inadvertently. Accordingly, we granted leave to file this affidavit and to place the documents accompanying it on record.

15. The rival contentions now fall for our determination.

16. In this case, we are concerned with the order for confiscation and possible destruction of three artworks by Akbar Padamsee and four artworks by Francis Newton Souza purchased by the Petitioner from famous auctioneers based in London and imported into India through authorised channels.

17. The pictures of the artworks are placed on record at Exhibit-C (Souza's artworks) and Annexure A to the Additional Affidavit filed on 21 October 2024 (Padmsee's artworks). The artworks undoubtedly depict nude *inter-alia* in some sexual poses. But the question is whether they are 'obscene', as repeatedly declared by the Assistant Commissioner of Customs, Mumbai (ACC).

18. The ACC bases its entire case on Notification No.1/1964-Customs dated 18 January 1964, issued under Section 11 of the Customs Act, 1962, and contends that since such artworks constitute obscene drawings, paintings or representations, importing such artworks is prohibited.

19. The relevant extract of the 1964 notification reads as follows:

*"In exercise of the powers conferred by
Section 11 of the Customs Act, the Central*

Government, being satisfied that it is necessary in the public interest so to do, for the purposes specified in subsection 2 of that Section, has prohibited the import of inter-alia the following goods, namely: -

- (1)*
- (2) any obscene book, pamphlet, paper, drawing, painting, representation, figure or article;*
- (3)*
- (4)*
- (5)"*

20. In concluding that the Padamsee and Souza artworks are “obscene” and, therefore, prohibited under the Notification dated 18 January 1964, the ACC has relied entirely on his personal interpretation of obscenity. He has neither bothered to seek any experts’ opinion on the subject nor even looked into the reports, expert opinions and other material submitted by the Petitioner to contend otherwise. The ACC’s reasoning shows an “*Ipse Dixit*” approach, wherein he concluded that anything depicting nudity is inherently obscene.

21. In paragraph 11 of the impugned order, the ACC noted that “*the subject Drawings are nude as already declared in the used invoices and accepted by the Importer in their written reply.*” Further, the ACC has noted the submission that the Customs had, in the past, already held that the works of artists like Souza and Padamsee are “*work of art and not obscene*”.

22. However, the ACC dismissed this by observing that ‘*the same rationale can be applied only in case of identical drawings/paintings. The extent of depiction of nudity in different*

drawings can be different which at one point may not be upto the level of obscenity but at other point may be upto that level so that goods can be considered nude. In this case, from the available drawings in the file the subject drawings are completely nude with some sexual intercourse position”.

23. The ACC has surmised that *“the Importer wanted to take advantage of reputation of two renowned artist for import of obscene/prohibited goods”*. The ACC observed, *“I find that nobody is above law and reputation of any award do not give any guarantee to Importer or any other person to import any obscene/prohibited goods”*

24. Several significant Supreme Court decisions were cited before the ACC, including *Ranjit D Udhesi* (supra), *Navtej Singh Johar Vs Union of India & Ors*² and *S Rangarajan Vs P Jagjivan Ram*³. However, he brushed aside these decisions by simply observing: *“I find the level of nudity depicted in the said Drawings should be considered as obscene. The past reference in this regard can not be applied blindly to every case which could have the future consequences without any limit on level of obscenity/nudity could be depicted in such drawings/paintings”*.

25. The ACC also distinguished the decision of the Kerala High Court in *Xxx Vs State of Kerala*⁴ by observing: *“I find that the said judgment is related to the exposed video of naked upper body of female but in the instant case the subject drawings are completely nude as already accepted by the Importer and verified through examination”*.

² AIR 2018 SC 4321

³ (1989) 2 SCC 574

⁴ 2023 SCC OnLine Ker 3673

26. The ACC acknowledged that “obscene” is not defined in the Customs Act, Indian Penal Code, or the relevant Notification 1/1964-Customs. Therefore, he referred to the Oxford Dictionary to conclude that the imported artworks fell squarely under the category of prohibited goods, as they depicted complete nudity with sexual positions. The ACC observed: *“I find that the said imported goods/drawings are perfect for consideration as obscene”*.

