

Cri. Rev.333/2022

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MHCC020046592022



Presented on : 11/04/2022

Registered on :11/04/2022

Decided on : 03/04/2023

Duration : 11 Months, 22 Days

IN THE COURT OF SESSIONS FOR GREATER BOMBAY AT BOMBAY  
CRIMINAL REVISION APPLICATION NO.333 OF 2022

The State of Maharashtra

(At the instance of Mundawar Alwar Police Station  
Rajasthan and MRA Marg Police Station)

... Applicant

Vs.

Shilpa Shetty Kundra

R/o: 57A, Plot No.3,

1<sup>st</sup> floor, Ocean View,

Dr. R.S. Jain Marg,

Gandhi Grem Road, Juhu,

Near Hare Rama Hare Krishna Temple,

Mumbai – 400 049.

... Respondent

Learned APP Smt. Kalpana Hire for State.

Learned Advocate Shri. Prashant Patil for respondent.

**CORAM : HER HONOUR THE ADDITIONAL SESSIONS  
JUDGE SMT. S.C. JADHAV (C.R. NO.35)**

Date : 03/04/2023.

**ORDER**

Being aggrieved and dissatisfied by the impugned order dated  
18/01/2022 passed in C.C. No. 225/SW/2017 by the Ld. Metropolitan

Magistrate, 16<sup>th</sup> Court, Ballard Pier, Mumbai, thereby discharging the respondent / accused - Shilpa Shetty Kundra, present revision application is filed by the State.

2. The brief facts leading to the filing of revision application can be stated in short as under :

The informant Bhupsinh son of Ramjilal had filed a complaint in the court of Judicial Magistrate First Class at Mundawar, Alwar, Rajasthan. Pursuant to the order passed u/s. 156(3) of Cr.P.C., the offence under Sections 292, 293, 294, 120-B of Indian Penal Code, 1860 and under Section 67 of Information of Technology Act, 2000 and under Sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986 was registered against the accused Richard Ger and Shilpa Shetty-Kundra (present respondent) vide Crime No.82/2007 with Mundawar Police Station. Thereafter, the respondent approached the Hon'ble Supreme Court and pursuant to the order of the Hon'ble Supreme Court, the case was transferred to the Court of Metropolitan Magistrate and the same was assigned to Ld. Metropolitan Magistrate, 16<sup>th</sup> court, Ballard Pier, Mumbai for disposal.

3. On 07/02/2017 the respondent filed an application under Section 239 of Cr.P.C. for discharge. The application was opposed by the State. The Ld. Metropolitan Magistrate, 16<sup>th</sup> Court, Ballard Pier, Mumbai, vide order dated 18/01/2022 discharged the respondent/accused. According to prosecution, the term obscenity is a relative and subjective term. It is the subjective in the sense that it transcribes the reaction of human mind to a certain amount of

experience. The same object not have the same effect on all persons. It varies from person to person, community to community and place to place. The standard of obscenity is the resultant of cultural values of a given society at a given time. Accused No.2 (present respondent) was very well aware about the fact that press and media persons are present. To kiss in a public is an offence and kiss is bilateral act. The respondent/ accused did not protest the accused No.1 and her act amounts to illegal omission on her part. The respondent was aware that her act will definitely broadcast on news channel which shows her mental culpability. Hence, there is ample evidence against the respondent to frame the charge under Sections 292, 293, 294, 120-B of Indian Penal Code, 1860, under Section 67 of Information of Technology Act, 2000 and under Sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986. On these lines, it is submitted that the order passed by the Ld. Metropolitan Magistrate is illegal, improper and needs to be set aside.

4. The respondent resisted the revision by filing her reply. The respondent supports the order passed by the Ld. Trial Court and it is submitted that the order passed by the Ld. Trial Court is proper and legal one. There is no material against the respondent to frame the charge and therefore, there is no perversity in the impugned order. Hence, the revision application needs to be dismissed with heavy costs.

5. Following points arise for my determination and my finding thereon are as under for the reasons to follow :

**POINTS**

**FINDINGS**

1] Whether the impugned order dated

Cri. Rev.333/2022

:: 4 ::

18/01/2022 passed in C.C. No.225/SW/  
2017 by the Ld. Metropolitan Magistrate,  
16<sup>th</sup> Court, Ballard Pier, Mumbai, suffers  
from any illegality, impropriety and  
invalidity?

In the Negative.

2] Whether the impugned order requires  
interference at the hands of this court?

In the negative.

3] What order?

Revision is dismissed.

### REASONS

#### As to Point Nos.1 and 2 :

6. Ld. APP for the State submitted that the Ld. Trial Court has failed to appreciate the police papers. The Ld. Trial Court ought to have taken into consideration the act of accused/respondent to kiss or allow to kiss in a public definitely comes within the purview of 'Obscene' act and the Ld. Trial Court ought to have taken into consideration that the Ld. JMFC, Mundawar, Alwar, Rajasthan passed the order u/s. 156(3) of Cr.P.C. It is further submitted that there is *prima facie* sufficient material on record to frame the charge against the respondent for the offences punishable under Sections 292, 293, 294, 120-B of Indian Penal Code, 1860 and under Section 67 of Information of Technology Act, 2000 and under Sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986.

7. On the other hand, Ld. Advocate for respondent submitted that the Ld. Trial Court has rightly interpreted the provisions and concluded that there is no sufficient material to frame the charge against the respondent. Hence, no infirmity is found in the impugned order, it deserves to be confirmed.