27. The ACC, in the context of the definition of “*prohibited goods*” under Section 2(33) of the Customs Act, 1962, read with Notification 1/1964-Customs dated 18 January 1964 (Sr. No.2), held that *“the subject imported drawings fall under the category of “Prohibited Goods” as the said drawings are completely nude with some sexual intercourse position”*.

28. Thus, in short, the ACC has made the impugned order only because, in his opinion, drawings that portray nudes or drawings that refer to some sexual intercourse positions are “obscene” in all circumstances. The eminence of the artists, their expertise in the field or the fact that several other experts have acknowledged and even feted such expertise were considered irrelevant considerations. The ACC virtually brushed aside the opinions expressed by the Hon’ble Supreme Court or the various other High Courts on the issue of obscenity and stuck to his position that anything “*completely nude*” constitutes “*complete obscenity*”.

29. After reviewing the ACC’s impugned order dated 01 July 2024 in the context of Notification No.1/1964-Customs dated 18 January 1964, we are satisfied that the same suffers from perversity and unreasonableness. Relevant material, including settled law on the subject, has been completely ignored. The ACC,

utterly obsessed with his notions of obscenity, has confiscated and possibly directed the destruction of the artworks of Padamsee and Souza. The ACC relies solely on his conviction that any artwork depicting nudity or sexual intercourse is inherently obscene. He disregarded the artists' prominence and expertise and the fact that many art experts and judicial precedents had recognised these works as significant artworks and not obscenity. The ACC failed to appreciate that "Sex and obscenity are not always synonymous. Obscene material is that which deals with sex in a manner appealing to prurient interest (William J Brennan, Jr.). Such an order, in our opinion, is unsustainable and must go.

30. While it is true that this matter cannot be decided based only on the eminence of the two artists, so also, the matter could not have been decided by the ACC by repeatedly focusing on the fact that the artworks were of nudes and, in some cases, portrayed sexual intercourse positions and were, therefore, necessarily obscene. Every nude painting or every painting depicting some sexual intercourse poses cannot be styled as obscene. The Petitioner, in Ground (C) of its Petition, has correctly pointed out that nude sculptures and art are prevalent in several Indian temples and celebrated for their artistic excellence. He referred to sculptures and artworks in several significant galleries exhibiting matchless art in the form of nudes or sexual positions.

31. The Petitioner had placed on record certificates issued by Sakshi Gallery of India and Grosvenor Gallery London certifying that nothing was obscene in the subject artworks. The Petitioner had submitted prints of the Virtual Tour of the National Gallery of Modern Art (<https://ngmaindia.gov.in/virtual-tour.asp>) showing paints of nudes or paintings depicting sexual intercourse positions in various Art Galleries in India and abroad. However, the ACC

refused to consider this voluminous evidence, allowing solely his personal convictions to dictate his decision.

32. The Petitioner pointed out that Souza's paintings are displayed at the Lalit Kala Academy of Indian Government and the National Gallery of Modern Art, India. Several certificates and experts' opinions of various art galleries in London and India certifying that such paintings were not obscene were produced by the Petitioner for the consideration of the ACC. But the ACC, so enamoured by his convictions, has refused to even look into this voluminous material placed before him.

33. Akbar Padamsee has been conferred the following awards: -

- Lalit Kala Academy Fellowship, 1962
- J.D. Rockefeller III Fund Fellowship, 1965
- Artist in Residence. Stout Residence University, Wisconsin, 1967
- Jawaharlal Nehru Fellowship, 1969
- Kalidas Samman, Madhya Pradesh Government, 1997-1998
- Lalit Kala Ratna, Lalit Kala Academy, New Delhi, 2004
- Padma Bhushan, Government of India, 2010.

34. Similarly, FN Souza has been conferred the following awards: -

- John Moore Prize, Liverpool, 1957
- Italian Government Scholarship, 1960
- Guggenheim International Award, New York, 1967.

35. While these accolades do not exempt an artist from scrutiny, the ACC should not have entirely ignored the artistic merit and the worldwide recognition these artists have garnered. The ACC's personal conviction that any nude portrayal of a woman or any drawings portraying sexual poses is invariably obscene could not or should not have been the fulcrum of his decision. This is a case

of completely ignoring vital and relevant material and basing the decision on personal preferences and prejudices that should have no place in the decision-making by a public authority.

36. Mr Mishra's contention that the awards must have been given for other artworks of these world-renowned artists is, with respect, an attempt to trivialise the issue. These awards are perhaps a testament to the artist's lifelong contributions to the global art world. While not everyone is obliged to approve of, like or enjoy such artworks, the option of banning, censoring, prohibiting the import or even destroying such artworks feted by world expertise based entirely on personal opinions, likes and dislikes of a public official is simply unacceptable.

37. Mr Mishra's rhetoric about nothing could be obscene if the artworks in this case were not construed as obscene, which also misses the point entirely. Neither the Court's nor Mr Mishra's or ACC's purely personal opinions matter when discharging public adjudicatory functions. The ACC or Mr Mishra's views on this subject in their private capacity may be respected (and are being respected). However, such views, however respectable or otherwise they may be, cannot seep into official decision-making.

38. If the ACC were to express such views in a newspaper column or on social media (subject to the service rules that govern his service) and if some public authorities were to ban or censor such views, perhaps the judiciary and the Courts would rise in the ACC's defence and protect his freedom of speech and expression. The Constitutional Courts in this Country go by Voltaire's dictum that they may not agree with anything you say but shall defend unto death your right to say it (as long as what you say is within the constitutional bounds of free speech).

39. However, when the ACC purports to exercise public powers as a Customs official, such personal opinions or preferences must necessarily take a back seat. He cannot allow his personal opinions, however strong, to cloud his judgment. The interpretation of the notification or obscenity must align with the legal precedents established by the Supreme Court and the High Courts, regardless of the ACC's personal opinions. A mere "ipse dixit" would not suffice. Ipse dixit is a Latin term that translates to "*he himself said it*". In the legal context, it refers to an assertion or statement made by an individual based solely on their own authority, without any supporting evidence or proof (LII/Legal Information Institute. <https://www.law.cornell.edu/Wex>). Public officials must act within the law, not based on personal ideology.

40. Suppose public authorities vested with powers to decide on vital aspects prefer ipse dixit over the law and legal precedents. In that case, we stand to degenerate from a system sworn to the rule of law to the rule of men. The rule of law demands that public functionaries exercise their powers within the four corners of the law and not in some arbitrary, whimsical, or purely discretionary manner based on their preferences or ideology. Aristotle extolled a government according to institutionalised impersonal rules and condemned a government by personal fiat. That is the difference between the rule of law and the rule of men. In a democratic set-up like ours, we pride ourselves on being governed by the rule of law and not the rule of men. Every public functionary must be conscious of this source of pride and do nothing to wound this hallowed principle.

41. Several great artists, it appears, have had to tread such an unfortunate path hedged by those dressed in little brief or even grand and pompous authority. The Petitioner, in paragraph 23 of

the Petition, has referred to F N Souza, in 1979, expressing his frustration with customs authorities several years ago in the following words: -

...how do they [customs] function there? The official is acting outside his jurisdiction as a custodian of public morals. His duty is to collect revenue on dutiable goods and to prevent contrabands entering into the country. The manuscript he is arbitrarily detaining has not been legally declared contraband. The drawings are an integral part of the text. The writings and the illustrations dovetail into each other. The drawings are not photographs which may or may not be regarded as obscene. I don't know how the law there stands on that issue. But these drawings are works of art and the law is clear on that [as reported in <https://www.livemint.com/Leisure/dZyMulvnr9fPEEJhsdgqpK/Excerpt-A-Scrapbook-Of-Memories.html>]