8. I have gone through the police papers filed by the State. In 2007, Hollywood Actor Richard Gere and respondent/accused Shilpa Shetty Kundra were at AIDS Awareness Event at the Sanjay Gandhi Transport Nagar, in Outer Delhi on 15/04/2007. During the said event, Richard Gere kissed the respondent/ accused on her cheeks. The original complainant then filed private complaint in the court of Judicial Magistrate First Class, Mundawar, Alwar, Rajasthan, wherein order u/s. 156 (3) of Cr.P.C. was passed and First Information Report was registered vide CR. No.82/2007 with Mundawar Police Station, District Alwar, Rajasthan, for the offences punishable under Sections 292, 293, 294, 120-B of Indian Penal Code, 1860 and under Section 67 of Information of Technology Act, 2000 and under Sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986. Statement of complainant and witnesses were recorded under Section 161 of Cr.P.C. and ultimately charge-sheet was filed. As per the order passed by the Hon'ble Supreme Court in Transfer Petition No.165/2007 the case was transferred to Mumbai.

9. In support of the argument, the respondent relied on the ratio laid down in **Aveek Sarkar and another Vs. State of West Bengal (AIR 2014 SC 1495)**. In this case, a German Magazine 'Stern' having worldwide circulation published an article with a picture of Boris

Becker, a world renowned Tennis player, posing nude with his dark skinned fiancée Barbara Feltus, a film actress covering her breasts with his hand. The photograph was taken by the father of Barbara. The article conveyed a message to the people at large of Boris Becker being a strident protester against the pernicious practice of 'Apartheid'. Further, it was stated that the purpose of the photograph was also to signify that love triumphs over hatred. 'Sports World' a widely circulated magazine published in India reproduced the article and the photograph as cover story in its Issue 15 dated 05/05/1993. It was also circulated in Kolkata. A practicing lawyer of Kolkata then filed a complaint u/s. 292 of IPC against the appellants - the Editor, the Publisher and Printer of the newspaper. In this case, the Hon'ble Supreme Court observed that :

“The question in the present case is whether the photograph of Boris Becker with his fiancée Barbara Feltus, a dark-skinned lady standing close to each other bare-bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292 of the IPC. Applying the community tolerance test, it cannot be said that such a photograph is suggestive of depraved minds and designed to excite sexual passion in person who are likely to look at them and see them. The breast of Barbara Feltus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph has no tendency to deprave or corrupt the minds of people in whose hands the

magazine 'Sports World' or 'Anandbazar Patrika' would fall. The said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The cover story of the Magazine carries the title, "*Posing nude, dropping out of tournaments, battling racism in Germany...*". Boris Becker himself in the article published in the German magazine, speaks of the racial discrimination prevalent in Germany and the article highlights Boris Becker's protests against racism in Germany."

**10. In Aveek Sarkar case, the Hon'ble Supreme Court has tested obscenity on the Community standard test as under:**

**COMMUNITY STANDARD TEST:**

24. We are also of the view that Hicklin test is not the correct test to be applied to determine "what is obscenity". Sec. 292 of the Indian Penal Code, of course, uses the expression 'lascivious and prurient interests' or its effect. Later, it has also been indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than

“Hicklin test” to determine what is “obscenity”. A bare reading of Sub-section (1) of Sec. 292 , makes clear that a picture or article shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot *per se* be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex - related materials which have a tendency of “exciting lustful thoughts” can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

Therefore, an act *per se* indecent and obscene would not warrant prosecution under Section 294 of the Indian Penal Code in absence of *prima facie* material of annoyance by any of the persons. The two ingredient to make them liable for prosecution are 1) Obscene act and 2) annoyance to the person. It is unsaid fact that the present



respondent had not kissed but was kissed. Obscenity on her part is not evident. There is nothing on record to elaborate on the *prima facie* evidence of annoyance by complainant. "indecent representation of women" as defined in The Indecent Representation Act means the depiction in any manner of the figure of a woman; her form or body or any part thereof in such way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals;

11. There is nothing to suggest that the present respondent produced or cause to be produced, sell, let to hire, distributed, circulated or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains the alleged act to make it offence u/s. 4 punishable u/s. 6 of the Indecent Representation of Women (Prohibition) Act, 1986, in any form. So also ingredients of Section 67 of The Information Technology Act, 2000 i.e. publication or transmission of alleged act by the present respondent/accused is not brought on record by the State. A woman being groped on the street or touched on a public way or in public transport cannot be termed as accused or participative to an extent of mental culpability and she cannot be held for illegal omission to make her liable for prosecution.

12. Having considered the material placed on record and the police papers, there is no material against the respondent to frame the charge under Sections 292, 293, 294, 120-B of Indian Penal Code, 1860 and under Section 67 of Information of Technology Act, 2000 and under Sections 4 and 6 of the Indecent Representation of Women

(Prohibition) Act, 1986. There is absolutely no *prima facie* material to proceed with the trial. As such, the impugned order does not require any interference at the hands of this court. The Ld. Metropolitan Magistrate has rightly considered the material placed before her. Criminal Revision Application deserves to be dismissed Hence, I answer the point Nos.1 and 2 in the negative and in answer point no.3 proceed to pass the following order :

**ORDER**

Criminal Revision Application No.333 of 2022 stands dismissed and disposed of accordingly.



(S.C. JADHAV)

Additional Sessions Judge

Gr. Bombay.

03/04/2023.

Dictated on : 03/04/2023

Transcribed on : 06/04/2023

Checked on : 10/04/2023

Sign on : 10/04/2023

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

10/04/2023. 6.00 p.m.

Mrs. S.U. Manjrekar

UPLOAD DATE AND TIME

STENOGRAPHER (GRADE I)

Name of the Judge (With Court room no.)	<b>Smt. S.C. JADHAV (C.R.No.35)</b>
Date of Pronouncement of JUDGMENT/ORDER	03/04/2023
JUDGMENT/ORDER signed by P.O. on	10/04/2023
JUDGMENT/ORDER uploaded on	10/04/2023