42. The Petitioner, in paragraph 24 of its Petition, has referred to the exasperation of Shrikant Verma, a Poet, Author, and Rajya Sabha, in his address before the Rajya Sabha, on learning that the Assistant Collector of Customs has confiscated manuscripts and drawings of F N Souza on the ground of obscenity. The Petitioner has quoted from the extract of Shrikant Verma's speech in Rajya Sabha, and the same reads as follows: -

"...a painter speaks not only through words but through sketches and drawings. The assistant collector of customs in New Delhi has confiscated the manuscript [and] drawings It is a disgrace for the entire government that the customs of this government are so backward that they have taken upon themselves the task of the censor, that they have become the custodians of public morality, that they can ban a book in this manner. They have confiscated 62 drawings as they consider these to be obscene ... [will they confiscate] the presents the dignitaries bring with them if the customs consider them obscene? If the drawings of Souza can be detained by the customs why not the paintings of the great masters of the twentieth century in Europe and America? If we were to agree to the standards adopted by the Delhi customs for considering a certain work of art as obscene and erotic then what shall we do when we are confronted with our own temples at Khajuraho and Konark? Are we going to hang our heads in shame? Today, we have a backward mind as reflected in

the Delhi customs [as reported in <https://www.livemintg.com/Leisure/dZyMulvnr9fPEEJhsdgqpK/Excerpt-A-Scrapbook-Of-Memories.html>]

43. The legal position on obscenity requires a reference to Section 292 of the Indian Penal Code, which provides that whoever, among other things, sells or even has in his possession any obscene book, pamphlet, paper, writing, drawing, painting, representation or figure or any other obscene object whatsoever or imports, exports or conveys any obscene object for any of the purposes aforesaid shall be committing an offence punishable under Section 292 of the Indian Penal Code.

44. In *Ranjit Udhesi* (supra), the Hon'ble Supreme Court accepted the test for determining obscenity propounded by Cockburn, C.J. in the *Regina Vs Hicklin*⁵. This test requires the decision maker to assess the tendency of the matter charged as obscenity to deprave and corrupt those whose minds are open to such immoral influences and into those whose hands a publication of this sort may fall. The Court noted that the Indian Penal Code does not define the word "obscene", and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by Courts. The test that could be evolved must be general. Still, it must admit of a just application from case to case by indicating a line of demarcation that is not necessarily sharp but sufficiently distinct to distinguish between obscene and not.

45. The Court noted that none has attempted a definition of obscenity so far because the meaning can be laid bare without attempting a definition by describing what must be looked for. *It may, however, be said at once that treating with sex and nudity in*

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(1868) LR 3 QB 360

art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michael Angelo should be made to wear breeches before they can be viewed. If the rigid test of treating sex as a minimum ingredient were accepted, hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the bookshops would close, and the other half would deal in nothing but moral and religious books, which Lord Campbell boasted was the effect of his Act.

46. The Court held that in such matters, it must apply itself to consider each work at a time. *This should not, of course, be done in the spirit of the lady who charged Dr Johnson with putting improper words in his Dictionary and was rebuked by him. "Madam, you must have been looking for them". To adopt such an attitude towards Art and Literature would make the Courts a Board of Censors.* An overall view of the obscene matter in the setting of the whole work would, of course, be necessary. Still, the obscene matter must be considered by itself and separately to find out whether it is so gross. 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 expected to fall.

47. This was the position and the view in 1964. Therefore, the Court forewarned that the concept of obscenity would change with time, and what might have been "obscene" at one point in time would not be considered obscene at a later period. The Court noted several examples of changing notions of obscenity and observed that the world can now tolerate much more than formerly, having become indurated by the literature of different sorts. The attitude is not yet settled. This is what the Court said in 1964. Again in 1969, in *Chandrakant Kalyandas Kakodkar Vs.*

*State of Maharashtra*⁶, the Supreme Court reiterated the principle by stating that the standards of contemporary society in India are also fast changing. This principle was reaffirmed in *Samaresh Bose and another vs Amal Mitra and another*⁷ and in *S. Khushboo Vs. Kanniammal & Anr*⁸

48. In *Aveek Sarkar and another Vs. State of West Bengal and others*⁹, the Court was concerned with a criminal prosecution under Section 292 against some Indian magazines that had reproduced a German magazine photograph. This was a photograph of Boris Becker, a world-renowned tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, but Boris Becker covering his fiancée's breast with his hands. The article and the photograph ran with the caption "Posing nude dropping out of tournaments, battling Racism in Germany. Boris Becker explains his recent approach to life" – Boris Becker Unmasked.

49. The Supreme Court empathetically held that the *Hicklin test*, propounded in 1868 in England and adopted in 1964 in India, could no longer be a correct test to be applied to determine "what is obscenity". The Court noted that the *Hicklin test* postulated that a publication must be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. The Supreme Court referred to *Roth Vs. United States*¹⁰, where the Supreme Court of the United States held

6 1969 (2) SCC 687
 7 (1985) 4 SCC 289
 8 (2010) 5 SCC 600
 9 (2014) 4 SCC 257
 10 354 US 476 (1957)

sex and obscenity were not synonymous with each other. Only those sex-related materials which tended to “exciting lustful thoughts” were found to be obscene, and further, the same must be judged from the point of view of an average person by applying *contemporary community standards*.

50. The Supreme Court of Canada in *R. Vs. Butler*¹¹, held that the dominant test is the “*community standard problems test*”. They held that explicit sex that is not violent and neither degrading nor dehumanising is generally tolerated in Canadian society and will not qualify as the undue exploitation of sex unless it employs children in its production. The Court held that for the work or material to qualify as “obscene”, the exploitation of sex must not only be a dominant characteristic, but such exploitation must be “undue”. The Court accordingly refused to apply the Hicklin test and used the community standard test.

51. The Supreme Court, in 2014, emphatically rejected the *Hicklin Test* in the context of determining “obscenity” under Section 292 of the Indian Penal Code. *The Court held that a picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it tends to arouse the feeling of or reveal an overt sexual desire. The picture should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted.* Only those sex-related materials which tend to “exciting lustful thoughts” can be held to be obscene, *but the obscenity has to be judged from the point of view of an average person by applying contemporary community standards*. The Court quashed the issue of process by a Magistrate under Section 292 of the Indian Penal

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(1992) 1 SCR 452 (Can SC)

Code and observed that the learned Magistrate should have exercised his wisdom based on judicial precedents in the event of which he would not have ordered the appellants to face the trial. The Supreme Court also held that the High Court should have exercised powers under Section 482 of CrPC to secure the ends of justice.

52. In *Raj Kapoor vs State*¹², the Supreme Court quashed the criminal proceedings initiated against Raj Kapoor for alleged obscenity in his film “Satyam Shivam Sundaram”. Krishna Iyer, J., observed *that morals made to measure by statute and court are risky with a portentous impact on fundamental freedoms*. In our constitutional order, the root principle is the liberty of expression and its reasonable control with the limits of “public order, decency or morality”. Here, social dynamics guide legal dynamics in the province of “policing” art forms. The relation between reality and relativity must haunt the Court’s evaluation of obscenity, expressed in society’s pervasive humanity, not the law’s penal prescriptions.

53. The Court noted that social scientists and spiritual scientists would broadly agree that man lives not alone by mystic squints, ascetic chants and austere abnegation but by luscious love of beauty, the sensuous joy of companionship and moderate non-denial of normal demands of the flesh. Extremes and excesses boomerang, although some crazy artists and film directors do practise Oscar Wilde’s observation: ‘Moderation is a fatal thing. Nothing succeeds like excess. All these add up to one conclusion that finality and infallibility are beyond courts, which must interpret and administer the law with pragmatic realism rather than romantic idealism or recluse extremism.

¹² (1980) 1 SCC 43

54. In *Maqbool Fida Husain Vs. Rajkumar Pandey & etc.*¹³, learned Single Judge of Delhi High Court (Sanjay Kishan Kaul, J., as His Lordship then was) quashed the attempted criminal prosecution against Hussain under Section 292 of the Indian Penal Code. This decision opens with the following three paragraphs, which bear reference, given the views expressed by the ACC, in the impugned order:-

1. Pablo Picasso, a renowned artist, said, "Art is never chaste. It ought to be forbidden to ignorant innocents, never allowed into contact with those not sufficiently prepared. Yes, art is dangerous. Where it is chaste, it is not art." Art, to every artist, is a vehicle for personal expression. An aesthetic work of art has the vigour to connect to an individual sensory, emotionally, mentally and spiritually. With a 5000-year-old culture, Indian Art has been rich in its, tapestry of ancient heritage right from the medieval times to the contemporary art adorned today with each painting having a story to narrate.

2. Ancient Indian art has been never devoid of eroticism where sex worship and graphical representation of the union between man and woman has been a recurring feature. The sculpture on the earliest temples of 'Mithuna' image or the erotic couple in Bhubaneswar, Konark and Puri in Orissa (150-1250 AD); Khajuraho in Madhya Pradesh (900-1050 AD); Limbojimata temple at Delmel, Mehsana (10th Century AD); Kupgallu Hill, Bellary, Madras; and Nilkantha temple at Sunak near Baroda to name a few. These and many other figures are taken as cult figures in which rituals to Kanya and Kumari worship for progeny gained deep roots in early century A.D. Even the very concept of 'Lingam' of the God Shiva resting in the centre of the Yoni, is in a way representation of the act of creation, the union of Prakriti and Purusua. The ultimate essence of a work of ancient Indian erotic art has been religious in character and can be enunciated as a state of heightened delight or ananda, the kind of bliss that can be experienced only by the spirit.

3. Today Indian art is confidently coming of age. Every form of stylistic expression in the visual arts, from naturalism to abstract expressionism derives its power from the artist's emotional connection to his perceptual

reality. The Nude is contemporary art, a perennial art subject, considered to be the greatest challenges in art has still not lost its charm and focuses on how the human form has been re-interpreted by the emerging and influential artists today. The paintbrush has become a powerful tool of expression as the pen is for some, and has thus occasionally come under the line of fire for having crossed the 'Lakshman Rekha' and for plunging into the forbidden, which is called 'obscene', 'vulgar', 'depraving', 'prurient' and 'immoral'. No doubt this form of art is a reflection of a very alluring concept of beauty and there is certainly something more to it than pearly 'flesh' but what needs to be determined is which art falls under the latter category.

55. In *Kavita Phumbhra Vs. Commissioner of Customs (Port), Calcutta*¹⁴, the Division Bench of the Calcutta High Court, set aside the orders of the Customs Authorities in confiscating the imported goods on the ground that the same were obscene. In this case, the imported goods were transparent glass objects of unclothed female form. The Court held that the Customs Authorities or the Tribunal had not approached the whole issue from the perspective of the settled legal positions and changing modern concepts.

56. The Court held that the Customs authorities had attempted to enforce morality by some vague and individualised standards imposed overbearingly. The Court noted that moral standards vary from community to community and person to person within one society. The morals of the present day in our society also do not represent a uniform pattern. The variations and variables inside a certain society are also crucial considerations when judging whether an object comes within the mischief of obscenity. A certain shift in moral and sexual standards is very easily discernible over the years. Accordingly, it was held that the Customs Authorities and the Tribunal have committed serious errors in holding the relevant goods as obscene to render them prohibited articles.

¹⁴

2011 SCC OnLine Cal 2378

Consequently, the confiscation order and penalty imposition were quashed and set aside.

57. In *Ajay Goswami vs Union of India and others*¹⁵, the Hon'ble Supreme Court held that nudity alone is not enough to make a material legally obscene. The Court laid down several tests before it could be concluded that an obscenity case was made out. The Court held that nudity *per se* will not constitute obscenity. *Where art and obscenity are mixed, what must be seen is whether the work's artistic, literary or social merit outweighs its obscene content. The Court must have regard to contemporary standards.* The work must be judged as a whole. The opinion of literary and artistic experts is relevant in such matters. *The Court should apply the test of an ordinary man of common sense and prudence, not an "out of the ordinary or hypersensitive man".* The Court quoted Chief Justice Hidayatullah's remark in *K.A. Abbas vs The Union of India and another*¹⁶: *"If a depraved man begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped."*

58. In *Indibily Creative Private Limited and others vs Government of West Bengal and others*¹⁷, the Hon'ble Supreme Court criticised the approach of public authorities, including the police, in refusing to assist in filming a movie in West Bengal. The police, despite certification from CBFC, did not allow the film to be exhibited. *The Court observed that the police are the self-appointed guardians of public morality, not in a free society.* The uniformed authority of their force is subject to the rule of law. They

¹⁵ (2007) 1 SCC 143

¹⁶ (1970) 2 SCC 780

¹⁷ (2020) 12 SCC 436

cannot arrogate the authority to be willing allies in suppressing dissent and obstruction of speech and expression. The Court held that *the danger the case exemplifies is the peril of subjecting citizens' freedom of speech and expression to actions not contemplated by the statute and lie beyond the lawful exercise of public power.* The Court held that if *the right of the playwright, artist, musician or actor were subjected to popular notions of what is or is not acceptable, the right itself and its guarantee under the Constitution would be rendered illusory.*

59. The Court held that the true purpose of art, as manifest in its myriad forms, is to question and provoke. In an elemental sense, art reflects a human urge to question the assumptions on which societal values may be founded. Every art form seeks to espouse a vision of questioning prevailing social values and popular cultures. Underlying the artist's vision is a desire to find a new meaning for existence. The artist, to do so, is entitled to the fullest liberty and freedom to critique and criticise. Satire and irony are willing allies of the quest to entertain, at the same time, to lead to self-reflection. We find in the foibles of others an image of our own lives. Our experiences provide meaning to our existence. Art is as much for the mainstream as it is for the margins. The Constitution protects the ability of every individual citizen to believe as much as to communicate, to conceptualise as much as to share.

60. The Court emphasised that public power must be conscious that ours is a democracy simply because the Constitution recognises the inalienable freedoms of every citizen. Power has been entrusted to the State by the people under a written Constitution. The State holds it in trust, and its exercise is accountable to the people. The State does not entrust freedoms to the people; the freedoms the Constitution recognises are

inseparable from our existence as human beings. Freedom is the defining feature of human existence. Freedoms are not subject to power. The people assign public power to the Government. Ours is a controlled Constitution that recognises the fullest element of liberty and freedom and the answerability of power to freedom.

61. The views of the writer of a play, the metre of a poet or the sketches of a cartoonist may not be palatable to those who are criticised. Those who disagree have a simple expedient of not watching a film, not turning the pages of the book, or not hearing what is not music to their ears. *The Constitution does not permit those in authority who disagree to crush the freedom of others to believe, think and express.* The ability to communicate “ideas” is a legitimate area of human endeavour and is not controlled by the acceptability of the views to those to whom they are addressed. *When the ability to portray art in any form is subject to extra-constitutional authority, there is a grave danger that a cloud of opacity and arbitrary State behaviour will imperil fundamental human freedoms.*

62. The danger of vesting Customs authorities to decide on obscenity issues was evident about two years ago when the Customs Authorities confiscated and ordered the destruction of Wave Body Massagers by invoking the same Notification No.1/1964-Customs dated 18 January 1964. The concerned Commissioner reasoned that this Wave Body Massager *was “an obscene object because it had the potential to be used as an adult sex toy”*. The CESTAT, by its detailed judgment and order dated 11 May 2023 penned by C J Mathew, roundly criticised the Customs Authorities for such a perverse approach. This decision discusses admirably the legal position about obscenity and the power of the Customs Commissioners to determine the same.

63. Undeterred, the Customs Department challenged the CESTAT's judgment and order dated 11 May 2023 in Customs Appeal (L) No. 582 of 2024 and connected matters. By judgment and order dated 20 March 2024, the Co-ordinate Bench of this Court approved the CESTAT's stinging criticism of the Customs Commissioner's approach. This Court held that if what was observed by the Commissioner in the order in original is accepted to be the only test for determining obscenity, then it would amount to accepting the officer's personal views, which would be something unknown to law. Such an approach, the bench held, is certainly not permissible. The Bench held that the Commissioner failed to act as a prudent official who would be expected to reasonably decide the issues of clearance of goods in question, which should have been strictly per law. Any perverse application of the law would fall foul of the rules of legitimacy and fairness expected from a quasi-judicial authority. The Bench also noted that the Commissioner ignored one of the most relevant circumstances: that such Wave Body Massagers could be freely purchased in India. The sale of such Body Massagers within the national boundaries was not subjected to any prohibition. This was a relevant consideration which was completely ignored by the Commissioner.

64. The impugned order in the present case ignores most relevant considerations like expert opinions, appeals from experts, artistic value, contemporary community standards, and several legal precedents on the subject. The impugned order is based mainly on irrelevant considerations like the ACC's individualised standards of morality and decency, his personal opinions and prejudices on the topic of obscenity, the fact that the Petitioner had declared that the goods were "nude paintings", and some of the artworks depicted sexual intercourse poses. The ACC has brushed

aside several legal precedents by trying to distinguish them on frivolous or even jejune grounds. The circumstance that similar artworks are available in the domestic market or displayed in prestigious art galleries nationally and internationally was entirely ignored. The reasoning in the impugned order is quite perverse. Therefore, judged by the law laid down by the Hon'ble Supreme Court and other High Courts in such matters, we are satisfied that the impugned order is unsustainable and must be quashed and set aside.

65. The objection on the availability of alternate remedy cannot stand given that this is a gross case where the ACC has entirely acted without jurisdiction by refusing even to take cognisance of the law laid down by the Hon'ble Supreme Court and by attempting to distinguish the decisions of the Hon'ble Supreme Court on grounds which border perversity. This is a classic case where the ACC, obsessed by his convictions on obscenity in art, has usurped jurisdiction he did not have. In such a situation, to require the Petitioner to avail of the alternate remedy would not be appropriate.

66. The Customs laws of India do not insist that Michelangelo's David be fully clothed before he passes through our Customs Borders. An assistant commissioner of customs cannot lightly and without adverting to relevant considerations assume the mantle of being a spokesperson for community standards. Just as one swallow does not make a summer, so also one such decision of one such assistant commissioner of customs does not make the law on this subject.

67. The alternate remedy in the facts of this gross case would not amount to an efficacious remedy for yet another reason. The

SCN issued by the ACC, in this case, had required the Petitioner to show cause as to why the works of art by Akbar Padamsee and F N Souza should not be destroyed upon confiscation. Although, the impugned order is unclear on the destruction of these works of art. Still, considering the severe observations made by the ACC, we are not sure whether the ACC might destroy these works of art if the Petitioner were to be relegated to resort to the alternate remedy of departmental appeals, etc. In such circumstances, requiring the petitioner to go through the regular channels of appeals and second appeals is not quite appealing.

68. Equally unappealing is the argument that the Petitioner applied for re-export when confronted with a customs official who treated not just to confiscate but to destroy the artworks of the world-renowned artists. Discretion was perhaps thought the better part of valour by way of an offer to at least allow re-export. To deny the petitioner relief on such grounds would be a travesty of justice.

69. Accordingly, we allow this Petition and quash and set aside the impugned order. We direct the third Respondent to immediately and, in any event, within two weeks from today, release the confiscated artworks to the Petitioner.

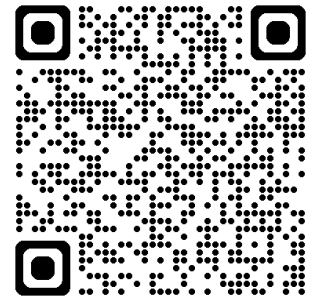
70. The rule is made absolute in the above terms. No costs. All concerned must act upon an authenticated copy of this order.

(Jitendra Jain, J)

(M.S. Sonak, J)

Case Brief & MCQs on "M/S. B. K. Polimex India Private Limited" (2024:BHC-AS:42748-DB) is available in the eBook:

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